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OF THE UNITED STATES OF AMERICA**

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UNITED STATES

REPORT

"RESEARCH"

The United States

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Nation in its collective and political
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Bovier - only legal dictionary 5/1/50

SEMINAR OUTLINE

SUBJECT I.

"PREAMBLE"

A.) "We the People of the United States

"PEOPLE. A state; as the people of the State of New York; a nation in its collective and political capacity. 4 Term Reports: 783. See 6 Peters Supreme Court Reports 467.

Body Politic; Nation.

B.) in Order to form a more perfect Union,

"ORDER, government. By this expression is understood the several bodies which compose the state. In ancient Rome, for example, there were three distinct orders; namely, that of senators, that of the patricians, and that of the plebians.

2. In the United States there are no orders of men, all men are created equal in the eyes of the law, except that in some states slavery has been entailed on them while they were colonies, and it still exists, in relation to some of the African race; but these have no particular rights. Vide - Rank. (Bouvier's Law Dictionary, 1859 Ed.)

ORDERS. 2. Orders also signify the instructions given by the owner to the captain or commander of a ship which he is to follow in the course of the voyage. (Bouvier's Law Dictionary, 1859 Ed.)

UNION. By this word is understood the United States of America; as, all good citizens will support the Union. (Bouvier's Law Dictionary, 1859 Ed.)

SEE: ARTICLE VI, CLAUSE 1:

"All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation."

C.) establish Justice,

"JUSTICE. The constant and perpetual disposition to

render every man his due. Just. Inst. B. 1, tit. 1. Toullier defines it to be the conformity of our actions and our will to the law. Dr. Civ. Fr. tit. prel. n. 5.

In the most extensive sense of the word, it differs little from virtue, for it includes within itself the whole circle of virtues. Yet the common distinction between them is that which considered positively and in itself, is called virtue, when considered relatively and with respect to others, has the name of justice. But justice being in itself a part of virtue, is confined to things simply good or evil, and consists in a man's taking such proportion of them as he ought.

2. Justice is either distributive or commutative. Distributive justice is that virtue whose object is to distribute rewards and punishments to each one according to his merits, observing a just proportion by comparing one person or fact with another, so that neither equal persons have unequal things, nor unequal persons things equal. Tr. of Eq. 3, and Toullier's learned note, Dr. Civ. Fr. tit. prel. n. 7, note.

3.) Commutative justice is that virtue whose object is to render to everyone what belongs to him, as nearly as may be, or that which governs contracts. To render commutative justice, the judge must make an equality between the parties, that no one may be a gainer by another's loss. Tr. Eq. 3.

4.) Toullier exposes the want of utility and exactness in this division of distributive and commutative justice, adopted in the compendium or abridgments of the ancient doctors, and prefers the division of internal and external justice; the first being a conformity of our will, and the latter a conformity of our actions to the law: their union making perfect justice. Exterior justice is the object of jurisprudence; interior justice is the object of morality. Dr. Civ. Fr. tit. prel. n. 6 & 7.

5. According to the Fredrician code, part 1, book 1, tit. 2, sec. 27, justice consists simply of letting every one enjoy the rights which he has acquired in virtue of the laws. And as this definition includes all the other rules of right, there is properly but one single general rule of right, namely, Give every one his own.

See generally, Puffend. Law of Nature and Nations, B. 1 Ch. 7, Sec. 89; Elementorum Jurisprudentia Universalis, lib. 1, definitio, 17, 3, 1; Gro. lib. 2,

ch. 11, sec. 3; Ld. Bac. Read. Stat. Uses, 306; Treatise of Equity, B. 1, ch. 1, sec. 1. (Bouvier's Law Dictionary, 1859)

LAW = DISTRIBUTIVE JUSTICE. That virtue, whose object is to distribute rewards and punishments to everyone according to his merits or demerits. Tr. of Eq. 3; Lepage, El. du Dr. ch. 1, art. 3, § 2; 1 Toull. n. 7, note.

EQUITY = COMMUTATIVE JUSTICE. That virtue whose object is, to render to every one what belongs to him, as nearly as may be, or that which governs contracts.

2. The word commutative is derived from commutare, which signifies to exchange. Lepage, El. du Dr. ch. 1, art. 3, § 3.

D.) insure domestic Tranquillity,

"PEACE: The tranquillity enjoyed by a political society, internally, by the good order which reigns among its members, and externally, by the good understanding it has with all other nations. Applied to the internal regulations of a nation, peace imports, in a technical sense, not merely a state of repose and security, as opposed to one of violence and warfare, but likewise a state of public order and decorum. Ham. N.P. 139; 12 Mod. 566. Vide generally, Bac. Abr. Prerogative, D 4; Hale, Hist. P. C. 160; 3 Taunt. R. 14; 1 B. & A. 227; Peake, R. 89; 1 Esp. R. 294; Harr. Dig. Officer, V 4; 2 Benth. Ev. 319, note. Vide Good Behavior, Surety of the Peace."

E.) provide for the common defence,

Not the defense of other nations.

F.) promote the general Welfare,

As opposed to Special Welfare.

G.) an secure the Blessings of Liberty

"LIBERTY. Freedom from restraint. The power of acting as one thinks fit, without any restraint or control, except from the laws of nature.

2. Liberty is divided into civil, natural, personal, and political.

3. Civil liberty is the power to do whatever is

permitted by the constitution of the state and the laws of the land. It is no other than natural liberty, so far restrained by human laws, and no further, operating equally upon all citizens, as is necessary and expedient for the general advantage of the public. 1 Black. Com. 125; Paley's Mor. Phil. R. 6, e. 5; Swift's Syst. 12.

4. That system of laws is alone calculated to maintain civil liberty, which leaves the citizen entirely master of his own conduct, except in those points in which the public good requires some direction and restraint. When a man is restrained in his natural liberty by no municipal laws but those which are requisite to prevent his violating the natural law, and to promote the greatest moral and physical welfare of the community, he is legally possessed of the fullest enjoyment of his civil rights of individual liberty. But it must not be inferred that individuals are to be judge for themselves how far the law may justifiably restrict their individual liberty; for it is necessary to the welfare of the commonwealth, that the law should be obeyed, and thence derived the legal maxim, that no man may be wiser than the law.

5. Natural liberty is the right which nature gives to all mankind, of disposing of their persons and property after the manner they judge most consonant to their happiness, on condition of their acting within the limits of the law of nature, and that they do not in any way abuse it to the prejudice of other men. Burlamaqui, ch. 3, sec. 15; 1 Bl. Com. 134.

6. Personal liberty is the independence of our actions of all other will than our own. Wolff, Inst. Nat. § 77. It consists in the power of locomotion, of changing situations, or removing one's person to whatever place one's inclination may direct, without imprisonment or restraint, unless by due process of law. 1 Bl. Com. 134.

7. Political liberty may be defined to be the security by which, from the constitution, from the nature of the established government, the citizens enjoy civil liberty. No ideas or definitions are more distinguishable than those of civil and political liberty, yet they are generally confounded. 1 Bl. Com. 6, 125. The political liberty of a state is based upon those fundamental laws which establish the distribution of legislative and executive powers. The political liberty of a citizen is that tranquillity of mind,

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which is the effect of an opinion that he is in perfect security; and to insure this security, the government must be such that one citizen shall not fear another.

8. In the English law, by liberty is meant a privilege held by grant or prescription, by which some men enjoy greater benefits than ordinary subjects. A liberty is also a territory, with some extraordinary privilege."

H.) to ourselves and our Posterity,

"POSTERITY. All the descendants of a person in a direct line."
(Bouvier's Law Dictionary, 1859)

UNIVERSAL LEGACY. A term used among civilians. An universal legacy is a testamentary disposition, by which the testator gives to one or several persons the whole property which he leaves at his decease. Civil Code of Lo. art. 1599; Code Civ. art. 1003; Poth. Donations testamentaries, c. 2, sect. 1 & 2.

I.) do ordain and establish this Constitution ^{not of} (for) the United States of America."

"ORDAIN. To ordain is to make an ordinance, to enact a law.

2. In the constitution of the United States, the preamble declares that the people "do ordain and establish this constitution for the United States of America." The 3d article of the same constitution declares, that "the judicial power shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." See 1 Wheat. R. 304, 324; 4 Wheat. R. 316, 402.

"CONSTITUTION. government. The fundamental law of the state, containing the principles upon which the government is founded, and regarding the division of the sovereign powers, directing to what persons each of these powers is to be confided, and the manner it is to be exercised; as the constitution of the United States. See Story on the Constitution; Rawle on the Constitution.
(Bouvier's Law Dictionary (1859)

This was the DECLARED "PUBLIC POLICY" of "WE THE PEOPLE" of the UNION OF STATES of the UNITED STATES OF AMERICA, UNDER THE EXPRESS AND CONDITIONAL TERMS OF THE ORDAINED CONTRACTUAL

(Agreement) known as The CONSTITUTION of the United State Of America.

The Preamble is particularly broad in scope, stating the reasons for forming the government under the constitution. It is the original, fundamental Bill of Rights, and what followed was a declaratory and restrictive statement as to the manner in which it was to be accomplished.

The People of the State of Colorado have enacted a similar Preamble, which resolutely expressed the reasons for its formation. If it is not already blatantly apparent, it should be readily apparent that the framers were of more sober mind, virtue and integrity, as opposed to and compared with those who have evolved into the body politic today.

The preservation of Justice, Tranquillity, general Welfare (not special welfare), the defense of you Lives, Liberty and Property and that of Posterity is up to you, as individuals, don't look for help in a judicature that murders children and saves homosexuals, who condones the debasing of the lawful monetary system, and turns loose one of the most socially destructive forces known to mankind, that openly protects a Criminal de facto Oligarchy, under color of a socialist Democracy, in contravention to a Republic. All in violation of the Creator's Laws, the Constitution, the Laws made in Pursuance thereof, and then claims itself and its corrupt members a title of nobility, commonly called sovereign immunities. Gods one and all, no doubt. Kings knew better than to do such things as debauch the monetary system of their nation. Those who failed, refused and/or neglected to pay proper attention to these and other necessary, basic social concepts were historically ousted, many executed, such as the Earl of Stratford, and other Officers of the Mint and Treasury of England under the Crown, and King Charles I, himself being prosecuted and thereafter executed.

Liberty is not without its necessary duties and responsibilities, and that includes ETERNAL VIGILANCE. If you expect to be ignorant and free, you expect what never has been, and what never will be. If you expect to be apathetic, hedonistic, and amoral, you are doomed to failure.

"The safety of the people is the supreme law." Bacon's Maxims in Regulae 12; Broom's Maxims 1.

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ORDAINED CONSTITUTION
OF THE UNION OF STATES
OF THE UNITED STATES OF AMERICA

"PREAMBLE"
INTENT OF THE CONSTITUTION
"PUBLIC POLICY"

"We the People in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

(Passed without debate - August 7, 1787 - Madison's Notes)

INTENT OF THE FRAMERS

Federalist Papers No. 84 - Hamilton:

"It has been several times truly remarked that bills of rights are in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of their privilege, reservations of rights not surrendered to the prince. Such was Magna-Carta, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by subsequent princes. Such was the Petition Of Right assented to by Charles the First in the beginning of his reign. Such, also, was the Declaration Of Right presented by the Lords of Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of Parliament called the Bill Of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations. "WE THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America. Here is a better recognition of popular rights than volumes of aphorisms which make the principle figure in several of our State bills of rights and which would sound much better in a treaties of ethics than in a constitution of government."

THOMAS JEFFERSON - "The Writings Of Thomas Jefferson" Albert Ellery Bergh, 2d Ed., Volume 17, page 445.

"We owe every other sacrifice to ourselves, to our federal brethren, and to the world at large to pursue with temper and

perseverance the great experiment which shall prove that man is capable of living in [a] society governing itself by laws self imposed, and securing to its members the enjoyment of life, liberty, property, and peace; and further, to show that even when the government of its choice shall manifest a tendency to degeneracy, we are not at once to despair, but that the will and watchfulness of its sounder parts will reform its aberrations, recall it to original and legitimate principles, and restrain it within the rightful limits of self-government."

THOMAS JEFFERSON - "The Writings Of Thomas Jefferson", Paul Leicester Ford, ed., Volume 10 page 152.

"[A] people [can become] so demoralized and depraved as to be incapable of exercising a wholesome control...Their minds [are] to be informed by education what is right and what wrong, to be encouraged in habits of virtue and deterred from those of vice by the dread of punishments, proportioned, indeed, but irremissible; in all cases, to follow truth as the only safe guide and to eschew error, which bewilders us in one false consequence after another in endless succession. These are the inculcations necessary to render the people a sure basis for the structure or order and good government."

THOMAS JEFFERSON - "The Writings Of Thomas Jefferson", Bergh 2d ed, Supra, Volume 14 page 384.

"If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be. The functionaries of every government have propensities to command at will the liberty and property of their constituents. There is no safe deposit for these but with the people themselves; nor can they be safe with them without information. Where the press is free, and every man able to read, all is safe."

HENRY - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Johnathan Elliot Ed., Volume 3 page 59.

"Show me that age and country where to rights and liberties of the people were placed on the sole chance of their rulers being good men, without consequent loss of liberty! I say that the loss of that dearest privilege has ever followed, with absolute certainty, every such mad attempt."

HENRY - Johnathan Elliot Ed., Supra, Volume 3 page 45.

"Suspicion is a virtue as long as its object is the preservation of the public good, and as long as it stays within proper bounds...."

Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are inevitably ruined."

GOUDY - Johnathan Elliot Ed., Supra, Volume 4 page 93.

"I am jealous and suspicious of the liberties of mankind....Suspensions in small communities, are a pest to mankind, but in a matter of this magnitude, which concerns the interest of millions yet unborn, suspicion is a very noble virtue."

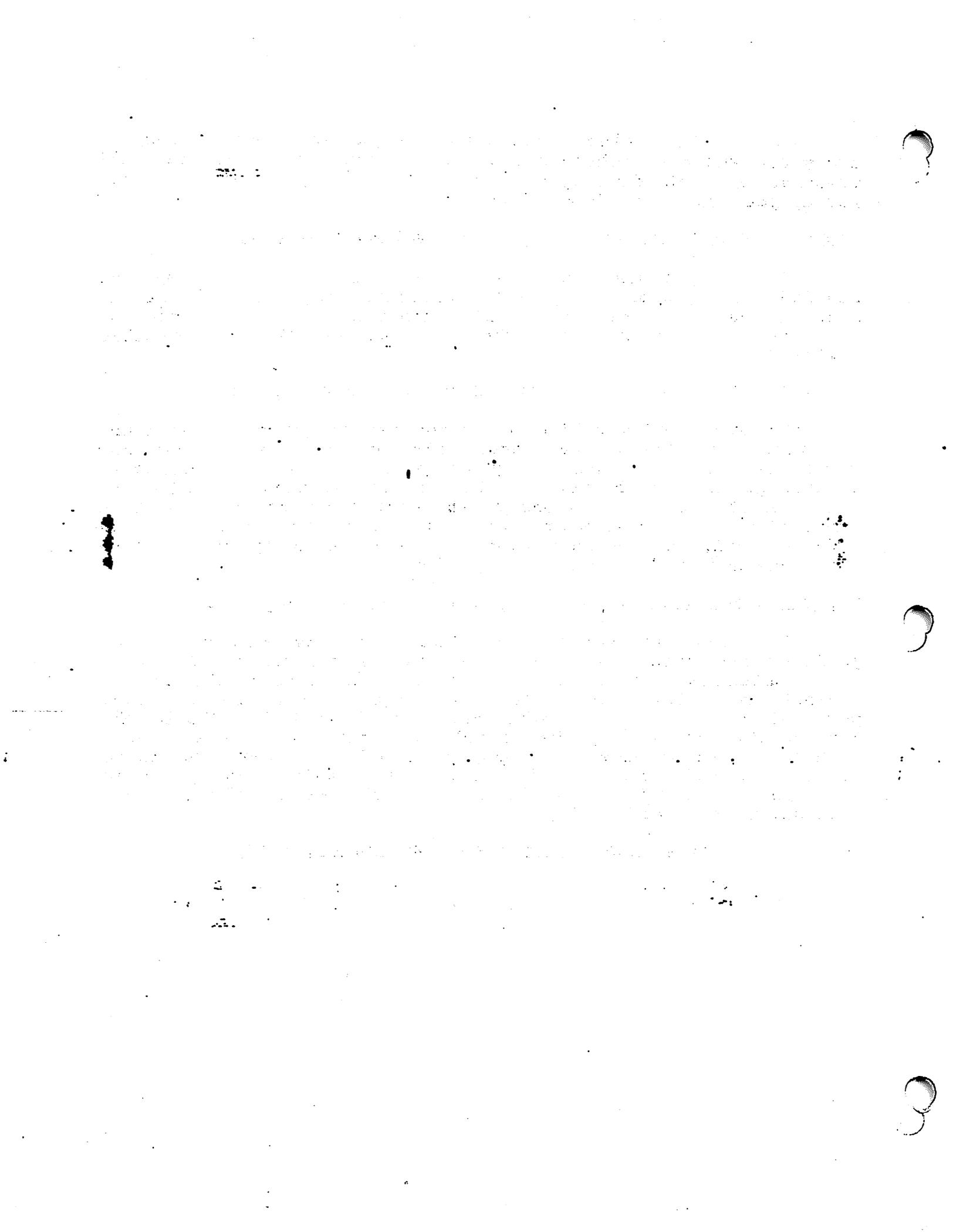
IREDELL - Johnathan Elliot Ed., Supra Volume 4 page 50.

"No power, of any kind or degree can be given but what may be abused; we have, therefore, only to consider whether any particular power is absolutely necessary. If it be, the power must be given, and we must run the risk of the abuse, considering our risk of this evil as one of the conditions of the imperfect state of human nature, where there is no good without the mixture of some evil. At the same time, it is undoubtedly our duty to guard against abuses as much as possible."

IREDELL - Johnathan Elliot Ed., Supra, Volume 4 page 130.

"The only real security of liberty, in any country, is the jealousy and circumspection of the people themselves. Let them be watchful over their rulers. Should they find a combination against them, they have, thank God, and ultimate remedy. That power which created the government, can destroy it. Should the government, on trial, be found to want amendments, those amendments can be made in a regular method, in a mode prescribed by the Constitution itself....We have [this] security, in addition to the natural watchfulness of the people, which I hope will never be found wanting."

(ALSO SEE: DECLARATION OF INDEPENDENCE)



ORDAINED CONSTITUTION
OF THE UNION OF STATES
OF THE UNITED STATES OF AMERICA

"SUPREMACY CLAUSE"

ARTICLE VI:

"All Debts contracted and Engagements entered into, before Adoption of this Constitution, shall be valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as Qualification to any Office or public Trust under the United States."

INTENT OF THE FRAMERS

FEDERALIST PAPERS NO. 27:

"The plan reported by the convention, by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each in the execution of its laws. It is easy to perceive that this will tend to destroy, in the common apprehension, all distinctions between the sources from which they might proceed; and will give the federal government the same advantage for securing due obedience to its authority which is enjoyed by the government of each State, in addition to the influence on public opinion which will result from the important consideration of its having power to call to its assistance and support the resources of the whole Union. It merits particular attention in this place, that the laws of the Confederacy as to the enumerated and legitimate objects of its jurisdiction will become the SUPREME LAW of the land; to the observance of which all officers, legislative executive, and judicial in each State will be bound by sanctity of an oath. Thus the legislatures, courts, and magistrates, of the respective members will be incorporated into the operations of the national government as

far as its just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws."

FEDERALIST PAPERS NO. 33:

"The residue of the argument against the provisions of the Constitution in respect to taxation is ingrafted upon the following clauses. The last clause of the eighth section of the first article authorizes the national legislature "to make all laws which shall be necessary and proper for carrying into execution the powers by that Constitution vested in the government of the United States, or in any department or officer thereof"; and the second clause of the sixth article declares that "the Constitution and the laws made in pursuance thereof and the treaties made by their authority shall be the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding."

These two clauses have been the source of much virulent invective and petulant declamation against the proposed Constitution. They have been held up to the people in all exaggerated colors of misrepresentation as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated; as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor sacred nor profane; and yet, strange as it may appear, after all this clamor, to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same if these clauses were entirely obliterated as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government and vesting it with certain specified powers. This is so clear a proposition that moderation itself can scarcely listen to the railings which have been so copiously vented against this part of the plan without emotions that disturb its equanimity.

What is power but the ability or faculty of doing a thing? What is the ability to do a thing but the power of employing the means necessary to its execution? What is a LEGISLATIVE power but a power of making LAWS? What are the means to execute a LEGISLATIVE power but LAWS? What is the power of laying and collecting taxes but a legislative power, or a power of making laws to lay and collect taxes? What are the proper means of executing such a power but necessary and proper laws?

This simple train of inquiry furnishes us at once with a test of the true nature of the clause complained of. It conducts us to this palpable truth that a power to lay and collect taxes

must be a power to pass all laws necessary and proper for the execution of that power; and what does the unfortunate and calumniate provision in question do more than declare the same truth, to wit, that the national legislature to whom the power of laying and collecting taxes had been previously given might, in the execution of that power, pass all laws necessary and proper to carry it into effect? I have applied these observations thus particularly to the power of taxation, because it is the immediate subject under consideration and because it is the most important of the authorities proposed to be conferred upon the Union. But the same process will lead to the same result in relation to all other powers declared in the Constitution. And it is expressly to execute these powers that the sweeping clause, as it has been affectedly called, authorizes the national legislature to pass all necessary and proper laws. If there be anything exceptional, it must be sought for the specific powers upon which this general declaration is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless.

But SUSPICION may ask, Why then was it introduced? The answer is that it could only have been done for greater caution, and to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union. The Convention probably foresaw what it has been a principal aim of these papers to inculcate, that the danger which most threatens our political welfare is that the State governments will finally sap the foundations of the Union; and might therefore think it necessary, in so cardinal a point, to leave nothing to construction. Whatever may have been the inducement to it, the wisdom of the precaution is evident from the cry which has been raised against it; as that very cry betrays a disposition to question the great and essential truth which it is manifestly the object of that provision to declare.

But it may be again asked, Who is to judge of the necessity and propriety of the laws to be passed for executing the powers of the Union? I answer first that this question arises as well and as fully upon the simple grant of those powers as upon the declaratory clause; and I answer in the second place that the national government, like every other, must judge, in the first instance, of the proper exercise of its powers, and its constituents last. If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify. The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced construction of its authority (which, indeed, cannot easily be imagined), the federal

legislature should attempt to vary the law of descent in any State, would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon that of the State? Suppose, again, that upon the pretense of an interference with its revenues, it should undertake to abrogate a land tax imposed by the authority of a State; would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which its Constitution plainly supposes to exist in the State governments? If there ever should be a doubt on this head, the credit of it will be entirely due to those reasoners who, in the imprudent zeal of their animosity to the plan of the convention, have labored to envelop it in a cloud calculated to obscure the plainest and simplest truths.

But it is said that the laws of the Union are to be the supreme law of the land. What inference can be drawn from this, or what would they amount to, if they were not to be supreme? It is evident that they would amount to nothing. A LAW, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY. But it will not follow from this doctrine that the acts of the larger society which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. Hence we perceive that the clause which declares the supremacy of the laws of the Union, like the one we have just before considered, only declares a truth which flows immediately and necessarily from the institution of a federal government. It will not, I presume, have escaped observation that it expressly confines this supremacy to laws made pursuant to the Constitution; which I mention merely as an instance of caution in the convention; since that limitation would have been to be understood, though it had not been expressed.

Though a law, therefore, for laying a tax for the use of the United States would be supreme in its nature and could not legally be opposed or controlled, yet a law for abrogating or preventing the collection of a tax laid by the authority of a State (unless upon imports and exports) would not be the supreme

law of the land, but a usurpation of power not granted by the Constitution. As far as an improper accumulation of taxes on the same object might tend to render the collection difficult or precarious, this would be a mutual inconvenience, not arising from a superiority or defect of power on either side, but from an injudicious exercise of power by one or the other in a manner equally disadvantageous to both. It is to be hoped and presumed, however, that mutual interest would dictate a concert in this respect which would avoid any material inconvenience. The inference from the whole is that the individual States would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may stand in need, by every kind of taxation, except duties on imports and exports. It will be shown in the next paper that this concurrent jurisdiction in the article of taxation was the only admissible substitute for an entire subordination, in respect to this branch of power, of the State authority to that of the Union.

PUBLIUS"

FEDERALIST PAPERS NO. 44 - Madison:

"2. 'This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.'

The indiscreet zeal of the adversaries to the Constitution has betrayed them into an attack on this part of it also, without which it would have been evidently and radically defective. To be fully sensible of this, we need only to suppose for a moment that the supremacy of the State constitutions had been left complete by a saving clause in their favor.

In the first place, as these constitutions invest the State legislatures with absolute sovereignty in all cases not excepted by the existing Articles of Confederation, all the authorities contained in the proposed Constitution, so far as they exceed those enumerated in the Confederation, would have been annulled, and the new Congress would have been reduced to the same impotent condition with their predecessors.

In the next place, as the constitutions of some of the States do not even expressly and fully recognize the existing powers of the Confederacy, an express saving of the supremacy of the former would, in such States, have brought into question every power posed in the Constitution.

In the third place, as the constitutions of the States

differ much from each other, it might happen that a treaty or national law of great or equal importance to the States would interfere with some and not other constitutions, and would consequently be valid in some of the States at the same time that it would have no effect in others.

In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members."

FEDERALIST PAPERS NO. 78 - Hamilton:

"There is no position which depends on clearer principle that every act of a delegate authority, contrary to the tenor of the commission under which it is exercised is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid."

Nor does this conclusion by means suppose a superiority of the Judicial to the Legislative Power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the Judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the Fundamental Laws rather than those which are not fundamental."

JOHNSTON - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Johnathan Elliot Ed., Volume 4 pages 187 - 188.

"The Constitution must be the supreme law of the land; otherwise, it would be in the power of any one State to counteract the other States and withdraw from the Union. The laws made in pursuance thereof by Congress ought to be the supreme law of the land; otherwise, any one State might repeal the laws of the Union at large. Without this claim, the whole Constitution would be a blank paper. Every treaty should be the supreme law of the land; without this, any one State might involve the whole Union in war....I do not know a word in the English language so good as the word pursuance, to express the idea meant and intended by the Constitution....When Congress

makes a law in virtue of their constitutional authority, it will be an actual law....Every law consistent with the Constitution will have been made in pursuance of the powers granted by it. Every usurpation or law repugnant to it cannot have been made in pursuance of its powers. The latter will be nugatory and void....Are laws as immutable as constitutions? Can any thing be more absurd than assimilating the one to the other? The idea is not warranted by the Constitution, nor consistent with reason."

Standard
for
reading
contract

IREDELL - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Supra, Volume 4 page 178-179.

"What is the meaning of this, but that, as we have given power, we will support the execution of it?...It is saying no more than that, when we adopt the government, we will maintain and obey it....Then when Congress passes a law consistent with the Constitution, it is to be binding on the people. If Congress, under pretense of executing one power, should, in fact, usurp another, they will violate the Constitution....

"Every power delegated to Congress is to be executed by laws made for that purpose. It is necessary to particularize the powers intended to be given, in the Constitution, as having no existence before; but, after having enumerated what we give up, it follows, of course, that whatever is done, by virtue of that authority, is legal without any new authority or power. The question, then, under this clause, will always be whether Congress has exceeded its authority. If it has not exceeded it, we must obey, otherwise not. This Constitution, when adopted, will become a part of our State Constitution; and the latter must yield to the former only in those cases where power is given by it. It is not to yield to it in any other cases whatever....It appears to me merely a general clause, the amount of which is that, when they pass an act, if it be in the execution of a power given by the Constitution, it shall be binding on the people, otherwise not."

W. DAVIS - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Supra, Volume 4 page 182.

"This Constitution, as to the powers therein granted, is constantly to be the supreme law of the land....It is not the supreme law in the exercise of a power not granted. It can only in cases consistent with the powers specially granted, and not usurpations. If you grant any power to the federal government, the laws made in pursuance of that power must be supreme and uncontrolled in their operation.

NICHOLAS - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Supra, Volume 3 page 507.

"They can, by this, make no treaty which shall be repugnant to the spirit of the Constitution, or inconsistent with the delegated powers. The treaties they make must be under authority of the United States, to be within their province. It is sufficiently secured because it only declares that, in pursuance of the powers given, they shall be the supreme law of the land, notwithstanding any thing in the constitution or laws of particular states."

(Compiler's Notes)

The Constitution can only be amended in pursuance of the mandates set forth in Article V, of the ordained Constitution of the Union of States, of the United States of America. No power or authority was vested in any branch of the government, national, federal, state, or municipality, or the officers, employees or agents thereof, to alter, amend, or abolish any part or portion of the said Constitution, without following the specified, mandated procedures. No treaty can be used to grant a power or authorize a usurpation or violation of the Constitution or the Laws made in pursuance thereof.

"If ever this vast country is brought under a single government, it will be one of the most extensive corruption, indifferent and incapable of a wholesome care over so wide a spread of surface. This will not be borne, and you will have to choose between reformation and revolution. If I know the spirit of this country, the one or the other is inevitable, BEFORE ITS VENOM HAS REACHED SO MUCH OF THE BODY POLITIC AS TO GET BEYOND CONTROL, REMEDY SHOULD BE APPLIED."

(Thomas Jefferson - "The Writings Of Thomas Jefferson" - Albert Ellery Bergh (1907), Volume 15 page 335.)

TREATY
ORDAINED CONSTITUTION
OF THE UNION OF STATES
OF THE UNITED STATES OF AMERICA

ARTICLE II, SECTION 2, CLAUSE 2:

^{- the Pres.}
"He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

INTENT OF THE FRAMERS

Federalist Papers No. 15 - Hamilton:

"There is nothing absurd or impracticable in the idea of a league or alliance between independent nations for certain purposes precisely stated in a treaty regulating all the details of time, place, circumstances, and quantity, leaving nothing to future discretion, and depending for its execution on the good faith of the parties. Compacts of this kind exist among all civilized nations, subject to the usual vicissitudes of peace and war, of observance and nonobservance, as the interests or passions of the contracting powers dictate. In the early part of the present century there was an epidemical rage in Europe for this species of compacts, from which the politicians of the times fondly hoped for benefits which were never realized. With a view to establishing the equilibrium of power and the peace of that part of the world, all the resources of negotiations were exhausted, and they were scarcely formed before they were broken, giving an instructive but afflicting lesson to mankind how little dependence is to be placed on treaties which have no other sanction than the obligations of good faith, and which oppose general considerations of peace and justice to the impulse of any immediate interest or passion."

FEDERALIST PAPERS NO. 22 - Hamilton:

"The treaties of the United States under the present Constitution are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?"

FEDERALIST PAPERS NO. 38 - Madison:

"It is a matter both of wonder and regret that those who raise so many objections against the new Constitution should never call to mind the defects of that which is to be exchanged for it. It is not necessary that the former should be perfect: it is sufficient that the latter is more imperfect. No man would refuse to give brass for silver or gold, because the latter had some alloy in it. No man would refuse to quit a shattered and tottering habitation for a firm and commodious building, because the latter had not a porch to it, or because some of the rooms might be a little larger or smaller, or the ceiling a little higher or lower than his fancies would have planned them. But waiving illustrations of this sort, is it not manifest that most of the capital objections urged against the new system lie with tenfold weight against the existing Confederation? Is an indefinite power to raise money dangerous in the hands of the federal government? The present Congress can make requisitions to any amount they please, and the States are constitutionally bound to furnish them; they emit bills of credit as long as they pay for the paper; they can borrow, both abroad and at home, as long as a shilling will be lent. Is an indefinite power to raise troops dangerous? The Confederation gives to Congress that power also; and they have already begun to make use of it. Is it improper and unsafe to intermix the different powers of government in the same political body of men? Congress, a single body of men are the sole depository of all the federal powers. Is it particularly dangerous to give the keys of the treasury and the command of the army, into the same hands? The Confederation places them both in the hands of Congress. Is a bill of rights essential to liberty? The Confederation has no bill of rights. Is it an objection against the new Constitution that it empowers the Senate, with concurrence of the executive, to make treaties which are to be the laws of the land? The existing Congress, without any control, can make treaties which they themselves have declared and most of the States have recognized, to be the supreme law of the land. Is the importation of slaves permitted by the new Constitution for twenty years? By the old it is

permitted forever."

FEDERALIST PAPERS NO. 43 - Madison:

"....A compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach, committed by either of the parties, absolves the others, and authorizes them, if they please, to pronounce the compact violated and void. Should it unhappily be necessary to appeal to these delicate truths for a justification for dispensing with the consent of particular States to a dissolution of the federal pact, will not the complaining parties find it a difficult task to answer the multiplied and important infractions with which they may be confronted? The time has been when it was incumbent on us all to veil the ideas which this paragraph exhibits...."

FEDERALIST PAPERS NO. 64 - Jay:

"It is a just and not a new observation that enemies to particular persons, and opponents to particular measures, seldom confine their censures to such things only, in either, as are worthy of blame. Unless, on this principle, it is difficult to explain the motives of their conduct, who condemn the proposed Constitution in the aggregate and treat with severity some of the most unexceptionable articles in it.

The second section gives power to the President, "by and with the advice and consent of the Senate, to make treaties, PROVIDED TWO THIRDS OF THE SENATORS PRESENT CONCUR."

The power of making treaties is an important one, especially as it relates to war, peace, and commerce; and it should not be delegated in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men best qualified for the purpose, and in the manner most conducive to the public good. The convention appears to have been attentive to both these points; they have directed the President to be chosen by select bodies of electors to be deputed by the people for that express purpose; and they have committed the appointment of senators to the State legislatures. This mode has, in such cases, vastly the advantage of elections by the people in their collective capacity where the authority of party zeal, taking advantage of the supineness, the ignorance, and the hopes and fears of the unwary and interested, often places men in office by the votes of a small portion of the electors.

As the select assemblies for choosing the President, as well

as the State legislature who appoint the senators, will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men only who have become most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence. The Constitution manifests very particular attention to this object. By excluding men under thirty-five from the first office, and those under thirty from the second, it confines the electors to men of whom the people have had time to form a judgment, and with respect to whom they will not be liable to be deceived by those brilliant appearances of genius and patriotism which, like transient meteors, sometimes mislead as well as dazzle. If the observation be well founded that wise kings will always be served by able ministers it is fair to argue that as an assembly of select electors possess, in greater degree than kings, the means of extensive and accurate information relative to men and characters, so will their appointments bear at least equal marks of discretion and discernment. The inference which naturally results from these considerations is this, that the President and senators so chosen will always be of the number of those who best understand our national interests, whether considered in relation to the several States or to foreign nations, who are best able to promote those interests, and whose reputation for integrity inspires and merits confidence. With such men the power of making treaties may be safely lodged.

Although the absolute necessity of system, in the conduct of any business, is universally known and acknowledged, yet the high importance of it in national affairs has not yet become sufficiently impressed on the public mind. They who wish to commit the power under consideration to a popular assembly composed of members constantly coming and going in quick succession seem not to recollect that such a body must necessarily be inadequate to the attainment of those great objects which require to be steadily contemplated in all their relations and circumstances, and which can only be approached and achieved by measures which not talents, but also exact information, and often much time, are necessary to concert and to execute. It was wise, therefore, in the convention, to provide not only that the power of making treaties should be committed to able and honest men, but also that they should continue in place a sufficient time to become perfectly acquainted with our national concerns, and to form and introduce a system for management of them. The duration prescribed is such as will give them an opportunity of greatly extending their political information, and of rendering their accumulating experience more and more beneficial to their country. Nor has the convention discovered less prudence in providing for the frequent elections of senators in such a way as to obviate that inconvenience of periodically transferring those great affairs entirely to new

men; for by leaving a considerable residue of old ones in place, uniformity and order, as well as a constant succession of official information, will be preserved.

There are few who will not admit that the affairs of trade and navigation should be regulated by a system cautiously formed and steadily pursued; and that both our treaties and our laws should correspond with and be made to promote it. It is of much consequence that this correspondence and conformity be carefully maintained; and they who assent to the truth of this position will see and confess that it is well provided for by making the concurrence of the Senate necessary both to treaties and to laws.

It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehension of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must, in informing them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.

They who turned their attention to the affairs of men must have perceived that there are tides in them; tides very irregular in their duration, strength, and direction, and seldom found to run twice exactly in the same manner or measure. To discern and to profit by these tides in national affairs is the business of those who preside over them; and they who have had much experience on this head inform us that there frequently are occasions when days, nay, even when hours, are precious. The loss of a battle, the death of a prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs may turn the most favorable tide into a course opposite our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of secrecy and dispatch that the Constitution would have been inexcusably defective if no attention had been paid to those objects. Those matters which negotiations usually require the most secrecy and the most dispatch are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation. For the President will find no

difficulty to provide; and should any circumstances occur which requires the advice and consent of the Senate, he may at any time convene them. Thus we see that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and dispatch on the other.

But to this plan, as to most others that have appeared, objections are contrived and urged.

Some are displeased with it, not on account of any errors or defects in it, but because, as the treaties, when made are to have the force of laws, they should be made only by men invested with legislative authority. These gentlemen seem not to consider that the judgments of our courts, and the commissions constitutionally given by our governor, are as valid and as binding on all persons whom they concern as laws, passed by our legislature. All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature; and therefore, whatever name be given to the power of making treaties, or however obligatory they may be when made, certain it is that the people may, with much propriety, commit the power to a distinct body from the legislature, the executive, or the judicial. It surely does not follow that because they have given the power of making laws to the legislature, that therefore they should likewise give them power to do every other act of sovereignty by which the citizens are to be bound and affected.

Others, though content that treaties should be made in the mode proposed, are averse to their being the supreme laws of the land. They insist, and profess to believe, that treaties, like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as they may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both, and consequently, that as the consent of both was essential to their format at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligations of treaties. They are just as binding and just as far beyond the lawful reach of legislative acts now as they will

be at any future period, or under any form of government.

However useful jealousy may be in republics, yet when like bile in the natural it abounds too much in the body politic, the eyes of both become very liable to be deceived by the delusive appearances which that malady casts on surrounding objects. From this cause, probably, proceed the fears and apprehensions of some, that the President and Senate may make treaties without an equal eye to the interest of all the States. Others suspect that the two thirds will oppress the remaining third, and ask whether those gentlemen are made sufficiently responsible for their conduct; whether, if they act corruptly, they can be punished; and if they make disadvantageous treaties, how are we to get rid of those treaties?

as all the States are equally represented in the Senate, and by men the most able and most willing to promote the interests of their constituents, they will all have an equal degree of influence in that body, especially while they continue to be careful in appointing proper persons, and to insist on their punctual attendance. In proportion as the United States assume a national form and a national character, so will the good of the whole be more and more an object of attention, and the government must be a weak one indeed if it should forget that the good of the whole can only be promoted by advancing the good of each of parts or members which compose the whole. It will not be in the power of the President and Senate to make treaties by which they and their families and estates will not be equally bound and affected with the rest of the community: and, having no private interests distinct from that of the nation, they will be under no temptations to neglect the latter.

As to corruption, the case is not supposable. He must either have been very unfortunate in his intercourse with the world, or possess a weak heart very susceptible of such impressions, who can think it probable that the President and two thirds of the Senate will ever be capable of such unworthy conduct. The idea is too gross and too invidious to be entertained. But in such case, if it should ever happen, the treaty so obtained from us would, like all other fraudulent contracts, be null and void by the laws of nations.

With respect to their responsibility, it is difficult to conceive how it could be increased. Every consideration that can influence the human mind, such as honor, oaths, reputations, conscience, the love of country, and family affections and attachments, afford security for their fidelity. In short, as the Constitution has taken the utmost care that they shall be men of talents, and integrity, we have reason to be persuaded that

the treaties they make will be advantageous as, all circumstances considered, could be made; and so far as the fear of punishment and disgrace ~~can~~ operate, that motive to good behavior is amply afforded by the article on the subject of impeachments.

FEDERALIST PAPERS NO. 75 - Hamilton:

The President is to have power "by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur." Though this provision has been assailed, on different grounds, with no small degree of vehemence, I scruple not to declare my firm persuasion that it is one of the best digested and most unexceptionable parts of the plan. One ground of objection is the trite topic of the intermixture of powers: some contending that the President ought alone to possess the power of making treaties; and others, that it ought to have been exclusively deposited in the Senate. Another source of objection is derived from the small number of persons by whom a treaty may be made. Of those who espouse this objection, a part are of opinion that the House of Representatives ought to have been associated in the business, while another part seem to think that nothing more was necessary than to have substituted two thirds of all the members of the Senate to two thirds of the members present. As I flatter myself the observations made in a preceding number upon this part of the plan must have sufficed to place it, to a discerning eye in a very favorable light, I shall here content myself with offering only some supplementary remarks, principally with a view to the objections which have been just stated.

With regard to the intermixture of powers, I shall rely upon the explanations already given in other places of the true sense of the rule upon which the objection is founded; and shall take it for granted, as an inference from them, that the union of the executive with the Senate, in the article of treaties, is no infringement of that rule. I venture to add that the particular nature of the power of making treaties indicates a peculiar propriety in that union. Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition; yet this is evidently an arbitrary disposition; for if we attend carefully to its operation it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws, and the employment of the common strength, either for this purpose or for the common defense, seem to compromise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of

the subsisting laws nor to the inaction of new ones; and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the executive as the most fit agent in those transactions; while the vast importance of the trust and the operation of treaties as laws plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.

However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe in improper to entrust that power to an elective magistrate of four years' duration. It has been remarked, upon another occasion, and the remark is unquestionably just, that an hereditary monarch, though often an oppressor of his people, has personally too much at stake in the government to be in any material danger of being corrupted by foreign powers. But a man raised from the station of a private citizen to the rank of Chief Magistrate, possessed of but a moderate or slender fortune, and looking forward to a period not very remote when he may probably be obliged to return to the station from which he was taken, might sometimes be under temptations to sacrifice his duty to his interest, which it would require superlative virtue to withstand. An avaricious man might be tempted to betray the interests of the state to the acquisition of wealth. An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents. The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstances as would be a President of the United States.

To have entrusted the power of making treaties to the Senate alone would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations. It is true that the Senate would, in that case, have the option of employing him in this capacity, but they would also have the option of letting it alone, and pique or cabal might induce the latter rather than the former. Besides this, the ministerial servant of the Senate could not be expected to enjoy the same confidence and respect of foreign powers in the same degree with the constitutional representative of the nation,

and of course, would not be able to act with an equal degree of weight or efficacy. While the Union would, from this cause, lose a considerable advantage in the management of its external concerns, the people would lose the additional security which would result from the cooperation of the executive. Though it would be imprudent to confide in him solely so important a trust, yet it cannot be doubted that his participation in it would materially add to the safety of the society. It must indeed be clear to a demonstration that the joint possession of the power in question, by the President and Senate, would afford a greater prospect of security than the separate possession of it by either of them. And whoever has maturely weighed the circumstances which must concur in the appointment of a President will be satisfied that the office will always bid fair to be filled by men of such characters as to render their concurrence in the formation of treaties peculiarly desirable, as well on the score of wisdom as on that of integrity.

The remarks made in the former number, which have been alluded to in another part of this paper, will apply with conclusive force against the admission of the House of Representatives to a share in the formation of treaties. The fluctuating and taking its future increase into account, the multitudinous composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematical adherence to the same views; a nice and uniform sensibility to national character; decision, secrecy, and dispatch, are incompatible with the genius of a body so variable and numerous. The very complication of the business, by introducing a necessity of the concurrence of so many different bodies, would of itself afford a solid objection. The greater frequency of the calls upon the House of Representatives, and the greater length of time which it would often be necessary to keep them together when convened to obtain their sanction in the progressive stages of a treaty would be a source of so great inconvenience and expense as alone ought to condemn the project.

The only objection which remains to be canvassed is that which would substitute the proportion of two thirds of all the members composing the senatorial body to that of two thirds of the members present. It has been shown, under the second head of our inquiries, that all provisions which require more than a majority of any body to its resolutions have a direct tendency to embarrass the operations of the government and an indirect one to subject the sense of the majority to that of the minority. This consideration seems sufficient to determine our opinion, that the convention have gone as far in the endeavor to secure the advantage of numbers in the formation of treaties as could have been reconciled either with the activity of the public councils or with a reasonable regard to the major sense of the community.

If two thirds of the whole number of members had been required it would in many cases, from the nonattendance of a part, amount in practice to a necessity of unanimity. And the history of every political establishment in which this principle has prevailed is a history of impotence, perplexity, and disorder. Proofs of this position might be adduced from the examples of the Roman Tribuneship, the Polish Diet, and the States-General of the Netherlands did not and example at home render foreign precedents unnecessary.

To require a fixed proportion of the whole body would not, in all probability, contribute to the advantages of a numerous agency, better than merely to require a proportion of the attending members. The former, by increasing the difficulty of resolutions disagreeable to the minority, diminishes the motives to punctual attendance. The latter, by making the capacity of the body depend on a proportion which may be varied by the absence or presence of a single member, has the contrary effect. And as, by promoting punctuality, it tends to keep the body complete, there is great likelihood that its resolution would generally be dictated by as great a number in this case as in the other; while there would be much fewer occasions of delay. It ought not to be forgotten that under the existing Confederation two members may, and usually do, represent a State; whence it happens that Congress, who now are solely invested with all the powers of the Union, rarely consist of a greater number of persons than would compose the intended Senate. If we add to this that as the members vote by States, and that where there is only a single member present from a State his vote is lost, it will justify a supposition that the active voices in the Senate, where the members are to vote individually, would rarely fall short in number of active voices in the existing Congress. When, in addition to these considerations, we take into view the cooperation of the President, we shall not hesitate to infer that the people of America would have greater security against an improper use of the power of making treaties, under the new Constitution, than they now enjoy under the Confederation. And when we proceed still one step further and look forward to the probable augmentation of the Senate, by the erection of new States, we shall not only perceive ample ground of confidence in the sufficiency of the numbers to whose agency that power will be entrusted, but we shall probably be led to conclude that a body more numerous than the Senate would be likely to become, would be very little fit for the proper discharge of the trust.

WILSON - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Johnathan Elliot Ed., Volume 2 page 506.

"Under this Constitution, treaties will become the supreme law of the land; nor is there any doubt but the Senate and

President possess the power of making them. But though the treaties have the force of laws, they are very different from other acts of legislation. In making laws, our own consent alone is necessary. In forming treaties, the concurrence of another power becomes necessary. Treaties, sir, are truly contracts, or compacts, between the different states, nations, or princes who find it convenient or necessary to enter into them."

MacLAINE - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Johnathan Elliot Ed., Volume 4 page 28.

"When treaties are made, they become as valid as legislative acts. I apprehend that every act of government, legislative, executive, or judicial, if in pursuance of a Constitutional power, is the law of the land....Every thing is the law of the land, let it come from what power it will, provided it be consistent with the Constitution."

CORBIN - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Johnathan Elliot Ed., Volume 3 page 365.

"Treaties are generally of a commercial nature, being a regulation of commercial intercourse between different nations. In all commercial treaties, it will be necessary to obtain the consent of the representatives."

CORBIN - Supra, Volume 3 page 511.

"The difference between a commercial treaty and other treaties. A commercial treaty must be submitted to the consideration of Parliament, because such treaties will render it necessary to alter some laws, add new clauses to some, and repeal others. If this be not done, the treaty is void.

The Mississippi [River] cannot be dismembered but in two ways - by a common treaty, or a commercial treaty. If the interest of Congress will lead them to yield it by the first, the law of nations would justify the people of Kentucky to resist, and the cession would be nugatory. It cannot then be surrendered by a common treaty. Can it be done by a commercial treaty? If it should, the consent of the House of Representatives would be requisite, because of the correspondent alterations that must be made in the laws."

TAXES

ORDAINED CONSTITUTION OF THE UNION OF STATES OF THE UNITED STATES OF AMERICA

ARTICLE I, SECTION 8, CLAUSE 1:

"The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throught the United States."

INTENT OF THE FRAMERS

FEDERALIST PAPERS NO. 10 - Madison:

"....No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the cause they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or in other words, the most powerful faction must be expected to prevail. Shall domestic manufacturers be encouraged, and in what degree, by restrictions on foreign manufacturers? are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with a sole regard to justice and public good. The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice. Every shilling with which they overburden the inferior number is a shilling saved to their own pockets.

It is vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at

the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will ~~rarely~~ prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.

The inference to which we are brought is that the cause of faction cannot be removed and that relief is only to be sought in the means of controlling its effects."

FEDERALIST PAPERS NO. 12 - Hamilton:

"The effects of Union upon the commercial prosperity of the States have been sufficiently delineated. Its tendency to promote the interests of revenue will be the subject of our present inquiry.

The prosperity of commerce is now perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth, and has become a primary object of their political cares. By multiplying the means of gratification, by promoting the introduction and circulation of the precious metals, those darling objects of human avarice and enterprise, it serves to vivify and invigorate all channels of industry and to make them flow with greater activity and copiousness. The assiduous merchant, the laborious husbandman, the active mechanic, and the industrious manufacturer - all orders of men look forward with eager expectation and growing alacrity to this pleasing reward for their toils. The often-agitated question between agriculture and commerce has from indubitable experience received a decision which has silenced the rivalry that once subsisted between them, and has proved, their interests are intimately blended and interwoven. It has been found in various countries that in proportion as commerce has flourished land has risen in value. And how could it have happened otherwise? Could that which produces a freer vent for the products of the earth, which furnishes new incitements to the cultivators of land, which is the most powerful instrument in increasing the quantity of money in a state - could that, in fine, which is the faithful handmaid of labor and industry in every shape fail to augment the value of that article, which is the prolific parent of far the greatest part of the objects upon which they are exerted? It is astonishing that so simple a truth should ever have had an adversary; and it is one among a multitude of proofs how apt a spirit of ill-informed jealousy, or too great abstraction and refinement, is to lead men astray from the plainest paths of reason and conviction.

The ability of a country to pay taxes must always be proportional in a great degree to the quantity of money in circulation and to the celebrity with it circulates. Commerce,

contributing to both these objects, must of necessity render the payment of taxes easier and facilitate the requisite supplies to the treasury. The hereditary dominions of the Emperor of Germany contain a great extent of fertile, cultivated, and populous territory, a large portion of which is situated in mild and luxuriant climates. In some parts of this territory are to be found the best gold and silver mines in Europe. And yet from want of the fostering influence of commerce that monarch can boast slender revenues. He has several times been compelled to owe obligations to the pecuniary succors of other nations for the preservation of his essential interests, and is unable, upon the strength of his own resources, to sustain a long or continued war.

But it is not in this aspect of the subject alone that Union will be seen to conduce to the purposes of revenue. There are other points of view in which its influence will appear more immediate and decisive. It is of the people, from the experience we have had on the point itself that it is impracticable to raise any very considerable sums by direct taxation. Tax laws have in vain been multiplied; new methods to enforce the collection have in vain been tried; the public expectation has been uniformly disappointed, and the treasuries of the States have remained empty. The popular system of administration inherent in the nature of popular government, coinciding with the real scarcity of money incident to a languid and mutilated state of trade, has hitherto defeated every experiment for extensive collections, and has at length taught the different legislatures the folly of attempting them.

No person acquainted with what happens in other countries will be surprised at this circumstance. In so opulent a nation as that of Britain, where direct taxes from superior wealth must be more tolerable, and from the vigor of the government, much more practicable than in America, far the greatest part of the national revenue is derived from taxes of the indirect kind, from imposts and from excises. Duties on imported articles form a large branch of this latter description.

In America it is evident that we must a long time depend for means of revenue chiefly on such duties. In most parts of it excises must be confined within a narrow compass. The genius of the people will ill brook the inquisitive and peremptory spirit of excise laws. The pockets of the farmers, on the other hand, will reluctantly yield but scanty supplies in the unwelcome shape of impositions on their houses and lands; and personal property is too precarious and invisible a fund to be laid hold of in any other way than by the imperceptible agency of taxes on consumption.

If these remarks have any foundation, that state of things

which will best enable us to improve and extend so valuable a resource must be the best adapted to our political welfare. And it cannot admit of serious doubt that this state of things must rest on the basis of a general Union. As far as this would be conducive to the interests of commerce, so far it must tend to the extension of the revenue to be drawn from that source. As far as it would contribute to rendering regulations for the collection of the duties more simple and efficacious, so far it must serve to answer the purpose of making the same rate of duties more productive and of putting it into the power of the government to increase the rate without prejudice to trade.

The relative situation of these States; the number of rivers with which they are intersected and of bays that wash their shores; the facility of communication in every direction; the affinity of language and manners; the familiar habits of intercourse - all these are circumstances that would conspire to render an illicit trade between them a matter of little difficulty and would insure frequent evasions of the commercial regulations of each other. The separate States, or confederacies, would be necessitated by mutual jealousy to avoid the temptation to that kind of trade by the lowness of their duties. The temper of our governments for a long time to come would not permit those rigorous precautions by which the European nations guard the avenues into their respective countries, as well as by water; and which, even there, are found insufficient obstacles to the adventurous stratagems of avarice.

In France there is an army of patrols (as they are now called) constantly employed to secure her fiscal regulations against the inroads of the dealer in contraband. Mr. Neckar computes the number of these patrols at upwards of twenty thousand. This proves the immense difficulty in preventing that species of traffic where there is an inland communication and shows in a strong light the disadvantages with which the collection of duties in this country would be encumbered, if by disunion the States should be placed in a situation with respect to each other resembling that of France with respect to her neighbors. The arbitrary and vexatious powers with which the patrols are necessarily armed would be intolerable in a free country.

If, on the contrary, there be but one government pervading all the States, there will be, as to the principal part of our commerce, but ONE SIDE to guard - the ATLANTIC COAST. Vessels arriving directly from foreign countries, laden with valuable cargoes, would rarely choose to hazard themselves to the complicated and critical perils which would attend attempts to unlade prior to their coming into port. They would have to dread both the dangers of the coast and of detection, as well after as before their arrival at the place of their destination. An

ordinary degree of vigilance would be competent to the prevention of any material infractions upon the right of the revenue. A few armed vessels, judiciously stationed at the entrance of our ports, might at small expense be made useful sentinels of the laws. And the government having the same interests to provide against violations everywhere, the co-operation of its measures in each State would have a powerful tendency to render them effectual. Here also we should preserve, by Union, an advantage which nature holds out to us and which would be relinquished by separation. The United States lie at a great distance from Europe and at a considerable distance from all other places with which they would have extensive connections of foreign trade. The passage from them to us, in a few hours or in a single night, as between the coasts of France and Britain, and of our other neighboring nations, would be impracticable. This is a prodigious security against a direct contraband with foreign countries; but a circuitous contraband to one State through the medium of another would be both easy and safe. The difference between a direct importation from abroad, and an indirect importation through the channel of a neighboring State, in small parcels according to time and opportunity, with the additional facilities of inland communication, must be palpable to every man of discernment.

It is therefore evident that one national government would be able at much less expense to extend the duties on imports beyond comparison, further than would be practicable to the States separately, or to any partial confederacies. Hitherto, I believe, it may safely be asserted that these duties have not upon an average exceeded in any State three percent. In France they are estimated at about fifteen percent, and in Britain the proportion is still greater. There seems to be nothing to hinder their being increased in this country to at least treble their present amount. The single article of ardent spirits under federal regulation might furnish a considerable revenue. Upon a ratio to the importation into this State, the whole quantity imported into the United States may at low computation be estimated at four millions of gallons, which, at a shilling per gallon, would produce two hundred thousand pounds. That article would well bear this rate of duty; and if it should tend to diminish the consumption of it, such an effect would be equally favorable to the agriculture, to the economy, to the morals, and to the health of the society. There is perhaps, nothing so much a subject of national extravagance as this very article.

What will be the consequence if we are not able to avail ourselves of the resource in question in its full extent? A nation cannot long exist without revenue. Destitute of this essential support, it must resign its independence and sink into the degraded condition of a province. This is an extremity to which no government will of choice accede. Revenue, therefore,

must be had at all events. In this country if the principal part be not drawn from commerce, it must fall with oppressive weight upon land. It has been already intimated that excises in their true signification are too little in unison with the feelings of the people to admit of great use being made of that mode of taxation; nor, indeed, in the States where almost the sole employment is agriculture are the objects proper for excise sufficiently numerous to permit very ample collections in that way. Personal estate (as has been before remarked), from the difficulty of tracing it, cannot be subject to large contributions by any other means than by taxes on consumption. In populous cities it may be enough the subject of conjecture to occasion the oppression of individuals, without much aggregate benefit to the State; but beyond these circles it must, in a great measure, escape the eye and the hand of the tax-gatherer. As the necessity of the State, nevertheless, must be satisfied in some mode or other, the defect of other resources must throw the principal weight of the public burdens on the possessor of land. And as on the other hand the wants of the government can never obtain an adequate supply, unless all the sources of revenue are open to its demands, the finances of the community, under such embarrassments, cannot be put into a situation consistent with its respectability to its security. Thus we shall not even have the consolations of a full treasury to atone for the oppression of that valuable class of the citizens who are employed in the cultivation of the soil. But public and private distress will keep pace with each other in gloomy concert and unite in deploring the infatuation of those counsels which led to disunion.

PUBLIUS

FEDERALIST PAPERS NO. 32 - Hamilton:

"Although I am of opinion that there would be no real danger of the consequences which seem to be apprehended to the State governments from a power in the Union to control them in the levies of money, because I am persuaded the the sense of the people, the extreme hazard of provoking the resentments of the State governments, and a conviction of the utility and necessity of local administrations for local purposes, would be a complete barrier against the oppressive use of such power; yet I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual State should possess and independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause of its Constitution.

An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instant an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally contradictory and repugnant. I use these terms to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interference's in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority. These three cases of exclusive jurisdiction in the federal government may be exemplified by the following instances: The last clause but one in the eighth section of the first article provides expressly that Congress shall exercise "exclusive legislation" over the district to be appropriated as the seat of government. This answers to the first case. The first clause of the same section empowers Congress "to lay and collect taxes, duties, imposts, and excises"; and the second clause of the tenth section of the same article declares that "no State shall without the consent of Congress lay any imposts or duties on imports or exports, except for the purpose of executing its inspection laws." Hence would result an exclusive power in the Union to lay duties on imports and exports, with the peculiar exception mentioned; but this power is abridged by another clause, which declares that no tax or duty shall be laid on articles exported from any State; in consequence of which qualification it now only extends to duties on imports. This answers to the second case. The third will be found in that clause which declares that Congress "shall have power "to establish an UNIFORM RULE of naturalization throughout the United States." This must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE.

A case which may perhaps be thought to resemble the latter, but which is in fact widely different, affects the question immediately under consideration. I mean the power of imposing taxes on all articles other than exports and imports. This, I contend, is manifestly a concurrent and coequal authority in the

United States and in the individual States. There is plainly no expression in the granting clause which makes the power exclusive in the Union. There is no independent clause or sentence which prohibits the States from exercising it. So far is this from being the case that a plain and conclusive argument to the contrary is to be deducible from the restraint laid upon the States in relation to duties on imports and exports. This restriction implies an admission that if it were not inserted the States would possess the power it excludes; and it implies a further admission that as to all other taxes, the authority of the States remains undiminished. In any other view it would be both unnecessary, and dangerous; it would be unnecessary, because if the grant to the Union of the power laying such duties implied the exclusion of the States, or even their subordination in this particular there could be no need of such a such a restriction; it would be dangerous, because the introduction of it leads directly to the conclusion which has been mentioned, and which, if the reasoning of the objectors be just, could not have been intended; I mean that the States, in all cases to which the restriction did not apply, would have a concurrent power of taxation with the Union. The restriction in question amounts to what lawyers call a NEGATIVE PREGNANT - that is, a negation of one thing, and an affirmance of another; a negation of the authority of the States to impose taxes on imports and exports, and an affirmance of their authority to impose them on all other articles. It would be mere sophistry to argue that it was meant to exclude them absolutely from the imposition of taxes of the former kind, and to leave them at liberty to lay others subject to the control of the national legislature. The restraining or prohibitory clause only says, that they shall not, without the consent of congress, lay such duties; and if we are to understand this in the sense last mentioned, the Constitution would then be made to introduce a formal provision for the sake of a very absurd conclusion; which is, that the States, with the consent of the national legislature, might tax imports and exports; and that they might tax every other article, unless controlled by the same body. If this was the intention, why was it not left in the first instance, to what is alleged to be the natural operation of the original clause, conferring a general power of taxation upon the Union? It is evident that this could not have been the intention, and that it will not bear a construction of the kind.

As to a supposition of repugnancy between the power of taxation in the States and in the Union, it cannot be supported in that sense which would be requisite to work an exclusion of the States. It is, indeed, possible that a tax might be laid on a particular article by a State which might render it inexpedient that a further tax should be laid on the same article by the Union; but it would not imply a constitutional inability to impose a further tax. The quantity of the imposition, the expediency or inexpediency of an increase on either side, would

be mutually questions of prudence; but there would be involved no direct contradiction of power. The particular policy of the national and of the State systems of finance might now and then not exactly coincide, and might require reciprocal forbearances. It is not, however, a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty.

The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union remain with them in full vigor is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution. We there find that, notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States to insert negative clauses prohibiting the exercise of them by the States. The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the convention, and furnishes a rule of interpretation out of the body of the act, which justifies the position I have advanced and refutes every hypothesis to the contrary."

WILSON - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Johnathan Elliot Ed., Volume 2 page 467.

"In this Constitution, a power is given to Congress to collect imposts, which is not given by the present Articles of Confederation. A very considerable part of the revenue of the United States will arise from that source; it is the easiest, most just, and most productive mode of raising revenue; and it is a safe one, because it is voluntary. No man is obliged to consume more than he pleases, and each buys in proportion only to his consumption. The price of commodities is blended with the tax, and the person is often not sensible of the payment."

WILSON - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Supra, Volume 2 page 501 - 502.

"I apprehend the greatest part of the revenue will arise from external taxation. But certainly it would have been very unwise in the late Convention to have omitted the addition of other powers; and I think it would be very unwise in the Convention to refuse to adopt this Constitution, because it

grants Congress power to lay and collect taxes, for the purpose of providing for the common defense and general welfare of the United States.

What is to be done to effect these great purposes, if an impost should be found insufficient? Suppose a war was suddenly declared against us by a foreign power, possessed of a formidable navy; our navigation would be laid prostrate, our imposts must cease; and shall our existence as a nation depend upon the peaceful navigation of our seas? A strong exertion of maritime power, on the part of an enemy, might deprive us of these sources of revenue in a few months....Nor can we agree that our safety should depend altogether upon a revenue arising from commerce.

Excises may be a necessary mode of taxation; it takes place in most states already."

ELLSWORTH - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Supra, Volume 2 page 193.

"It is a strong argument in favor of an impost, that the collection of it will interfere less with the internal police of the states than any other species of taxation. It does not fill the country with revenue officers, but is confined to the sea-coast, and is chiefly a water operation. Another weighty reason in favor of this branch of revenue is, if we do not give it to Congress, the individual States will have it. It will give some States an opportunity of oppressing others, and destroy all harmony between them. If we would have the States friendly to each other, let us take away this bone of contention, and place it, as it ought in justice to be placed, in the hands of the general government."

R. LIVINGSTON - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Supra, Volume 2 page 341.

"We may naturally suppose that wines, brandy, spirits, malt liquors, etc., will be among the first subjects of excise. These are proper objects of taxation, not only as they will be very productive, but as charges on them will be favorable to the morals of the citizens."

GORHAM - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Supra, Volume 2 page 106.

"By imposts and excises, the man of luxury will pay; and the middling and the poor parts of the community, who live by their industry, will go clear; and as this would be the easiest mode of raising a revenue, it was the most natural to suppose it would be resorted to."

ELLSWORTH - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Supra, Volume 2 page 90 - 91.

"This clause extends to all the objects of taxation. But though it does extend to all, it does not extend to them exclusively. It does not say that Congress shall have all these sources of revenue, and the States none. All, excepting the impost, still lie open to the states. This State owes a debt; it must provide for the payment of it. So do all the other States. This will not escape the attention of Congress. When making calculations to raise a revenue; they will bear this in mind. They will not take away that which is necessary for the States. They are the head, and will take care that the members do not perish.

PARSONS - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Supra, Volume 2 page 93.

"Congress have only a concurrent right with each State, in laying direct taxes, not an exclusive right; and the right of each State to direct taxation is equally extensive and perfect as the right of Congress; any law, therefore, of the United States, for securing to Congress more than concurrent right with each State, is usurpation, and void."

MADISON - (Speech before the First United States Congress) "Undermining The Constitution: A History Of Lawless Government", (New York: Devin-Aire Co., 1950) pg. 188.

"If Congress can apply money indefinitely to the general welfare, and are the sole and supreme judges of the general welfare, they may take the care of religion into their own hands; they may take into their own hands the education of children, establishing in like manner schools throughout the Union; they may undertake the regulation of all roads, other than post roads. In short, everything from the highest object of State legislation, down to the most minute object of policy, would be thrown under the power of Congress; for every object I have mentioned would admit the application of money, and might be called, if Congress pleased, provisions for the general welfare."

HAMILTON - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Supra, Volume 4 page 618.

"Congress can be considered as under only one restriction, which does not apply to other governments. They cannot rightfully apply money they raise to any purpose merely or purely local...The constitutional test of a right application must always be, whether it be for a purpose of general or local nature."

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ORDAINED CONSTITUTION
OF THE UNION OF STATES
OF THE UNITED STATES OF AMERICA

ARTICLE I, SECTION 9, CLAUSE 4:

"No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken."

(Census of Enumeration - Article I, Section 2, Clause 2 - as amended by Amendment.XIV, Section.2..)

INTENT OF THE FRAMERS

FEDERALIST PAPERS NO. 22 - Hamilton:

"....The wealth of nations depends upon an infinite variety of causes. Situation, soil, climate, the nature of the production, the nature of the government, the genius of the citizens, the degree of information they possess, the state of commerce, of arts, of industry - these circumstances and many more, too complex, minute, or adventitious to admit of a particular specification, occasion differences hardly conceivable in the relative opulence and riches of different countries. The consequence clearly is that there can be no common measure of national wealth, and, of course, no general or stationary rule by which the ability of a State to pay taxes can be determined. The attempt, therefore, to regulate the contributions of the members of a confederacy by any such rule cannot fail to be productive of glaring inequality and extreme oppression.

This inequality would of itself be sufficient in America to work eventual destruction of the Union, if any mode of enforcing a compliance with its requisitions could be devised. The suffering States would not long consent to remain associated upon a principle which distributed the public burdens with so unequal a hand, and which was calculated to impoverish and oppress the citizens of some States, while those of others would, scarcely be conscious of the small proportion of the weight they were required to sustain. This, however, is an evil inseparable from the principle of quotas and requisitions.

There is no method of steering clear of this inconvenience, but by authorizing the national government to raise its own revenues in its own way. Imposts, excises, and in general, all duties upon articles of consumption, may be compared to a fluid, which will in time find its level with the means of paying them. The amount to be contributed by each citizen will in degree be at his own option, and can be regulated by an attention to his

resources. The rich may be extravagant, the poor can be frugal; and private oppression may always be avoided by a judicious selection of objects proper for impositions. If inequalities should arise in some States from duties on particular objects, these will in all probability be counterbalanced by proportional inequalities in other States, from the duties on other objects. In the course of time and things, an equilibrium, as far as it is attainable in so complicated a subject, will be established everywhere. Or, if inequalities should still exist, they would neither be so great in their degree, so uniform in their operation, nor so odious in their appearance, as those which would necessarily spring from quotas upon any scale that can possibly be devised.

It is a signal advantage of taxes on articles of consumption that they contain in their own nature a security against excess. They prescribe their own limit, which cannot be exceeded without defeating the end proposed - that is, an extension of the revenue. When applied to this object, the saying is as just as it is witty that, "in political arithmetic, two and two do not always make four." If duties are too high, they lessen the consumption; the collection is eluded; and the product to the treasury is not so great as when they are confined within proper and moderate bounds. This forms a complete barrier against any material oppression of the citizens by taxes of this class, and is itself a natural limitation of the power of imposing them.

Impositions of this kind usually fall under the denomination of indirect taxes, and must for a long time constitute the chief part of the revenue raised in this country. Those of the direct kind, which principally relate to land and buildings, may admit of a rule of apportionment. Either the value of land, or the number of the people, may serve as a standard. The state of agriculture and the populousness of a country are considered as having a near relation with each other. And, as a rule, for the purpose intended, numbers, in the view of simplicity and certainty, are entitled to a preference. In every country it is a herculean task to obtain a valuation of land; in a country imperfectly settled and progressive in improvement, the difficulties are increased almost to impracticability. The expense of an accurate valuation is, in all situations, a formidable objection. In a branch of taxation where no limits to the discretion of the government are to be found in the nature of things, the establishment of a fixed rule, not incompatible with the end, may be attended with fewer inconveniences than to leave that discretion altogether at large."

FEDERALIST PAPERS NO. 36 - Hamilton:

"There is another objection of a somewhat more precise nature which claims our attention. It has been asserted that a

power of internal taxation in the national legislature could never be exercised with advantage, as well from the want of a sufficient knowledge of local circumstances as from an interference between the revenue laws of the Union and of the particular States. The supposition of a want of knowledge seems to be entirely destitute of foundation. If any question is depending in a State legislature respecting one of the counties, which demands a knowledge of local details, how is it acquired? No doubt from the information of the members of the county. Cannot the like knowledge be obtained in in the national legislature from the representatives of each State? And is it not to be presumed that the men who will generally be sent there will be possessed of the necessary degree of intelligence to be able to communicate that information? Is the knowledge of local circumstances, as applied to taxation, a minute topographical acquaintance with all the mountains, rivers, streams, highways, and bypaths in each State; or is it a general acquaintance with its situation and resources, with the state of its agriculture, commerce, manufactures, with the nature of its products and consumption's, with the different degrees and kinds of its wealth, property, and industry?

* Nations in general even under governments of the more popular kind, usually commit the administration of their finances to single men or to boards composed of a few individuals, who digest and prepare, in the first instance, the plans of taxation, which are afterwards passed into law by the authority of the sovereign or legislature.

Inquisitive and enlightened statesmen are everywhere deemed best qualified to make a judicious selection of the objects proper to revenue; which is a clear indication, as far as the sense of mankind can have weight in the question, of the species of knowledge of local circumstances requisite to the purpose of taxation.

The taxes intended to be comprised under the general denomination of internal taxes may be subdivided into those of the direct and those of the indirect kind. Though the objection be made to both, yet the reasoning upon it seems to be confined to the former branch. And indeed, as to the latter, by which must be understood duties and excises on articles of consumption, one is at a loss to conceive what can be the nature of the difficulties apprehended. The knowledge relating to them must evidently be of a kind that will either be suggested by the nature of the article itself, or can be easily procured from any well-informed man, especially of the merchantile class. The circumstances that may distinguish its situation in one State from its situation in another must be few, simple, and easy to comprehend. The principle thing to be attended to would be to avoid those articles which had been previously appropriated

to the use of a particular State; and there could be no difficulty in ascertaining the revenue system of each. This could always be known from the respective code of laws, as well as from the information of the members of the several States.

The objection, when applied to real property or to houses and lands, appears to have, at first sight, more foundation, but even in this view it will not bear a close examination. Land taxes are commonly laid in one of two modes, either by actual valuations, permanent or periodical, or by occasional assessments, at the discretion, or according to the best judgment, of certain officers whose duty it is to make them. In either case, the EXECUTION of the business, which alone requires the knowledge of local details, must be developed upon discreet persons in the character of commissioners or assessors, elected by the people or appointed by the government for the purpose. All that the law can do must be to name the persons or to prescribe the manner of their election or appointment, to fix their numbers and qualifications, and to draw the general outlines of their powers and duties. And what is there in all this that cannot as well be performed by the national legislature as by a State legislature? The attention to either can only reach to general principles; local details, as already observed, must be referred to those who are to execute the plan.

But there is a simple point of view in which this matter may be placed that must be altogether satisfactory. The national legislature can make use of the system of each State within that State. The method of laying and collecting this species of taxes in each State can, in all its parts, be adopted and employed by the federal government.

Let it be recollected that the proportion of these taxes is not to be left to the discretion of the national legislature, but is to be determined by the numbers of each State, as described in the second section of the first article. An actual census or enumeration of the people must furnish the rule, a circumstance which effectually shuts the door to partiality or oppression. The abuse of this power of taxation seems to have been provided against with guarded circumspection. In addition to the precaution just mentioned, there is a provision that "all duties, imposts, and excises shall be UNIFORM throughout the United States.

It has been very properly observed by different speakers and writers on the side of the Constitution that if the exercise of the power of internal taxation by the Union should be judged beforehand upon mature consideration, or should be discovered on experiment to be really inconvenient, the federal government may forebear the use of it, and have recourse to requisition in its stead. By way of answer to this, it has been triumphantly asked,

Why not in the first instance omit that ambiguous power and rely upon the latter resource? Two solid answers may be given. The first is that the actual exercise of the power may be found both convenient and necessary; for it is impossible to prove in theory, or otherwise than by experiment, that it cannot be advantageously exercised. The contrary, indeed, appears most probable. The second answer is that the existence of such power in the Constitution will have a strong influence in giving efficacy to requisition. When the States know that the Union can supply itself without their agency, it will be a powerful motive for exertion on their part.

As to interference of the revenue laws of the Union and of its members, we have already seen that there can be no clashing or repugnancy of authority. The laws cannot, therefore, in a legal sense, interfere with each other; and it is far from impossible to avoid an interference even in the policy of their different systems. An effectual expedient for this purpose will be mutually to abstain from those objects which either side may have first had recourse to. As neither can control the other, each will have an obvious and sensible interest in this reciprocal forbearance. And where there is an immediate common interest, we may safely count upon its operation. When the particular debts of the States are done away and their expenses come to be limited within their natural compass, the possibility almost of interference will vanish. A small land tax will answer the purpose of the States, and will be their most simple and most fit resource.

Many specters have been raised out of this power of internal taxation to excite the apprehensions of the people: double sets of revenue officers, a duplication of their burdens by double taxations, and the frightful forms of odious and oppressive poll taxes have been played off with all the ingenious dexterity of political legerdemain.

As to the first point, there are two cases in which there can be no room for double sets of officers: one, where the right to imposing the tax is exclusively vested in the Union, which applies to the duties on imports; the other, where the object has not fallen under any State regulation or provision, which may be applicable to a variety of objects. In other cases, the probability is that the United States will either wholly abstain from the objects preoccupied for local purposes, or will make use of the State officers and State regulations for collecting the additional imposition. This will best answer the views of revenue, because it will save expense in the collection, and will best avoid any occasion of disgust to the State governments and to the people. At all events, here is a practicable expedient for avoiding such an inconvenience; and nothing more can be required than to show that the evils predicted do not necessarily

result from the plan.

As to any argument derived from a supposed system of influence, it is a sufficient answer to say that it ought not to be presumed; but the supposition is susceptible of a more precise answer. If such a spirit should infest the councils of the Union, the most certain road to the accomplishment of its aim would be to employ the State officers as much as possible, and to attach them to the Union by an accumulation of their emoluments. This would serve to turn the tide of State influence into the channels of the national government, instead of making federal influence flow in an opposite and adverse current. But all suppositions of this kind are invidious, and ought to be banished from the consideration of the great question before the people. They can answer no other end than to cast a mist over the truth.

As to the suggestion of double taxation, the answer is plain. The wants of the Union are to be supplied in one way or another; if to be done by the authority of the federal government, it will not need to be done by that of the State governments. The quantity of taxes to be paid by the community must be the same in either case; with this advantage - if the provision is to be made by the Union - that the capital resources of commercial imposts, which is the most convenient branch of revenue, can be prudently improved to a greater extent under federal than under State regulation, and of course will render it less necessary to recur to more inconvenient methods; and with this further advantage, that as far as there may be any real difficulty in the exercise of the power of international taxation, it will impose a disposition to greater care in the choice and arrangement of the means; and must naturally tend to make it a fixed point of policy in the national administration to go as far as may be practicable in making the luxury of the rich tributary to the public treasury in order to diminish the necessity of those impositions which might create dissatisfaction in the poorer and most numerous classes of the society. Happy it is when the interest which the government has in the preservation of its own power coincides with a proper distribution of the public burdens and tends to guard the least wealthy part of the community from oppression!

As to poll taxes, I without scruple, confess my disapprobation of them; and though they have prevailed from an early period in those States* which have uniformly been the most tenacious of their rights, I should lament to see them introduced into practice under the national government. But does it follow because there is a power to lay them that they will actually be laid? Every State in the Union has power to impose taxes of this kind; and yet in several of them they are unknown in practice.

* The New England States.

Are the State governments to be stigmatized as tyrannies because they possess this power? If they are not, with what propriety can the like power justify such a charge against the national government, or even be urged as an obstacle to its adoption? As little friendly as I am to the species of imposition, I still feel a thorough conviction that the power of having recourse to it ought to exist in the federal government. There are certain emergencies of nations in which expedients that in the ordinary state of things ought to be forborne become essential to the public weal. And the government, from the possibility of such emergencies, ought ever to have the option of making use of them.

The real scarcity of objects in this country, which may be considered as productive sources of revenue, is a reason peculiar to itself for not abridging the discretion of the national councils in this respect. There may exist certain critical and tempestuous conjunctures of the State, in which a poll tax may become an inestimable resource. And as I know nothing to exempt this portion of the globe from common calamities that have befallen other parts of it, I acknowledge my aversion to every project that is calculated to disarm the government of a single weapon, which in any possible contingency might be usefully employed for the general defense and security.

I have now gone through the examination of those powers proposed to be conferred upon the federal government which relate more peculiarly to its energy, and to its efficiency for answering the great and primary objects of its union. There are others, which, though omitted here, will, in order to render the view of the subject more complete, be taken notice of under the next head of our inquiries. I flatter myself the progress already made will have sufficed to satisfy the candid and judicious part of the community that some of the objections which have been most strenuously urged against the Constitution, and which were most formidable in their first appearance, are not only destitute of substance, but if they had operated in the formation of the plan, would have rendered it incompetent to the great ends of public happiness and national prosperity. I equally flatter myself that a further and more critical investigation of the system will serve to recommend it still more to every sincere and disinterested advocate for good government and will leave no doubt with men of this character of the propriety and expediency of adopting it. Happy will it be for ourselves, and most honorable for human nature, if we have wisdom and virtue enough to set so glorious an example to mankind!

PUBLIUS

(Transcriber's Note: Numerous other references to taxation, both on the National and State levels, are to be found in the Federalist Papers. See: No. 41 & 44)

MARSHALL - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Johnathan Elliot Ed., Volume 3 Page 229.

"The objects of direct taxes are well understood: they are but few: what are they? Lands, slaves, stock of all kinds, and a few other articles of domestic [personal] property."

MADISON - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Johnathan Elliot Ed., Volume 3 Page 307.

"There is a proportion to be laid on each State, according to its population. The most proper article will be selected in each State. If one article, in any State, should be deficient, it will be laid on another article."

MADISON - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Johnathan Elliot Ed., Volume 3 Page 458.

"The census in the Constitution was intended to introduce equality in the burdens to be laid on the community...But uniformity of taxes would be subversive of the principles of equality; for it was not possible to select any article which would be easy for one State but what would be heavy for another;...the proportion of each State being ascertained, it would be raised by the general government in the most convenient manner for the people, and not by the selection of any one particular object."

SEDGWICK - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Johnathan Elliot Ed., Volume 2 Page 61.

"Let us suppose...that we are attacked by a foreign enemy; that in this dilemma our treasury was exhausted, our credit gone, our enemy on our borders, and that there was no possible method of raising impost or excise; in this case, the only remedy would be direct tax."

R. LIVINGSTON - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Johnathan Elliot Ed., Volume 2 Page 342.

"There are no governments that have not been obliged to levy direct taxes, and even procure loans, to answer the public wants; there are no governments which have not, in certain emergencies,

been compelled to call for all capital resources....The necessities of government will call for more money than external and indirect taxation can produce."

CORBIN - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Johnathan Elliot Ed., Volume 3 Page 109.

"This mode of levying money, though indispensably necessary on great emergencies, will be but seldom recurred to."

JOHNSTON - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Johnathan Elliot Ed., Volume 4 Page 77 - 78.

"It seems to me probable that the money arising from duties and excises will be, in general, sufficient to answer all the ordinary purposes of government; but in cases of emergency, it will be necessary to lay direct taxes...for it cannot be supposed that, from the ordinary sources of revenue, money can be brought into our treasury in such a manner as to answer pressing dangers; nor can it be supposed that our credit will enable us to procure any loans, if our government is limited in the means of procuring money....I hope and believe that the taxes to be laid on by the general legislature will be so very light that it will be no inconvenience to the people to pay them."

SPENCER - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Johnathan Elliot Ed., Volume 3 Page 229.

"How are direct taxes to be laid? By a poll tax, assessments on land or other property? Inconvenience and oppression will arise from any of them....Laws operating on individuals cannot be carried on against the States; because, if they do not comply with the general laws of the Union, there is no way to compel a compliance but force. There must be an army to compel them. Some States may have some excuse for noncompliance. Others will feign excuses. Several States may be in the same predicament. If force be used to compel them, they will probably call for foreign aid; and the very means of defense will operate to the dissolution of the system, and to the destruction of the States....Therefore...Congress ought to have power of taking out of the pockets of the individuals at large."

DAWES - "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Johnathan Elliot Ed., Volume 2 Page 60.

"That Congress, however, will not apply to the power of direct taxation, unless in case of emergency, is plain; because, as thirty thousand inhabitants will elect a representative, eight-tenths of which electors perhaps are yeomen, and holders of farms, it will be their own faults if they are not represented by such men as will never permit the land to be injured by unnecessary taxes."

FEDERALIST PAPERS NO. 41 - Madison:

"Some who have not denied the necessity of the power of taxation have grounded a very fierce attack against the Constitution, on the language in which it is defined. It has been urged and echoed that the power "to lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defense and general welfare of the United States," amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction.

Had no other enumeration or definition of the powers of the Congress been found in the Constitution than the general expressions just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by jury, or even to regulate the course of descents, or the forms of conveyances, must be very singularly expressed by the terms "to raise money for general welfare."

But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows and is not even separated by a longer pause than a semicolon? If the different parts of the same instrument ought to be so expounded as to give meaning to every part which will bear it, shall ~~on~~ part of the same sentence be excluded altogether from a share in the meaning: and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expression be denied any signification whatsoever? For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the

dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing had not its origin with the latter.

The objection here is the more extraordinary, as it appears that the language used by the convention is a copy from the Articles of Confederation. The objects of the Union among the States, as described in article third, are "their common defense, security of their liberties, and mutual and general welfare." The terms of article eighth are still more identical: "All charges of war and all other expenses that shall be incurred for the common defense or general welfare and allowed by the United States in Congress shall be defrayed out of the common treasury," etc. A similar language again occurs in article ninth. Construe either of these articles by the rules which would justify the construction put on the new Constitution, and they vest in the existing Congress a power to legislate in all cases whatsoever. But what would have been thought of that assembly, if, attaching themselves to these general expressions and disregarding the specifications which ascertain and limit their import, they had exercised and unlimited power of providing for the common defense and general welfare? I appeal to the objectors themselves, whether they would in that case have employed the same reasoning in justification of Congress as they now make use of against the convention. How difficult it is for error to escape its own condemnation.

PUBLIUS"



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OTHER QUOTATIONS
FOR YOUR CONSIDERATION AND IMMEDIATE ATTENTION

THOMAS JEFFERSON - "The Writings Of Thomas Jefferson," Albert Ellery Bergh Ed., Volume 13, Page 269:

"It is a wise rule, and should be fundamental in a government disposed to cherish its credit, and at the same time to restrain the use of it within the limits of its faculties, 'never' to borrow a dollar without laying a tax in the same instant for paying the interest annually, and the principal within a given term; and to consider that tax as pledged to the creditors on the public faith.' On such a pledge as this, sacredly observed, a government may always command, on a reasonable interest, all the lendable money of their citizens, while the necessity of an equivalent tax is salutary warning to them and their constituents against oppressions, bankruptcy, and its inevitable consequence, revolution."

THOMAS JEFFERSON - "The Writings Of Thomas Jefferson", Albert Ellery Bergh Ed., Volume 13 Page 357:

"We shall all consider ourselves unauthorized to saddle posterity with our debts, and morally bound to pay them ourselves; and consequently within what may be deemed the period of a generation, or the life of the majority."

THOMAS JEFFERSON - "The Writings Of Thomas Jefferson", Paul Leicester Ford Ed., Volume 10 Page 175:

"It is incumbent on every generation to pay its own debts as it goes; a principle which, if acted on, would save one-half the wars of the world."

THOMAS JEFFERSON - "The Writings Of Thomas Jefferson", Albert Ellery Bergh Ed., Volume 13 Page 357:

"The principle of spending money to be paid by posterity, under the name of funding, is but swindling futurity on a large scale."

THOMAS JEFFERSON - "The Writings Of Thomas Jefferson", Albert Ellery Bergh Ed., Volume 13 Page 420:

"At the time we are funding our national debt, we heard much about 'a public debt being a blessing': that the stock

representing it was the alimant of commerce, manufactures, and agriculture. This paradox was well adapted to the minds of believers and dreamers....If the debt which the banking companies owe be a blessing to anybody, it is to themselves alone, who are realizing a solid interest of 8 or 10 percent on it. As to the public, these companies have banished all our gold and silver medium, which before their institution we had without interest, which never could have perished in our hands, and would have been our salvation now in the hour of war; instead of which they have given us two hundred million of froth and bubble, on which we are to pay them heavy interest until it shall vanish into air....The truth is that the capital may be produced by industry, and accumulated by economy; but jugglers only will propose to create it by legerdemain tricks with paper."

THOMAS JEFFERSON - "The Writings Of Thomas Jefferson", Albert Ellery Bergh Ed., Volume 15 Page 47:

"I...place economy among the first and most important of republican virtues, and public debt as the greatest of the dangers to be feared."

THOMAS JEFFERSON - "The Writings Of Thomas Jefferson", Albert Ellery Bergh Ed., Volume 12 Page 324:

"I consider the fortunes of our republic as depending, in an eminent degree, on the extinguishment of the public debt before we engage in any war; because, that done, we shall have revenue enough to improve our country in peace and defend it in war, without recurring either to new taxes or loans. But if the debt should once more be swelled to a formidable size, its entire discharge will be despaired of, and we shall be committed to the English career of debt, corruption, and rottenness, closing with revolution. The discharge of the debt, therefore, is vital to the destinies of our government."

THOMAS JEFFERSON - "The Writings Of Thomas Jefferson", Albert Ellery Bergh Ed., Volume 15 Page 39:

"I am not among those who fear the people. They, and not the rich, are our dependence for continued freedom. And to preserve their independence, we must not let our rulers load us with perpetual debt. We must make our election between economy and liberty or profusion and servitude. If we run into such debts as that we must be taxed in our meat and in our drink, in our necessaries and our comforts, in our labors and our amusements, for our callings and our creeds, as the people of England are, our people like them, must come to labor sixteen hours in the twenty-four, [and] give the earnings of fifteen of these to the government for their debts and daily expenses; and

the sixteenth being insufficient to afford us bread, we must live, as they now do, on oatmeal and potatoes; have no time to think, no means of calling the mismanagers to account; but be glad to obtain subsistence by hiring ourselves to rivet their chains on the necks of our fellow sufferers....This example reads to us the salutary lesson that the private fortunes are destroyed by public as well as private extravagance. And this is the tendency of all human governments. A departure from principle in one instance becomes a precedent for a second, that second for a third, and so on, till the bulk of society is reduced to be mere automatons of misery, to have no sensibilities left but for sinning and suffering. Then begins indeed the bellum omnium in omnia which some philosophers, observing [it] to be so general in this world, have mistaken...for the natural instead of the abusive state of man. And the forehorse of this frightful team is public debt. Taxation follows that, and in its train wretchedness and oppression."

SAMUEL ADAMS - "The Life And Public Service Of Samuel Adams," Wells, Volume 1 page 504:

"It is the greatest absurdity to suppose it in the power of one, or any number of men, at the entering into society, to renounce their essential natural rights, or the means of preserving those right; when the grand end of civilized government, from the very nature of its institution, is for the support, protection, and defense of those very rights; the principal of which...are life, liberty, and property. If men, through fear, fraud or mistake, should in terms renounce or give up any essential natural right, the eternal law of reason and the grand end of society would absolutely vacate such renunciation. The right to freedom being the gift of God Almighty, it is not in the power of man to alienate this gift and voluntarily become a slave."



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QUOTATIONS

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Exodus 22 : 22 - 26

"22 Thou shalt not afflict any widow or fatherless child.

23 If thou afflict them in any wise, and they cry at all unto me, I will surely hear their cry;

24 And my wrath shall wax hot, and I will kill you with the sword; and your wives shall be widows, and your children fatherless.

25 If thou lend money to any of my people that is poor by them thou shalt not be to him as an userer, neither shalt thou lay upon him usury.

26 If thou at all take thy neighbor's raiment to pledge, thou shalt deliver it unto him by the sun goeth down."

Leviticus 19 : 13

"13 Thou shalt not defraud thy neighbor, neither rob him: the wages of him that is hired shall not abide with thee all night until the morning."

Dueteronomy 24 : 14-15

"14 Thou shalt not oppress an hired servant that is poor and needy, whether he be of thy bretheren, or of thy strangers that are in thy land within thy gates.

15 At his day thou shalt give him his hire, neither shalt the sun go down upon it; for he is poor, and setteth his heart upon it: lest he cry against thee unto the Lord, and it be a sin unto thee."

*standards in
have relations*

Dueteronomy 25 : 13-16

"13 Thou shalt not have in thy bag diverse weights a great and a small.

14 Thou shalt not have in thy house diverse measures, a great and a small.

15 But thou shalt have a perfect and just weight, a perfect and just measure shalt thou have: that thy

*Standards in
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days may be lengthened in the land which the Lord thy God giveth thee.

16 For all that do such things, and all that do unrighteously, are an abomination unto the Lord thy God."

(Also see: Mathew 20 : 1 - 16)

MAXIMS
(Principles of Law)

GODS LAW - NATURAL LAW:

"The law of God and the law of the land are all one; and both preserve and favor the common and public good of the land." (See: Keilway's Reports 191)

"The laws of nature are unchangeable." (See: Oliver, Forms 56; Branche's Principia Legis Equitatis)

"The law regards the order of nature." (See: Coke on Littleton 197; Broom's Maxims, 252)

"Offenses against nature are the most serious." (See: 3 Coke's Pleas of the Crown 20)

"What is prohibited in the nature of things can be confirmed by no law." (See: Finch, Law 74)

"When laws imposed by the State fail, we must act by the law of nature." (See: 2 Rolle's Abridgments 298)

"According to the laws of nature, it is just that no one should be enriched with detriment and injury to another (i.e. at expense of another)." (See: Digest Of The Civil Law, Book 50, Title 17, Law 200)

"If you depart from the law, you will wander without a guide, and everything will be in a state of uncertainty to every one. (See: Coke on Littleton, 227)

"It is more serious to hurt divine than temporal majesty." (See: 11 Coke's Reports 29)

MONEY:

"Money is the just medium and measure of all exchangeable things, for by the medium of money a convenient and just estimation of all things is made." (See: 1 Bouvier's Institutes Of American Law, n. 922; Barton's Maxims 222)

"The right of coining is comprehended amongst those rights of royalty which are never relinquished by the kingly sceptre." (See: Davy's Reports 18)

"The words current money, refer to the time of payment." (See: Davy's Reports 20)

"The value of a thing is estimated by its worth in money, and the value of money is not estimated by reference to the thing." (See: 9 Coke's Reports 76; 1 Bouvier's Institutes of American Law, n. 922)

- "The fund which received the benefit should make the satisfaction." (See: 4 Bouvier's Institutes Of American Law, n. 3730)

CONSIDERATION:

"A contract founded on an unlawful consideration or against good morals is null." (See: Hobart's Reports 167; Digest Of The Civil Law, Book 2, Title 14, Law 27, Section 4)

"Under the head of creditors are included not alone those who have lent money, but all to whom from any cause a debt is owing." (See: Digest Of The Civil Law, Book 50, Title 16, Law 11)

"The right of creditors to sue cannot be taken away or lessened by the contracts of their debtors." (See: Barton's Maxims, 115; Pothier's, Treaties On The Law Of Obligations 108; Broom's Maxims 697)

"No action arises on a contract without consideration." (See: Noy's Maxims 24; Broom's Maxims 745; 3 Burrow's Reports 1670; Black's Commentaries 445; Chitty on Contracts, 11th Amend. Ed. 24; 1 Story on Contracts Sec. 525)

"From an illicit contract no action arises." (See:)

Brooms Maxims 742; 7 Clark & Finelly's Reports 729)

"In all obligations, when no time is fixed for the performance, the thing is due immediately." (See: Digest Of The Civil Law, Book 50, Title 17, Law 14)

"An obligation without consideration, or upon a false consideration (which fails), or upon unlawful consideration, cannot have any effect." (See: Code 3., 3., 4.; Chitty on Contracts, 11th Amend. Ed. 25, note)

"Nothing is more unjust than to extend equity too far." (See: Halkertons's Digest 103)

"Nothing is so natural as that an obligation should be dissolved by the same principles which were observed in contracting it." (See: Digest Of The Civil Law, Book 50, Title 17, Law 35; Coke's Magna Carta 359; Broom's Maxims 887)

"Equity never contradicts the Law." (See: Lofft's Reports 379)

"Equity follows the law." (See: 1 Story's Commentaries on Equity Jurisprudence § 64; 3 Wooddesson's Vinerian Lectures 479, 482; Branche's Principia Legis et Equitatis 8; 2 Black's Commentaries 330; Gilb. 136; 2 Eden 316; 10 Mod. 3; 15 How. (U.S.) 299, 14 L. Ed. 696; 7 Allen (Mass.) 503; 5 Barb. (N.Y.) 277, 282)

FRAUD & DECEIT:

"Fraud is not purged by circuitry." (See: Bacon's Maxims In Regulae 1; Noy's Maxims 9, 12; Broom's Maxims 228; 6 E. & B. 948)

"Out of fraud no action arises." (See: Cowper's Reports, 343; Broom's Maxims 349)

"It is a fraud to conceal fraud." (See: 1 Vernon's Reports 270)

"Fraud and deceit should excuse no man." (See: 3 Coke's Reports 78)

"Fraud and justice never agree together." (See: Wingate's Maxims 680)

"Fraud lurks in generalities." (See: Trayner's Maxims 162)

"Once a fraud always a fraud." (See: 13 Viner's Abridgments 539)

"What is otherwise good and fair, if sought by force or fraud, becomes bad and unjust." (See: Coke's Reports 78)

"Time cannot render valid an act void in its origin." (See: Digest Of The Civil Law, Book 50, Title 17, Law 29)

"The laws help persons who are deceived, not those deceiving." (See: Trayner's Maxims 149)

"A deceiver deals in generalities." (See: 2 Coke's Reports 34; 2 Bulstrode's Reports 226; Lofft's Reports 782; 1 Rolle's Abridgments 157; Wingate's Maxims 636; Broom's Maxims 289)

"Fraud should be proved by clear proofs." (See: Code 2. 21, 6; 1 Story On Contract § 625)

"Deceit and fraud shall excuse or benefit no man (they themselves need to be excused)." (See: Year B. 14 Henry VIII. 8; Story's Commentaries On Equity Jurisprudence § 395; 3 Coke's Reports 78; 2 Fonblanque On Equity b. 2, ch. 6 § 3)

"Fraud deals in generalities." (See: Trayner's Maxims 162.)

"A right of action cannot arise out of fraud." (See: Brooms Maxims 297, 729; Cowper's Reports 343; 2 Communi Blanco or Common Bench 501; 5 Scott's New Reports 558; 10 Mass. 276; 38 Fed. 800)

"Fraud is odious and not to be presumed." (See: Barton's Maxims 159; Croke's Reports (Charles I) 550)

"When the form is not observed, it is inferred that the act is annulled." (See: 12 Coke's Reports 7)

"A naked promise does not create an obligation." (See: Digest Of The Civil Law, Book 2, Title 14, Law 7; Broom's Maxims 746)

"Naked reason and naked promise do not bind any

debtor." (See: Fleta, 1. 2, c. 60 § 25, a commentary on English Law, by anonymous author, during reign of Edward I, while a prisoner in the Fleet)

"Nadum pactum is where there is no consideration besides the agreement; but when there is a consideration, an obligation is created and an action arises." (See: Blacks Commentaries 445; Broom's Maxims 745; 1 Powell On Contracts 330; 3 Burrow's Reports 1670)

"Nadum pactum is that upon which which no action arises." (See: Broom's Maxims 676; Barton's Maxims 231)

INTERNATIONAL LAW:

"Commerce, by the law of nations, ought to be common, and not be converted into a monopoly and the private gain of a few." (See: Coke's Pleas Of The Crown, 181)

"That which natural reason has established among all men, is called the law of nations." (See: Digest Of The Civil Law, Book 1, Title 1, Section 9; Institutes of Justinian, Book 1, Title 2, Law 1; 1 Balck's Commentaries 43)

OTHER MAXIMS:

"What is inconvenient or contrary to reason, is not allowed in law." (See: Coke on Littleton 178)

"The word things has a general signification, which comprehends corporeal and incorporeal object, of whatever nature, sort or specie. (See: Coke's Pleas of the Crown 482; 1 Bouvier's Institutes of American Law, n. 415)

"The reason of the law, is the soul of the law." (See: Jenkin's Eight Centuries of Reports 45)

"Whenever anything is prohibited directly, it is also prohibited indirectly." (See: Coke on Littleton 223)

"He acts contrary to law who does what the law prohibits; but he acts in fraud of the law who, the

letter of the law being inviolate, uses the law contrary to its intentions." (See: Digest Of The Civil Law, Book 1, Title 3, Section 29)

QUOTES - MONEY - BILLS OF CREDIT

Ordained and Established Constitution of the Union of States of the United States of America.

Article I, Section 8, Clause 5:

"Congress shall have Power....To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;...."
(See: 31 U.S.C. 314 & 321)

Article I, Section 8, Clause 6:

"Congress shall have Power....To provide for the
* Punishment of counterfeiting the Securities and current
* Coin of the United States;...."
+ (See 18 U.S.C. 331 & 332)

Article I, Section 10, Clause 1:

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility...."

CONSTITUTIONAL MONEY - COIN

INTENT OF FRAMERS

1.) Madison's Notes: Debates In The Federal Convention, August 16, 1787, denying the General Government of the United States the Power to emit or utter "Bill of Credit." (See: Documents Illustrative, Of The Formation Of The Union of the American States, House Document. 398, (House Concurrent Resolution No. 400, June 10, 1965))

2.) "As Revenue is the ESSENTIAL ENGINE by which the means of answering the National exigencies must be procured...."
(See: Federalist Papers No. 31)

3.) McKean: "The power to coin money and regulate its value, must be esteemed highly advantages to the States, for hitherto its fluctuations has been productive of great confusion and fraudulent finesse. But when this power has a certain medium throughout the United States, we know the extent and operation of our contracts, in what manner we are to pay or be paid; no illicit practice will expose property to sudden and capricious depreciation, and the traveler will not be embarrassed with the different estimates of the same coin in the different districts through which he passes."

(See: Johnathan Elliot Ed., "Debates In The Several State Conventions On The Adoption Of The Federal Constitution", Vol. 2, pg. 275)

4.) McKean: "By this means sir, some security will be offered for the discharge of Honest Contracts, and an end put to the pernicious speculation upon paper emissions - medium which has undermined the morals, and relaxed the industry of the people, and from which one-half of the controversies in our courts of justice has arisen."

(See: Johnathan Elliot Ed., supra, Vol. 2, pg. 279)

5.) C.C. Pickney: I apprehend these general reasoning's will be found true with respect to paper money: That experience has shown that, in every State where it has been practiced since the revolution, it always carries away the gold and silver out the country, and impoverishes it - that, while it remains, all the foreign merchants, trading in America, must suffer and lose by it; therefore, that it must ever be a discouragement to commerce - that every medium of trade should have an intrinsic value, which paper money has not; gold and silver are therefore the fittest for this medium, as they are an equivalent, which paper can never be - that debtors in the assemblies will, when ever they can, make paper money with fraudulent views - that in those States where the credit of paper money has been best supported, the bills have never kept to their nominal value in circulation, but have constantly depreciated to a certain degree"

But above all, how much will this section tend to restore your credit with foreigners - to rescue your national character from the contempt which must ever follow the most flagrant violation of public faith and private honesty! No more shall paper money, No more shall Tender-Laws, drive their commerce from our shores, and darken the American name in every country where it is known. No more shall our Citizens conceal in their coffers those treasures which the weakness and dishonesty of our Government have long hidden from the public eye. The firmness of a just system shall bring them into circulation, and honor and virtue shall be again known and countenanced among

us. No more shall the widow, the orphan, and the stranger, become the miserable victims of unjust rulers. Your government shall now, indeed, be lifted on high, and the poor and the rich, the strong and the weak, shall be equally protected in their rights. Public as well as private confidence shall again be established; industry shall return among us; and the blessings of our government shall verify that old, but useful maxim, that with States, as well as individuals, honesty is the best policy." (See: Johnathan Elliot Ed., supra, Vol. 4, pg. 334, 336)

6.) C.C. Pickney: "It corrupted the morals of the people; it diverted them from paths of industry to the ways of ruinous speculation; it had destroyed both public and private credit, and had brought ruin on numberless widows and orphans." (See: Johnathan Elliot Ed., supra, Vol. 4, pg. 306)

7.) MacLaine: "The experience of this country, for many years, has proved that such emissions involve us in debts and distress, destroy our credit, and produce no good consequences." (See: Johnathan Elliot Ed., supra, Vol. 4, pg. 174)

8.) MacLaine: "Taxes must be paid in gold and silver coin, and not in imaginary money....It is well known in this country gold and silver vanished when paper money is made....People will not let their hard earned money go because they know that paper cannot repay it." (See: Johnathan Elliot Ed., supra, vol. 4, pg. 188)

9.) Lee: "Permit me to ask if there be an evil which can visit mankind so injurious and oppressive, in its consequences and operation, as a Tender-Law?....It breaks down the moral character of your people, robs the widow of her maintenance, and defrauds the orphan of his food. The widow and orphan are reduced to misery, by receiving, in a depreciated value, money which the husband and father had lent out of friendship. This reverses the natural course of things. It robs the industrious of the fruits of their labor, and often enables the idle and rapacious to live in ease and comfort at the expense of the better part of the community...."

How are your domestic creditors situated?....I mean the military creditor - the man who, by the vices of your system, is urged to part with his money for a trivial consideration - the poor man, who has paper in his pocket for which he can receive little or nothing....These unfortunate men are compelled to receive paper which in reality represents almost nothing." (See: Johnathan Elliot Ed., supra, Vol. 3, pg. 179)

10.) Randolph: "Does not the prohibition of paper money merit our approbation? I approve of it because it prohibits Tender-Laws, secures the widow and orphans, and prevents the State

from Impairing Contracts."

(See: Johnathan Elliot Ed., supra, Vol. 3, pg. 207)

11.) Turner: ~~"The operation of paper money, and the practice of privateering, have produced a gradual decay of morals; introduced pride, ambition, envy, lust of power, produced a decay of patriotism and the love of commutative justice."~~
(See: Johnathan Elliot Ed., supra, Vol. 2, pg. 31)

12.) W. Davie: "Another object of the federal union is, to promote the agriculture and manufactures of the States.... Commerce, sir, is the nurse of both.... Our commerce... is unprotected abroad, and without regulation at home, and in this and many of the States ruined by partial and iniquitous laws - laws which, instead of having a tendency to protect property and encourage industry, led to depreciation of the one, and destroyed every incitement of the other - laws which basely warranted and legalized the payment of just debts by paper, which represents nothing, or property of very trivial value.
(See: Johnathan Elliot Ed., supra, Vol. 4, pgs. 16 - 20)

13.) Count Destutt de Tracy: "It is to be desired, that coins had never borne other names than those of their weight, and that the arbitrary denominations, called moneys of account, as L, s., d., etc., had never been used. But when these denominations are admitted and employed in transactions, to diminish the quantity of metal to which they answer, by an alteration of the real coins, it is to steal; and it is a theft which injures even him who commits it. ~~A theft of greater magnitude and still more ruinous, is the making of paper money; it is greater because in this money there is absolutely no real value; it is more ruinous because of its gradual depreciation during the time of its existence, it produces the effect which would be produced by an infinity of successive deterioration's of the coins. All those iniquities are founded on the false idea the money is but a sign.~~
(See: Clarence B. Carson, "The Rebirth Of Liberty: The Founding Of The American Republic", (1976 ed.), pg. 135; also see, "The Life And Works Of John Adams", Vol. X, pg. 375)

14.) John Adams: "I am firmly of the opinion... that there never was a paper pound, a paper dollar, or a paper promise of any kind, that ever yet obtained a general currency [as money] but by force or fraud, generally both. That the army has been grossly cheated; that the creditors have been infamously defrauded [some closed their shops to prevent being paid off with worthless paper money]; that the widows and fatherless have been oppressively wronged and beggard; that the gray hairs of the aged and the innocent, for want of their just dues, have gone down with sorrow to their graves, in consequence of our disgraceful depreciated paper currency."

(See: Albert S. Bolles, "The Financial History Of The United States", (1896 ed.), pg. 139)

15.) Madison: "If the notes of State Banks... whether chartered or unchartered, be made a tender, they are prohibited; if not made a legal tender, they do not fall within the prohibition." (See: Johnathan Elliot Ed., supra, Vol. 4, pg. 608)

16.) Hamilton: "The additional securities to Republican Government, to liberty, and to property, to be derived from the adoption of the plan under consideration, consists chiefly... in the precaution against the repetition of those practices on the part of the State governments which undermined the foundations of property and credit, have planted mutual distrust in the breasts of all classes of citizens, and have occasioned an almost universal prostration of morals." (See: Federalist Papers No. 85)

17.) Madison: "...a right of coinage in the particular States could have no other effect than to multiply expensive mints and diversify the forms and weights of circulating pieces..."

"The extension of the prohibition to bills of credit must give pleasure to every Citizen in proportion to his love of justice and his knowledge of the true springs of public prosperity. The loss America has sustained since the peace, from the pestilent effects of paper money on the necessary confidence in the public councils, on the industry and morals of the people, and on the character of republican government, constitutes an enormous debt against the States chargeable with this unadvised measure, which must remain unsatisfied; or rather an accumulation of guilt, which can be expiated no otherwise than by a voluntary sacrifice on the altar of justice of the power which has been the instrument of it. In addition to these persuasive considerations, it may be observed that the same reasons which show the necessity of denying the States the power of regulating coin prove with equal force that they ought not to be at liberty to substitute a paper medium in place of coin. Had every State the right to regulate the value of its coin, there might be as many different currencies as States, and thus intercourse between them would be impeded; retrospective alterations in its value might be made, and thus the citizens of other States be injured, and animosities be kindled among the States themselves. The subjects of foreign powers might suffer the same cause, and hence the Union be discredited and embroiled by the indiscretion of a single member. No one of these mischiefs is less incident to a power in the States to emit paper money than to coin gold and silver. The power to make anything but gold and silver a payment in tender of debt is withdrawn from the States on the same principle with that of issuing paper currency."

(See: Federalist Papers No. 44)

18.) Peletiah Webster: "Paper money polluted our laws, turned them into engines of oppression, corrupted the justice of our public administration, destroyed the fortunes of thousands who had confidence in it, enervated our trade, husbandry, and manufactures of our country, and went so far as to destroy the morality of our people." (1789)

19.) Thomas Jefferson: ~~"If the American people ever allow private banks to control the issue of their currency, first by inflation and then by deflation, the banks and corporations that will grow up around them will deprive the people of all property until their children will wake up homeless on the continent their fathers conquered."~~

(See: Money, Questions And Answers, by Rev. Charles Coughlin, Omni Books, P.O. Box 216, Hawthorn, California 90250)

20.) "Dollar. - Derived from daler or thaler. The American silver dollar is modeled after the Spanish milled dollar. It was authorized by an Act of Congress passed in 1792, which declared $371 \frac{1}{4}$ grains of pure silver to be equal to $24 \frac{3}{4}$ grains of pure gold and each equivalent to a dollar of account. It was made the unit of value. The silver dollar was first coined in 1794 and weighed 416 grains, $371 \frac{1}{4}$ grains being of silver and the remainder alloy. In 1837 the weight was reduced to $412 \frac{1}{2}$ grains by decreasing the weight of alloy. In 1873 provision was made for a dollar of 420 grains for use in trade with China and Japan known as the "trade dollar." The gold dollar was issued under the act of Mar. 3, 1849. Its coinage was discontinued in 1890. The coinage act of Feb. 12, 1873, tacitly suspended the coinage of silver dollars (except the trade dollar) and made the gold dollar the standard of value. The act of Feb. 28, 1878, authorized the Secretary of the Treasury to purchase each month, at market value, not less than \$4,000,000 worth of bullion, to be coined into silver dollars of $412 \frac{1}{2}$ grains each. This act was repealed by the act of June 14, 1890. By act of 1900, the gold dollar again became the standard of value in this country."

(See: "Messages and Papers of the Presidents", by James D. Richardson (1910 ed.), Bureau of National Literature And Art, Index, Volume XI, pg. 225)

For further Quotes, References and logical Reasoning, I sincerely suggest READING the following writings:

A.) "A Caveat Against Injustice or An Inquiry Into The Evils Of A Fluctuating Medium Of Exchange", by Roger Sherman (1752), Spencer Judd Publishers, P.O. Box 143, Swanee, Tenn. 37375.

using the silver

B.) "A Plea For The Constitution Of The United States", by George Bancroft (1886), Spencer Judd Publishers, P.O. Box 143, Swanee, Tenn. 37375.

C.) "Pieces Of Eight", by Edwin J. Viera, Jr., Devine-Adair Publishers, 6 North Water Street, Greenwich, Conneticut 06830.

FIAT MONEY

1.) "By a continuing process of inflation, governments can confiscate, secretly and unobserved, an important part of the wealth of its citizens. There is no subtler, no surer means of overturning the existing basis of society than to debauch the currency. The process engages all the hidden forces of economic law on the side of destruction, and does it in such a manner which not one man in a million is able to diagnose." (See: John Maynard Keynes, "The Economic Consequences Of Peace", (1920))

2.) "Give me control over a nations currency, and I care not who makes its laws." (Mayer Amschel Rothchild, 1743 - 1812)

3.) "The Federal Reserve Bank that should have been the farmer's greatest protection has become his greatest foe. The deflation of the farmer was a crime deliberately committed." (William Jennings Bryant, U.S. Secretary of State, Hearst Magazine, November, 1923)

4.) "Representative Patman: How did you get the money to buy those two billion dollars worth of government securities in 1933?"

Gov. Eccles: ~~We created it.~~

Rep. Patman: ~~Out of what?~~

Gov. Eccles: ~~Out of the right to issue Credit Money.~~

Rep. Patman: And there is nothing behind it, is there, except our government's credit.

Gov. Eccles: That is what Our Monetary System is. If there were NO DEBTS in Our Monetary System, THERE WOULD BE NO MONEY." (See: House Banking And Currency Committee, Sept. 30, 1941)

5.) MR. ROTHSCHILD'S
ENERGY DISCOVERY

"What Mr. Rothschild had discovered was the basic principle of power, influence, and control over people as applied to economics. That principle is "when you assume the appearance of power, people soon give it to you."

Mr. Rothschild had discovered that currency or deposit loan accounts had the required appearance of power that could be used to induce people (inductance), with people corresponding to a magnetic field) into surrendering their wealth (instead of real compensation). They would put up real collateral in exchange for a loan of promissory notes. Mr. Rothschild found that he could issue more notes than he had backing for, so long as he had someone's stock of gold as a persuader to show to his customers.

Mr. Rothschild loaned his promissory notes to individuals and to governments. These would create over-confidence. Then he would make money scarce, tighten control of the system, and collect the collateral through the obligation of contracts. The cycle was then repeated. These pressures could be used to ignite a war. Then he would control the availability of currency to determine who would win the war. The government which agreed to give him control of its economic system got his support. Collection of debts was guaranteed by economic aid to the enemy of the debtor. The profit derived from this economic methodology made Mr. Rothschild all the more wealthy and all the more able to extend his wealth. He found that the public greed would allow currency to be printed by government order beyond the limits (inflation) of backing in precious metal or the production of goods and services (gross national product, GNP)."

APPARENT CAPITAL AS
"PAPER" INDUCTOR

In this structure, credit, presented as a pure circuit element called "currency", has the appearance of capital, but is, in fact, negative capital. Hence, it has the appearance of service, but is, in fact, indebtedness or debt. It is therefore an economic inductance instead of an economic capacitance, and if balanced in no other way, will be balanced by the negation of population (war, genocide). The total goods and services represents real capital called gross national product, and currency may be printed up to this level and still represent economic capacitance; but currency printed beyond this level is subtractive, represents the introduction of economic inductance, and constitutes notes of indebtedness. War is therefore the balancing of the system by killing the true creditors (the public which we have taught to exchange true value for inflated

currency) and falling back on whatever is left of the resources of nature and the regeneration of those resources.

Mr. Rothschild had discovered that currency gave him the power to rearrange the economic structure to his own advantage, to shift economic inductance to those economic positions which would encourage the greatest economic instability and occilation."

(See: "Silent Weapons For Quiet Wars", Operations Research Technical Manual TM-SW7905.1, pages 11 - 13)

6.) "...steal a march on the evolution of history."
(See: "The Whims Of Fortune", Baron Guy de Rothschild)

7.) "Money is such a routine part of everyday living that its existence and acceptance are ordinarily taken for granted. A user may sense that money must come into being either automatically as a result of economic activity or as outgrowth of some government operation. But just how this happens all to often remains a mystery."

(See: "Modern Money Mechanics", A Workbook On Deposits, Currency And Bank Reserves, Public Information Center, Federal Reserve Bank of Chicago, P.O. Box 834, Chicago, Illinois 60690, by Dorothy M. Nichols (revised October, 1982), at pg. 2)

8.) "In the United States neither paper currency nor deposits have value as commodities. Intrinsically, a dollar bill is just a piece of paper. Deposits are merely book entries. Coins do have some intrinsic value as metal, but generally far less than their face value.

What, then, makes these instruments - checks, paper money, and coins - acceptable at face value in payment of all debts and for other monetary uses? Mainly, it is the confidence people have that they will be able to exchange such money for other financial assets and real goods and services whenever they choose to do so."

(See: "Modern Money Mechanics", supra, pg. 3)

9.) "Everything that is expected from an ordinary weapon is expected from a silent weapon by its creators, but only in its own manner of functioning.

It shoots situations, instead of bullets; propelled by data processing, instead of a chemical reaction (explosion); originating from bits of data, instead of grains of gunpowder; from a computer programmer, instead of a marksman; under orders of a banking magnate, instead of a military general.

It makes no obvious explosive noises, causes no obvious physical or mental injuries, and does not obviously interfere

with anyone's daily social life.

Yet it makes an unmistakable 'noise', causes unmistakable physical and mental damage, and unmistakably interferes with daily social life, i.e. unmistakable to the trained observer, one who knows what to look for.

The public cannot comprehend this weapon, and therefore cannot believe that they are being attacked and subdued by a weapon.

The public might instinctively feel that something is wrong, but because of the technical nature of the silent weapon, they cannot express their feelings in a rational way, or handle the problem with intelligence. Therefore, they do not know how to cry out for help, and do not know how to associate with others to defend themselves against it.

When a silent weapon is applied gradually to the public, the public adjusts/adapts to its presence and learns to tolerate its encroachment on their lives until the pressure (psychological via economic) becomes too great and they crack up.

Therefore, the silent weapon is a type of biological warfare. It attacks the vitality, options, and mobility of the individuals of a society by knowing, understanding, manipulating, and attacking their sources of natural and social energy, and their physical, mental, and emotional strengths and weaknesses." (See: "Silent Weapons For Quite Wars", supra, pages 8 - 9)

10.) "In the absence of legal reserve requirements, banks can build up deposits by increasing loans and investments so long as they keep enough currency on hand to redeem whatever amounts the holders of deposits want to convert into currency. This unique attribute of the banking business was discovered several centuries ago. At one time, bankers were merely middlemen. They made a profit by accepting gold and coins brought to them for safekeeping and lending them to borrowers. But they soon found that the receipts they issued to depositors were being used as a means of payment. These receipts were acceptable as money since whoever held them could go to the banker and exchange them for metallic money.

Then bankers discovered that they could make loans merely by giving borrowers their promises to pay (bank notes). In this way, banks began to create money. More notes could be issued than the gold and coin on hand because only a portion of the notes outstanding would be presented for payment at any one time. Enough metallic money had to be kept on hand, of course, to redeem whatever volume of notes was presented for payment.

Transaction deposits are the modern counter-part of bank notes. It was a small step from printing notes to making book entries to the credit of borrowers which the borrowers, in turn could "spend" by writing checks, thereby "printing their own money."

(See: "Modern Money Mechanics", supra, pages 3 & 4)

11.) "Sec. 2. The first sentence of section 15 of the Federal Reserve Act (12 U.S.C. 391) is amended by striking "and the funds provided in this Act for the redemption of Federal Reserve notes".

(See: Federal Reserve Notes, United States Notes, Treasury Notes of 1890 - Reserve Requirements, Public Law 90-269; 82 Stat. 50, Section 2)

12.) "(2) RESERVE REQUIREMENTS. - (A) Each depository institution shall maintain reserves against its transaction accounts as the Board may prescribe by regulation solely for the purpose of implementing policy -

"(i) in the ratio of 3 per centum for that portion of its total transaction accounts of \$25,000,000 or less, subject to subparagraph (C); and

"(fi) in the ratio of 12 per centum, or in such other ratio as the Board may prescribe not greater than 14 per centum and not less than 8 per centum, for that portion of its total transaction accounts in excess of \$25,000,000, subject to subparagraph (C).

(See: "Depository Institutions Deregulation And Monetary Control Act Of 1980, Public Law 96-221, Sec. 103(b)(E)(2))

13.) "The dissolution of the monetary system created by the Bretton Woods Agreements can be traced to the early 1960s. The monetary system during this time period made a de facto transition from a gold standard to a dollar standard.... The reality of dollar convertibility ended."

(See: "Bretton Woods Agreements Act", Public Law 94-569, 90 Stat. 2660, at pg. 5936)

14.) "Moving to a floating exchange rate for international commerce means that private enterprises and not central governments bear the risk of currency fluctuations."

(See: "Bretton Woods Agreements Act", supra, pg. 5944)

15.) "The exchange rate decision that is incorporated in the amendment to Article IV of the IMF charter is not a straight forward declaration. The articles in fact allows for the simultaneous existence of numerous systems of exchange rates. It does not state that a floating system is authorized but implicitly states that the system presently in force is sanctioned."

(See: "Bretton Woods Agreements Act", supra, pg. 5945)

17.) "To remove gold from the international monetary system necessitated a decision on how to remove from the IMF its store of 150 million troy ounces of gold which had been contributed to it by member countries as part of their quota obligations. The decision was to sell this gold."

(See: "Bretton Woods Agreements Act", supra, pg. 5945 - 5946)

18.) "Continental Money. - On the authority of the Second Continental Congress an issue of paper money was begun in 1775, and continued till 1779. This "money" was in the nature of bills of credit and its value necessarily fluctuated with the fortunes of the Government which promised redemption. About \$242,000,000 were put forth. At first the bills circulated on a par with gold, but later greatly depreciated. In 2 years they had become depressed to half the value of gold. In 1779 they were reduced to one-twentieth of their face value and afterward to one-fortieth. Congress then ordered the notes brought up at their market value, replacing them by a new issue at the rate of 20 to 1, to bear interest at 5 per cent. The old notes sank as low as 1,000 to 1 and finally disappeared."

(See: "Messages and Papers of the Presidents", by James D. Richardson, (1910 ed.), by Bureau Of National Literature And Art, Index, Volume XI, pg. 186)

19.) "Greenbacks. - The common name for the legal-tender Treasury notes, printed on one side in green ink, issued by the Government during the Civil War. The right of the Government to issue bills of credit was disputed by many statesmen and financiers, but the exigencies of the time seemed to render some such measure necessary and the Supreme Court finally established their validity. Issues of \$150,000,000 each were authorized by the laws of Feb. 25 and July 11, 1862, and Mar. 3, 1863. The result was that, as compared with greenbacks, gold was held at an average of 220 throughout 1864, and at one time actually rose to 285, and did not again touch par with greenbacks till Dec. 17, 1878, nearly 17 years after the last previous sale of gold at par. By the specie redemption act of Jan. 14, 1875, it was ordered that on and after Jan. 1, 1879, all legal-tender notes presented to the assistant Treasurer of the United States at his office in New York should be redeemed in coin. The term "greenback" has been applied to other forms of United States securities printed in green ink." (See: "Messages and Papers of the Presidents" (1910 ed.), supra, Index, Volume XI, pg. 315)

Julius and Greenman

COURT CASES AND CITES

United States vs. Marigold, 50 U.S. 560, 13 L.Ed (9 Howard) 257:

"They appertain rather to the execution of an important trust invested by the Constitution, and to the obligation to fulfill that trust on the part of the government, namely, the trust and duty of creating and maintaining a uniform and pure metallic standard of value throughout the Union. The power of coining money and of regulating its value was delegated to Congress by the Constitution for the very purpose, as assigned by the framers of that instrument, of creating and preserving the uniformity and purity of such standard of value; and on account of the impossibility which was foreseen of otherwise preventing the inequalities and the confusion necessarily incident to different views of policy, which in different communities would be brought to bear on this subject. The power to coin money being thus given to Congress, founded on public necessity, it must carry with it the correlative power of protecting the creature and object object of that power. It cannot be imputed to wise and practical statesmen, nor is it consistent with common sense, that they should have vested this high and exclusive authority, and with a view to objects partaking of the magnitude of the authority itself, only to be rendered immediately vain and useless, as must have been the case had the government been left disabled and impotent to the only means of securing the objects in contemplation.

If the medium which the government was authorized to create and establish could immediately be expelled, and substituted by one it had neither created, estimated, nor authorized - one possessing no intrinsic value - then the power conferred by the Constitution would be useless - wholly fruitless of every end it was designed to accomplish. Whatever functions Congress are, by the Constitution, authorized to perform, they are bound to perform; and on this principle, having emitted a circulating medium, a standard of value, indispensable for the purposes of the community, and for the action of the government itself, they are accordingly authorized and bound in duty to prevent its debasement and expulsion, and the destruction of the general confidence and convenience, by the influx and substitution of a spurious coin in lieu of the constitutional currency."
(See: pgs. 260, 261)

"But this court have nowhere said, that an offense cannot be committed against the coin or currency of the United States, or against that constitutional power which is exclusively authorized for public uses to create that currency, and which

for the same public uses and necessity is authorized and bound to preserve it; nor have they said, that the debasement of the coin would not be as effectually accomplished by introducing and throwing into circulation a currency which was spurious and simulated, as it would be by actually making counterfeits - fabricating coin of inferior or base metal. On the contrary, we think that either of these proceedings would be equally in contravention of the right and of the obligation appertaining to the government to coin money, and to protect and preserve it at the regulated or standard rate of value."

(See: pg. 261; also see, 31 U.S.C.A. 314, gold coin, standard value, 31 U.S.C.A. 321, silver coin; Debasement - 18 U.S.C.A. 331 and 18 U.S.C.A. 332; Coinage Act of 1965, "namely their complete debasement")

Westfall vs. Braley, 10 Ohio 188, 75 Am. Dec. 509:

"As to the opinion of the elementary writers on this question, it is said by Mr. Chitty: 'It should seem that if, on discounting a bill or note, the promissory note of country bankers be delivered after they have stopped payment, but unknown to the parties, the person taking the same, unless guilty of laches, might recover the amount from the discounter, because it must be implied that, at the time of transfer, the notes were capable of being received if duly presented for payment.' Ch. Bills, 247. And Mr. Story, after stating the very question now under consideration, says that the weight of reasoning and of authority seems to favor the doctrine that the loss must be borne by the party transferring, and not by him who receives the bills: Story on Promissory Notes, p. 123, sec. 119.

Such we think, is the correct doctrine, though it must be admitted that plausible, if not forcible, reasons may be suggested against it. Bank notes are the representative of money, and circulate as such, only by the general consent and usage of the community. But this consent and usage are based upon the convertibility of such notes into coin, at the pleasure of the holder, upon their presentation to the bank for redemption. This fact is the vital principle which sustains their character as money. So long as they are in fact what they purport to be, payable on demand, common consent gives them the ordinary attributes of money. But upon failure of the bank by which they were issued, when its doors are closed, and its inability to redeem its bills is openly avowed, they instantly lose the character of money, their circulation as currency ceases with the usage and consent upon which it rested, and the notes become the mere dishonored and depreciated evidences of debt. When this change in their character takes place, the loss must necessarily fall upon him who is the owner

of them at the time; and this, too, whether he is aware or unaware of the fact. His ignorance of the fact can give him no right to throw the loss, which he has already incurred, upon an innocent third party.

In the absence of any special agreement, the very offer of bank notes, as a payment in money of a pre-existing debt, is a representation that such bank notes are what they purport to be, the representative of money, and that they have the quality of convertibility, upon which their currency as money depends. It is only upon this idea that they can be honestly tendered as money, and when accepted as such, under the same supposition, the mutual mistake of facts should no more be permitted to benefit one party, or prejudice the other, than if the notes had been spurious, or payment had been made in base or adulterated coin. That money paid under mistake of facts may be recovered back, is a familiar principle, and the application of the same equitable rule must be permitted to correct the mutual mistake of the parties in a case like the present. Besides, a contrary doctrine would present temptations, and afford facilities for the practice of fraud and imposition. A party might fraudulently pass the paper of a broken bank, and yet it might be difficult to prove his knowledge of the previous failure. Or if his victim should succeed in passing it to one equally ignorant of the facts with himself, the last recipient would be left to bear the loss, and the fraud be crowned with success."

(See: pg. 510 - 511)

KLAUBER vs. BIGGERSTAFF, 47 Wis. 551, 3 NW. 357, 32 Am. Rep. 773.

"In the use of the term, currency does not necessarily include all bank notes in actual circulation; for all bank-notes are not necessarily money. In this use of the term, currency includes only such bank-notes as are current de jure, et de facto at the locus in quo; that is, bank-notes which are issued for circulation by authority of law, and are in actual and general circulation at par with coin, as a substitute for coin, interchangeable with coin; bank-notes which actually represent dollars and cents, and are paid and received for dollars and cents at their legal standard value. Whatever is at a discount - that is whatever represents less than the standard value for dollars of coined dollars and cents at par - does not represent dollars and cents, and is not money; is not properly included in the term currency."

(See: pg. 362)

CLARIN vs. NESBITT, 2 Nott and McCord (11 S.C.) 519 (1820)

"If Congress can create a legal tender, it must be by virtue of the 'power to coin money', for nowhere in the constitution is the power to make a legal tender expressly given to them, nor is there any other power directly given, from which the power to make a legal tender can be incidentally deduced.

At common law, only gold and silver were a legal tender... In this State where the common law has been expressly adopted, anterior to all legislative and constitutional provisions on the subject, gold and silver were the only legal tender.

From the passage of this act to the adoption of the Constitution of the United States, the only legal tenders in this State were gold and silver and those were so by virtue of the common law. Prior to the adoption of the Constitution of the United States, the States, respectively, possessed and exercised jurisdiction over 'legal tender.'

¶ If Congress did not possess the power of creating a legal tender under the Confederation, they do not possess power under the Constitution."

DOCUMENTS ILLUSTRATIVE

Of The Formation Of
The American States

House Document #398
Sixty-Ninth Congress, 1st Session

Thursday, August 16, 1787
(Madison's Notes)

CONSTITUTIONAL HISTORY

OF THE FORMATION OF
THE AMERICAN STATES

House Document 333
Sixty-Ninth Congress, 1st Session

Thursday, August 16, 1787
(Session's Notes)

THURSDAY, AUGUST 16, 1787

IN CONVENTION

556

Formation of the United States

“To establish post-offices.” Mr GERRY moved to add, and post-roads. Mr MERCER 2^d & on “question

N. H. no. Mas. ay. Ct no. N. J. no. Pen: no. Del. ay. Mr ay. V:ay. N. C. no. S. C. ay. Geo. ay.”

Mr Gov: MORRIS moved to strike out “and emit bills on the credit of the U. States”—If the United States had credit such bills would be unnecessary: if they had not, unjust & useless.

Mr BUTLER, 2^d: the motion.

Mr MADISON, will it not be sufficient to prohibit the making them a *tender*? This will remove the temptation to emit them with unjust views. And promissory notes in that shape may in some emergencies be best.

Mr Gov: MORRIS. striking out the words will leave room still for notes of a *responsible* minister which will do all the good without the mischief. The Monied interest will oppose the plan of Government, if paper emissions be not prohibited.

Mr GHORUM was for striking out, without inserting any prohibition. if the words stand they may suggest and lead to the measure.

Col.^o MASON had doubts on the subject. Cong: he thought would not have the power unless it were expressed. Though he had a mortal hatred to paper money, yet as he could not foresee all emergences, he was unwilling to tie the hands of the Legislature. He observed that the late war could not have been carried on, had such a prohibition existed.

Mr GHORUM. The power as far as it will be necessary or safe, is involved in that of borrowing.

Mr MERCER was a friend to paper money, though in the present state & temper of America, he should neither propose nor approve of such a measure. He was consequently opposed to a prohibition of it altogether. It will stamp suspicion on the Government to deny it a discretion on this point. It was impolitic also to excite the opposition of all those who were friends to paper money. The people of property would be sure to be on the side of the plan, and it was impolitic to purchase their further attachment with the loss of the opposite class of Citizens

• The words “The clause” are here inserted in the transcript.

• The word “the” is here inserted in the transcript.

• In the transcript the vote reads: “Massachusetts, Delaware, Maryland, Virginia, South Carolina, Georgia, ay—4; New Hampshire, Connecticut, New Jersey, Pennsylvania, North Carolina, no—3.”

• The word “Mr.” is substituted in the transcript for “Col.”

Mr. ELSEWORTH thought this a favorable moment to shut and bar the door against paper money. The mischiefs of the various experiments which had been made, were now fresh in the public mind and had excited the disgust of all the respectable part of America. By withholding the power from the new Govern^t more friends of influence would be gained to it than by almost any thing else. Paper money can in no case be necessary. Give the Govern^t credit, and other resources will offer. The power may do harm, never good.

Mr. RANDOLPH, notwithstanding his antipathy to paper money, could not agree to strike out the words, as he could not foresee all the occasions which " might arise.

Mr. WILSON. It will have a most salutary influence on the credit of the U. States to remove the possibility of paper money. This expedient can never succeed whilst its mischiefs are remembered, and as long as it can be resorted to, it will be a bar to other resources.

Mr. BUTLER. remarked that paper was a legal tender in no Country in Europe. He was urgent for disarming the Govern^t of such a power.

Mr. MASON was still averse to tying the hands of the Legislature altogether. If there was no example in Europe as just remarked, it might be observed on the other side, that there was none in which the Govern^t was restrained on this head.

Mr. READ, thought the words, if not struck out, would be as alarming as the mark of the Beast in Revelations.

Mr. LANGDON had rather reject the whole plan than retain the three words "(and emit bills")

On the motion for striking out

N. H. ay. Mas. ay. C. ay. N. J. no. P. ay. Del. ay.

Mr. no. V. ay.* N. C. ay. S. C. ay. Geo. ay."

The clause for borrowing money,¹³ agreed to nem. con.

Adj^t

they were not
from members of
which to limit
deliberation
1/10/1789

* The word "that" is substituted in the transcript for "which."
* In the transcript the vote reads "New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia, ay-y; New Jersey, Maryland, no-a."
* This vote in the affirmative (by Virg) was occasioned by the acquiescence of Mr Madison who became satisfied that striking out the words would not disable the Govt from the use of public notes as far as they could be safe & proper; it would only cut off the pretext for a paper currency, and particularly for making the bills a tender either for public or private debts.
* The transcript italicizes the words "paper currency" and "a tender."
* The word "was" is here inserted in the transcript.

"Bills of Credit"

4 Peters 903 (1822)

CRAIG vs. MISSOURI

Billie Jo Child

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said Circuit Court with instructions to enter judgment in the said court for the avowant in said cause.

410*] **HIRAM CRAIG, John Moore and Ephraim Moore**

v.
THE STATE OF MISSOURI.

Missouri act for the establishment of loan-offices—bills of credit—defense to assumpsit on promissory note that U. S. Constitution prohibits the act forming the consideration.

On the 27th day of June, 1821 the Legislature of the State of Missouri passed an Act, entitled "An Act for the establishment of loan-offices;" by the third section of which the officers of the treasury of the State, under the direction of the governor, were required to issue certificates to the amount of two hundred thousand dollars of denominations not exceeding ten dollars nor less than fifty cents, in the following form: "This certificate shall be receivable at the treasury of any of the loan-offices in the State of Missouri in discharge of taxes or debts due to the State, for the sum of — dollars, with interest for the same, at the rate of two per centum per annum from this date." These certificates were to be receivable at the treasury, and by tax-gatherers and other public officers in payment of taxes or moneys due or to become due to the State, or to any town or county therein, and by all officers, civil and military, in the State in discharge of salaries and fees of office; and in payment for salt made at the salt springs owned by the State, and to be afterwards leased by the authority of the Legislature. The twenty-third section of the act pledges certain property of the State for the redemption of these certificates, and the law authorizes the governor to negotiate a loan of silver or gold for the same purpose. A provision is made in the law for the gradual withdrawal of the certificates from circulation, and all the certificates have

NOTE.—"Bills of Credit," what are within the Constitution.

No State shall emit bills of credit. Const. of U. S. Art. I Sec. 10, 1.

The term "bills of credit," in its mercantile sense, comprehends a great variety of evidences of debt, which circulate in a commercial country.

To constitute a bill of credit within the Constitution, it must be issued by a State, involve the faith of the State, and be designed to circulate as money, on the credit of the State, in the ordinary uses of business. Notes issued and payable in gold and silver by a bank, created by a law of the State, having capital for payment of its notes, containing no promise by the State, are not bills of credit within the Constitution. *Brayne v. Bank of Commonwealth of Ky.* 11 Pet. 257; *Harrington v. State Bank of Alabama.* 13 How. 12.

To "emit bills of credit" means to issue paper intended to circulate through the community, for its ordinary purposes, as money, which paper is redeemable at a future day. Contracts by which a State binds itself to pay money at a future day for services performed, or for money borrowed for present use, are not "bills of credit" within the inhibition of the Constitution. *Craig v. State of Missouri.* supra; followed in *Hyne v. State of Missouri.* 8 Pet. 40.

Certificates issued by the auditor and treasurer of a State, receivable at the treasury or loan-office

since been redeemed. The commissioners of the loan-offices were authorized to make loans of the certificates to the citizens of the State, assigning to each district a proportion of the amount of the certificates to be secured by mortgage or personal security; the loans to bear interest not exceeding six per cent per annum, and the loans on personal property to be for less than two hundred dollars. Held, that the certificates issued under the authority of the law of Missouri were "bills of credit," and that their emission was prohibited by the Constitution of the United States, which declares that no State shall "emit bills of credit."

A promissory note given for certificates issued at the loan-office of Chariton, in Missouri, payable to the State of Missouri, under the Act of the Legislature "establishing loan-offices," is void.

The action was assumpsit on a promissory note, and the record stated "that neither party having required a jury, the cause was submitted to the court, and the court having seen and heard the evidence, the court found that the defendants did assume as the plaintiff had declared, that the consideration for the note and the assumpsit was for loan-office certificates loaned by the State of Missouri at her loan-office in Chariton, which certificates were issued under "an Act for establishing loan-offices, etc." Held, that it could not be doubted that the declaration is on a note given in pursuance of the Act of Missouri; and that under the plea of non assumpsit, the defendants were at liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated. The record thus exhibiting the case gives jurisdiction to this court over the case on "a writ of error prosequi" granted by the defendants to this court from the Supreme Court of Missouri, under the provisions of the twenty-fifth section of the Judiciary Act of 1789.

Everything which disaffirms the contract, everything which shows it to be void, may be given in evidence on the general issue in an action of assumpsit. [420]

In its enlarged and perhaps literal sense, the term "bill of credit" may comprehend any instrument by which a State engages to pay money at a future day, thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, equally limit the interpretation of the terms. The word "emit" is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use. Nor are instruments executed for such purposes, in common language, denominated "bills of credit." "To emit bills of credit," conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes as money, which paper is redeemable at a future day. This is the sense in which the terms have always been understood. [431]

The Constitution considers the emission of bills of credit and the enactment of tender laws as dis-

of the State, for taxes or debts due the State, and other public payments, for the redemption of which a fund was constituted, and for which the faith of the State was pledged, are "bills of credit" within the meaning of the Constitution. *Idem; idem.*

Bills made and issued by a bank, incorporated by a State, managed by directors, having a capital stock paid in and liable for its debts, and subject to be used for nonpayment, are not "bills of credit" issued by a State, though the State owns the entire stock; the Legislature elects the directors, the faith of the State is pledged for their redemption; and they are receivable for public dues. *Harrington v. State Bank of Alabama.* 13 How. 12.

A state may grant acts of incorporation for the attainment of those objects which are essential to the interest of the society. This power is incident to sovereignty, and there is no limitation on its exercise by the States, in the Constitution, in respect to the incorporation of banks. *Briscoe v. Bank of Kentucky.* 11 Pet. 257.

The Constitution of the United States does not forbid States or counties from borrowing money and giving proper securities therefor; and such securities are not bills of credit within the meaning of the Constitution. *McCoy v. Washington County.* 3 Mills. 231.

"Inferior treasury notes" were not "bills of credit;" but they were, nevertheless illegal, because issued in aid of rebellion. *Dalley v. Milner.* 1 Abb. U. S. 281.

tract operations, independent of each other which may be separately performed. Both are forbidden. To sustain the one because it is not also the other: to say that bills of credit may be emitted if they be not made a tender in payment of debts, is, in effect, to exchange that distinct independent prohibition, and to read the clause as if it had been entirely omitted. (431)

It has been long settled that a promise made in violation of an act which is forbidden by the laws of the State, is not enforceable. It will not be questioned that an act forbidden by the Constitution of the United States, which is the supreme law, is against law. (438)

WRIT of error to the Supreme Court of the State of Missouri.

In 1823 an action of trespass on the case was instituted in the Circuit Court for the County of Chariton, in the State of Missouri, by the State of Missouri, against Hiram Craig and others. The declaration sets forth the cause of action in the following terms:

"For, that whereas, heretofore, on the 1st day of August, in the year of our Lord 1822, at the County of Chariton aforesaid, the said Craig, John Moore, and Ephraim Moore, made their certain promissory note in writing, bearing date the day and year aforesaid, and now to the court here shown, and thereby, and then and there, for value received, jointly, and severally, promised to pay to the State of Missouri on the 1st day of November, 1822, at the loan-office in Chariton, the sum of one hundred and ninety-nine dollars and ninety-nine cents, and the two per centum per annum, the interest accruing on the certificates borrowed, from the 1st day of October, 1821. Nevertheless, the said Hiram Craig, John Moore, and Ephraim Moore, did not on the 1st day of November, or at any time before or since, pay to the State of Missouri, at the loan-office in Chariton, the said sum of one hundred and ninety-nine dollars and ninety-nine cents, or the two per centum per annum, the interest accruing on the certificates borrowed, from the 1st day of October, 1821, but the same to pay, etc."

To this declaration the defendants pleaded the general issue; and neither party requiring a trial by jury, the case was submitted to the court on the evidence and the arguments of counsel. The record contained the following entry of the proceedings of the court:

"And afterwards, at a court began and held at Chariton, on Monday, the 1st day of November, 1824, and on the second day of said court, in open court, the parties came into court by their attorneys, and neither party requiring a jury, the cause is submitted to the court; therefore, all and singular the matter and things and evidences being seen and heard by the court, it is found by them that the said defendants did assume upon themselves, in manner and form as the plaintiffs, by their counsel, allege; and the court also find that the consideration for which the writing declared upon and the assumpsit was made, was for the loan of loan-office certificates loaned by the State at her loan-office at Chariton; which certificates were issued and the loan made in the manner pointed out by an Act of the Legislature of the said State of Missouri, approved the 27th day of June, 1821, entitled, 'An Act for the establishment of loan offices, and the acts amendatory and supplementary thereto.' And the court do further

find that the plaintiff hath sustained damages by reason of the nonperformance of the assumptions and undertakings of them, the said defendants, to the sum of two hundred and thirty-seven dollars and seventy-nine cents. Therefore, it is considered, etc."

The defendants in the Circuit Court of the County of Chariton appealed, in 1825, to the Supreme Court of the State of Missouri, the highest tribunal in that State, where the judgment of the Circuit Court was affirmed.

The defendants prosecuted this writ of error under the twenty-fifth section of the Judiciary Act of 1789.

The Act of the Legislature of Missouri under which the certificates were issued which formed the consideration of the note declared upon, was passed on the 27th of June, 1821. It is entitled "An Act for the establishment of loan-offices, etc." The provisions of the third, thirteenth, fifteenth, sixteenth, twenty-third and twenty-fourth sections of the act are all that have a connection with the questions in the case which were before the court.

"Sec. 3. Be it further enacted, That the auditor of public accounts and treasurer, under the direction of the governor, shall, and they are hereby required to issue certificates signed by the said auditor and treasurer to the amount of two hundred thousand dollars, or denominations not exceeding ten dollars, nor less than fifty cents (to bear such devices as they may deem the most safe) in the following form, to wit: This certificate shall be receivable at the treasury or any of the loan-offices of the State of Missouri in the discharge of taxes or debts due to the State, for the sum of \$—, with interest for the same, at the rate of two per centum per annum from this date, the — day of —, 182—.

"Sec. 13. Be it further enacted, That the certificates of the said loan-offices shall be receivable at the treasury of the State and by all tax-gatherers and other public officers in payment of taxes or other moneys now due or to become due to the State or any county or town therein; and the said certificates shall also be received by all officers civil and military in the State, in discharge of salaries and fees of office.

"Sec. 15. Be it further enacted, That the commissioners of the said loan-offices shall have power to make loans of the said certificates to citizens of this State residing within their respective districts only, and in each district a proportion shall be loaned to the citizens of each county therein, according to the number thereof, secured by mortgage or personal security: Provided, That the sum loaned on mortgage shall never exceed one (1/4) half the real unincumbered value of the estate so mortgaged: Provided, also, That no loans shall ever be made for a longer period than one year, nor at a greater interest than at the rate of six per cent per annum, which interest shall be always payable in advance, not shall a loan in any case be renewed unless the interest on such re-loan be also paid in advance: Provide, also, That the commissioners aforesaid shall never make a call for the payment of an installment at a greater rate than ten per centum for every six months; and that

whenever any installment to a greater amount than at the rate of ten per centum per annum be required, at least sixty days' previous notice shall be given to the person or persons thus required to pay: And provided, also, That all and every person failing to make payment shall be deprived in future of credit in such office, and be liable to suit immediately for the whole amount by him or them due.

"Sec. 10. Be it further enacted, That the said commissioners of each of the said offices are further authorized to make loans on personal securities by them deemed good and sufficient for sums less than two hundred dollars, which securities shall be jointly and severally bound for the payment of the amount so loaned, with interest thereon, under the regulations contained in the preceding section of this act."

"Sec. 23. Be it further enacted, That the general assembly shall, as soon as may be, cause the salt springs and lands attached thereto given by Congress to this State to be leased out, and it shall always be the fundamental condition in such leases that the lessee or lessees shall receive the certificates hereby required to be issued, in payment for salt, at a price not exceeding that which may be prescribed by law; and all the proceeds of the said salt springs, the interests accruing to the State, and all estates purchased by officers of the several offices under the provisions of this act, and all the debts now due or hereafter to be due to this State, are hereby pledged and constituted a fund for the redemption of the certificates hereby required to be issued; and the faith of the State is hereby also pledged for the same purpose.

"Sec. 24. Be it further enacted, That it shall be the duty of the auditor and treasurer to withdraw annually from circulation 415*] one-tenth part of the certificates which are hereby required to be issued, etc."

The case was argued by Mr. Sheffey for the plaintiffs in error, and by Mr. Benton for the State of Missouri.

Mr. Sheffey, for the plaintiffs in error, contended:

1. That the record shows a proper case for the jurisdiction of this court, within the provisions of the twenty-fifth section of the Judiciary Act of 1789.

2. That the Act of the Legislature of Missouri, entitled "An Act for the establishment of loan-offices," is unconstitutional and void; being repugnant to the provision of the Constitution of the United States, which declares that no State shall emit bills of credit.

3. That the State of Missouri has no right to recover on the promissory note which is the foundation of this suit, because the consideration was illegal.

He argued that this case comes fully within the purpose, spirit, and letter of the twenty-fifth section of the Judiciary Act of 1789. The purpose of that section was to place within the revising, controlling, and correcting power of the Supreme Court of the United States, any violations of the Constitution of the United States or of treaties by State legislation. The harmony of the government, its equal operation, the preservation of its fundamental principles, the peace of the nation, rest securely

upon the execution of this power of the Supreme Court. While this power would be cautiously used, it would be fearlessly asserted and employed when it was required of the court and enjoined on the judges. The government of the United States was one for the whole of "the people of the United States." It was formed for "the people;" and its solemn and impressive preamble contains the declaration that "we, the people of the United States, in order to form a more perfect union," "do ordain and establish this Constitution of the United States."

To keep the Constitution perfect, and preserve it as a government for "the whole people" the twenty-fifth section of the judiciary law of 1789 was enacted. This law "brought into exercise the constitu- [*410] tional powers of the court, but it created no new powers.

In the case of *Martin v. Hunter's Lessee*, 1 Wheat. 307, 330, this court have said: "the twenty-fifth section of the Judiciary Act of September 24, 1789, is supported by the letter and spirit of the Constitution." And in the same case (p. 324) they say, "the Constitution of the United States was ordained and established, not by the United States in their sovereign capacities, but, as the preamble declares, 'by the people of the United States.'"

That a tribunal should exist before which questions of a constitutional character may be brought, is not denied by anyone, and the Constitution itself has provided that which now entertains such questions. It has given to this court the powers which they exercise—great, extensive, superior and responsible as they are—that this court may stand forth as the guardians of the rights of the people claimed and declared in the Constitution, and that those rights may be protected from encroachment and destruction. To this court "the people" look for this protection; and when the invader of their rights is a sovereign State, they have not the less confidence and assurance that the principles of the government will be preserved. This court know no parties to the cases which come before them for decision. It is the principles which are to govern their decisions in those cases to which the court look, and they leave to those from whom their powers are derived—to "the people of the United States"—to decide, not upon their rightful and constitutional exercise of those powers, for to the Constitution they are answerable only for their exercise, but whether they shall continue so to use them. The whole people of the United States have given these powers, and they only, by a majority, and not a portion of them, less than this constitutional whole, can nullify those powers or interrupt the exercise of any which are regularly applied under the Constitution. The Constitution must be changed by the whole people before the exercise of this power of revision can cease.

This court have never been willing to employ its powers of inquiring into the constitutionality of laws but where the obligation [*411] was imperative, and the case was one clearly within their duties. In the case of *Fletcher v. Peck*, 6 Cranch, 129, the court declared, "the question whether a law be void for its repugnancy to the Constitution, is a question which

ought seldom, if ever, to be decided in a doubtful case. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

To present the question in the case now before the court no plea was necessary; the defense arises under the general issue.

The record shows that this was a case in the courts of the State of Missouri in which the constitutionality of a law of that State was brought into question. The cause of action is stated to be promissory notes given for certificates issued under the Act of the Legislature of Missouri establishing loan-offices, and the validity of these certificates must have been the whole subject of inquiry in the State courts. Their validity depended solely on the harmony of that act with the Federal compact, and the courts of Missouri could only have affirmed their validity by affirming the act under which they were issued to be constitutional and valid, or, in other terms, not repugnant to the Constitution of the United States.

This is not a new question. It has been frequently presented to this court, and has been uniformly decided according to the views of the plaintiffs in error. *Martin v. Hunter's Lessee*, 1 Wheat. 355; *Miller v. Nicholls*, 4 Wheat. 311; *Williams v. Norris*, 12 Wheat. 117. In *Wilson v. The Black Bird Creek Marsh Company*, 2 Peters, 251, the court say: "It is sufficient to bring the case within the provision of the twenty-fifth section of the Judiciary Act if the record shows that the Constitution of a law is directly and substantially in question, as the validity of the law is drawn in question, or as the validity of the law is drawn in question." ~~It is sufficient to bring the case within the provision of the twenty-fifth section of the Judiciary Act if the record shows that the Constitution of a law is directly and substantially in question, as the validity of the law is drawn in question, or as the validity of the law is drawn in question."~~

2. The certificates issued by the State of Missouri under the law are "bills of credit;" and thus the law conflicts with the Constitution of the United States. They are issued under the authority of the State, and put into circulation by the State as the representative [18] of money; as a substitute for it; to perform the functions of money, by becoming the medium of circulation.

The prohibition of the Constitution is in these terms, and every word in the clause is important and emphatic: "No State shall "coin money," "emit bills of credit," "make anything but gold and silver coin a tender in payment of debts."

What is the form and meaning of these bills? They purport to be receivable at the treasury, or any loan-office of the State, in discharge of taxes or debts due to the State. They are issued of different denominations, from two hundred dollars to fifty cents, payable to no particular person; they are, by the twenty-third section of the law, to be received for salt by the lessees of the property of the State; by the officers of the State in discharge of their salaries and fees of office. They pass, by delivery, with every characteristic of money. It is only necessary to state these, the purposes of their issue; the character and form of the certificates; the obligation imposed on the citizens of Missouri to receive them; to establish that they are "bills of credit;" "emitted" "by the State" of Missouri, or "coined" money; and that, not being "gold or silver," they are "a tender in payment of debts."

The sufferers of the people of the United

States from the issues of paper money, or "bills of credit," during the Revolution, were yet in full operation when the Constitution was formed. While it might be dangerous to deny that many of the means of the war were procured by the emission of that money, the exigencies of the country, struggling for existence, were the only safe apology for their use. When the confederated States were about to become a nation which should owe its prosperity to sound and just and equal principles, the opportunity to reproduce the same state of things—the same wide and wasteful ruin by the acts of any of the members of the confederacy—was at once decisively and explicitly prohibited by those who formed the Constitution. But, if it is contended that the certificates issued by the State of Missouri were not "bills of credit," because it is said they are not declared by the act which directs their emission to be "a legal tender," it is asserted "that if even they are not such, it is not [19] essential to "a bill of credit" that it shall have that incident. The *Federalist*, No. 44. Many of the bills issued by the States during the war were not made a legal tender; but they circulated widely, and with equally disastrous consequences. 9 Va. Stat. at large, 67, 147, 223, 480, etc.

In relation to money as a circulating medium, the States are one. All and each have one, and the same interest in a sound currency; these interests are a unit not only from the neighborhood of the States to each other, the identity of their interests, and their free and unrestricted intercourse, but because the regulations of the Constitution embrace the whole subject of money as a circulating medium.

To the existence of the government, certainly to its convenient fiscal operations, a uniform currency is important, if not essential; and if the principles which may be fairly drawn from a sound construction of the provision in the Constitution under examination extend to bring into doubt the legality of bank notes circulating as money under the charters granted to banks by State laws, these principles may not be the less true, or their importance of the less magnitude.

3. If the certificates for which promissory notes were given are void, and the act of the Legislature of Missouri on which they are founded was against the Constitution of the United States, the note upon which this action was brought in the Circuit Court of Missouri was without consideration and void. The State cannot receive upon such notes.

Mr. Benton, for the defendant in error: The State of Missouri has been "summoned" by a writ from this court under a "penalty," to be and appear before this court. In the language of the writ, she is "commanded" and "enjoined" to appear. Language of this kind does not seem proper when addressed to a sovereign State, nor are the terms fitting, even if the only purpose of the process was to obtain the appearance of the State. They impute a fault in the State; they imply an omission or neglect by the State. The language [420] of "commanding and enjoining" would only be well employed if these had occurred.

The State of Missouri has done no act which was not within the full and ample powers she

possesses as a free, sovereign, and independent State. She has passed a law which she considers in the proper and beneficial exercise of her legislative functions, and which had for its object the promotion of the interests of her citizens.

Mr. Benton said that he did not appear in this case for the State of Missouri as in ordinary cases depending in this court, not as the advocate of the State; for her acts did not require the efforts of an advocate to vindicate them; he appeared rather as a "corps of observation," to watch what was going on.

The State had passed a law authorizing the governor to employ counsel, and he had been called upon to represent the State. He had listened to what had been going on before the court, and he found a gentleman from another State imputing to Missouri an act fraught with injustice and immorality.

Such a course was not calculated to promote harmony and to secure a continuance of the Union. If, in questions of this kind, or if in any cases, the character of a sovereign State shall be made the subject of such imputation, this peaceful tribunal would not be enabled to procure the submission of the States to its jurisdiction; and contests about civil rights would be settled amid the din of arms, rather than in these halls of national justice.

The Act of the Legislature of Missouri "establishing loan-offices" had no purposes to accomplish by which injury could be sustained by anyone. The deficiency of currency in the State, and the expenses which attended its new organization, made the arrangements proposed and authorized by the act convenient and beneficial to the citizens of the State. The State, when it directed that the certificates should be issued, made sufficient and certain provision for their redemption and payment. The permanent continuance of the circulation of the certificates was prohibited by an effective regulation in the bill; the twenty-fourth [21] section of "the law provided for the gradual extinction of the certificates as they should come in; and power was given to the governor, by the twenty-ninth section of the law, to negotiate a loan of gold and silver for their redemption. Thus, the certificates were issued upon ample means for their discharge, and their discharge to their full value must soon take place.

These certificates were not made a legal tender. They are not directed to pass as "money;" and while there is no obligation imposed by the law that they shall be taken by the citizens of the State, it declares that the State shall take them in payment for taxes, for salt, and for fees of office.

When examined, these certificates will be found to be nothing more than evidences of loans made to the State, and for the payment of which she has given specific and available pledges.

It will not be contended that the States have not power to borrow money; and what other form of a certificate of a loan than that which was adopted by the State of Missouri can be devised, when this power is exercised. In every State of the Union loans have been negotiable, and certificates of the amount due by the State to the individual lenders are issued.

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The certificates which were the consideration of the note were, therefore, not "bills of credit," in the constitutional acceptance of such instruments.

An examination of the legislation of the States in which such bills were issued, and the proceedings under those laws, will clearly show that the condition of things in the view and recollection of the convention which formed the Constitution was different, in every essential feature, from that which was created by the law of Missouri, Massachusetts, in 1600, issued bills of credit to pay taxes and other debts due to the State treasury; but the soldiers, to whom they were offered, would not receive them. 1 Hutchinson's Hist. 402, 404. In 1714 and 1716 other issues were made, and they were directed to pass as money, and made as tender. In 1749 the issuing of such bills was discontinued.

During the Revolution, the "bills of credit" which were issued by the authority of the States and by that of Congress, were in most cases made a tender; and this was the objectionable feature in them. So long as no objection to receive them is imposed by the law which directs or authorizes their emission, they can injure no one. Free to refuse them, the citizen may protect himself from loss by their depreciation by rejecting them.

The bills issued under the Missouri law have not this vice. That part of the law which obliges the officers of the State to receive them for salaries and fees, is not before the court. The notes in this suit were given voluntarily; and thus, in reference to the case of the plaintiffs in error, it cannot be said that the certificates given for the note had the character of "a legal tender."

In reference to the duty imposed on the lessees of the salt springs owned by the State, it should be known to the court that when the "act for the establishment of loan offices" was passed no leases had been given for those salt springs. If it was to be made a condition of the lease (to which the lessees would consent) that these certificates should be received for salt, it cannot therefore be said that any obligation was imposed on him of which he could complain.

While, therefore, in every aspect of this case, those who consented to take these certificates could not be affected to their injury by their depreciation, they might be benefited by it; they could pay them to the State for taxes, for fees of office, and for salt at their nominal or par value.

An examination of the proceedings of the convention which formed the Constitution of the United States will show that the prohibition which is now supposed to operate on the law of Missouri was carried by a majority of one vote. Journal of the Convention, 302. It should not be presumed that this clause of the Constitution was intended to extend to such issues as those authorized by the act of Missouri: The language of the Constitution should be strictly construed, as it is a limitation on the sovereignty of a State.

All bank notes issued under State charters are equally within the constitutional prohibition, if the construction assumed by the counsel of the plaintiffs in error is correct.

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423.] "The "wolf scalp" certificate, by which the flocks and herds of the west are protected from the devastations of those destructive and numerous animals; the "crow certificates," the rewards of those who save the fields of the husbandman from the spoils of their worst enemies, are all receivable for taxes, and all are equally obnoxious to the exceptions taken to the certificates issued under the law of Missouri.

The consideration for the note which is the subject of this suit was a good and valuable consideration, and the note is binding on the parties to it by the express terms of the sixteenth section of the law. The note furnished the parties with the means of paying their taxes, and was a benefit to them. All the certificates have been redeemed by the State.

Congress is not authorized to issue bills of credit. The States may do all that is not prohibited, while Congress can do nothing which is not granted by the Constitution. Congress had no express authority to issue treasury notes, but they were issued. These notes were precisely like the Missouri certificates.

The treasury notes were not bills of credit; for they were not made, by the act under which they were issued, a legal tender. They were freely circulated throughout the United States without objections, and they were most useful instruments in the financial operations of the government during the last war.

This court has not jurisdiction of the case. It is not within the requirements of the twenty-fifth section of the Judiciary Act. The validity of the State law was not drawn in question before the courts of Missouri, and no decision was made in those courts upon the validity of the objection now set up under the Constitution of the United States.

The pleadings do not show that the law was drawn in question; they only deny the promise charged in the declaration. Upon the matters thus presented, and on no others, did the courts of Missouri decide.

Mr. Sheffey, in reply. The whole argument on the part of the State of Missouri is founded (21) on the assumption that "the certificates are not bills of credit, because they are not made a legal tender.

The provision of the Constitution was introduced to prevent a mischief, one of the most fatal effects on the property of the citizens of the United States; and thus considered, it is to be construed liberally. A strict construction, and particularly one which would render it inoperative, or feeble in its influence, would not be justifiable.

The evils are the same, and the notes will circulate as freely and as extensively whether they are made a tender or not. Whatever paper promise is circulated on the credit of the State is a bill of credit, and is within the sense of the Constitution.

This provision in the Constitution was introduced to prevent the States from resorting to State necessity as an apology for the issue of paper. The States are not allowed to "coin money," and the object clearly was to prevent anything being made by the States which would serve as a circulating medium.

The word "emit" is a peculiar expression. The States may borrow money and give notes,

but that is not coining money, nor is it emitting bills of credit; and so "wolf and crow scalp certificates" are only evidence that the counties in the States which authorize them owe so much money for meritorious and beneficial services.

It is denied that the power of the United States to issue bills of credit is the same which has been claimed by the State of Missouri under this law. It does not follow that because the United States may issue such bills the states may do so. The States are specially prohibited such issues by the Constitution.

The proposition which was made in the convention to give to Congress the power to issue bills of credit may have been rejected because that power had been already given in the power to coin money, and regulate its value. Congress has this power, as an incident, like the power to issue debentures; which is exercised as an incident to the power to regulate commerce.

*Mr. Chief Justice Marshall delivered (123 the opinion of the court, Justices Thompson, Johnson, and M'Lean dissenting:

This is a writ of error to a judgment rendered in the Court of Last Resort in the State of Missouri, affirming a judgment obtained by the State in one of its inferior courts against Hiram Craig and others on a promissory note.

The judgment is in these words: "And afterwards at a court," etc., "the parties came into court by their attorneys, and, neither party desiring a jury, the cause is submitted to the court; therefore, all and singular the matters and things being seen and heard by the court; it is found by them that the said defendants did assume upon themselves, in manner and form, as the plaintiff by her counsel alleged. And the court also find that the consideration for which the writing declared upon and the assumpsit was made was for the loan of loan-office certificates, loaned by the State at her loan-office at Chariton; which certificates were issued and the loan made in the manner pointed out by an Act of the Legislature of the said State of Missouri, approved the 27th day of June, 1821, entitled, 'An Act for the establishment of loan-offices,' and the acts amendatory and supplementary thereto; and the court do further find that the plaintiff has sustained damages by reason of the nonperformance of the assumptions and undertakings of them, the said defendants, to the sum of two hundred and thirty-seven dollars and seventy-nine cents, and do assess her damages to that sum. Therefore, it is considered," etc.

The first inquiry is into the jurisdiction of the court.

The twenty-fifth section of the Judicial Act declares "that a final judgment or decree in any suit in the highest court of law or equity of a State, in which a decision in the suit could be had, where is drawn in question" "the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity," "may be re-examined, and reversed and affirmed in the Supreme Court of the United States."

To give jurisdiction to this court, it must ap-
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426] pear in the record, 1. That the validity of a statute of the State of Missouri was drawn in question on the ground of its being repugnant to the Constitution of the United States. 2. That the decision was in favor of its validity.

1. To determine whether the validity of a statute of the State was drawn in question, it will be proper to inspect the pleadings in the cause, as well as the judgment of the court.

The declaration is on a promissory note, dated on the 1st day of August, 1822, promising to pay to the State of Missouri on the 1st day of November, 1822, at the loan-office in Chariton, the sum of one hundred and ninety-nine dollars ninety-nine cents, and the two per cent, per annum, the interest accruing on the certificates borrowed from the 1st of October, 1821. This note is obviously given for certificates loaned under the Act "for the establishment of loan-offices." That act directs that loans on personal securities shall be made of sums less than two hundred dollars. This note is for one hundred and ninety-nine dollars ninety-nine cents. The act directs that the certificates issued by the State shall carry two per cent. interest from the date, which interest shall be calculated in the amount of the loan. The note promises to repay the sum, with the two per cent. interest accruing on the certificates borrowed, from the 1st day of October, 1821. It cannot be doubted that the declaration is on a note given in pursuance of the act which has been mentioned.

~~Neither can it be doubted that the plea of non-assumpsit allowed the defendants to draw into question at the trial the validity of the consideration on which the note was given. Everything which discloses the contract, everything which shows to be void, may be given in evidence on the general issue in an action of assumpsit. The defendants, therefore, were at liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated.~~

Have they done so?

Had the cause been tried before a jury, the regular course would have been to move the court to instruct the jury that the act of Assembly in pursuance of which the note was given was repugnant to the Constitution of the United States, "and to except to the charge of the judges if in favor of its validity; or a special verdict might have been found by the jury stating the act of Assembly, the execution of the note in payment of certificates loaned in pursuance of that act, and referring its validity to the court. The one course or the other would have shown that the validity of the act of Assembly was drawn into question on the ground of its repugnancy to the Constitution, and that the decision of the court was in favor of its validity. But the one course or the other would have required both a court and jury. Neither could be pursued where the office of the jury was performed by the court. In such a case, the obvious substitute for an instruction to the jury, or a special verdict, is a statement by the court of the points in controversy, on which its judgments is founded. This may not be the usual mode of proceeding, but it is an obvious mode; and if the court of the Peters 4.

State has adopted it, this court cannot give up substance for form.

The arguments of counsel cannot be spread on the record. The points urged in argument cannot appear. But the motives stated by the court on the record for its judgment, and which form a part of the judgment itself, must be considered as exhibiting the points to which those arguments were directed, and the judgment as showing the decision of the court upon those points. There was no jury to find the facts and refer the law to the court; but if the court, which was substituted for the jury, has found the facts on which the judgment was rendered, its finding must be equivalent to the finding of a jury. Has the court, then, substituting itself for a jury, placed facts upon the record which, connected with the pleadings, show that the act in pursuance of which this note was executed was drawn into question on the ground of its repugnancy to the Constitution?

After finding that the defendants did assume upon themselves, etc., the court proceeds to find "that the consideration for which the writing declared upon and the assumpsit was made was the loan of loan-office certificates loaned by the State at her loan-office at Chariton; which certificates were issued and the loan made in the manner pointed out "by an Act of the Legislature of the said State of Missouri, approved the 27th of June, 1821, entitled," etc.

Why did not the court stop immediately after the usual finding that the defendants assumed upon themselves? Why proceed to find that the note was given for loan-office certificates issued under the act contended to be unconstitutional, and loaned in pursuance of that act, if the matter thus found was irrelevant to the question they were to decide?

Suppose the statement made by the court to be contained in the verdict of a jury which concludes with referring to a court the validity of the note thus taken in pursuance of the act; would not such a verdict bring the constitutionality of the act as well as its construction directly before the court? We think it would: such a verdict would find that the consideration of the note was loan-office certificates issued and loaned in the manner prescribed by the act. What could be referred to the court by such a verdict but the obligation of the law? It finds that the certificates for which the note was given were issued in pursuance of the act, and that the contract was made in conformity with it. Admit the obligation of the act, and the verdict is for the plaintiff; deny its obligation, and the verdict is for the defendant. On what ground can its obligation be contested, but its repugnancy to the Constitution of the United States? No other is suggested. At any rate, it is open to that objection. If it be in truth repugnant to the Constitution of the United States, that repugnancy might have been urged in the State, and may consequently be urged in this court; since it is presented by the facts in the record, which were found by the court that tried the cause.

It is impossible to doubt that, in point of fact, the constitutionality of the act under which the certificates were issued that formed the consideration of this note, constituted the only real question made by the parties, and the only

real question decided by the court. But the record is to be inspected with judicial eyes; and, as it does not state in express terms that this point was made, it has been contended that this court cannot assume the fact that it State.

[29] *The record shows distinctly that this point existed, and that no other did exist; the special statement of facts made by the court as exhibiting the foundation of its judgment contains this point and no other. The record shows clearly that the cause did depend, and must depend, on this point alone. If, in such a case, the mere omission of the court of Missouri to say, in terms, that the act of the Legislature was constitutional, withdraws that point from the cause, or must close the judicial eyes of the appellate tribunal upon it, nothing can be more obvious than that the provisions of the Constitution and of an act of Congress may be always evaded; and may be often, as we think they would be in this case, unintentionally defeated.

But this question has frequently occurred, and has, we think, been frequently decided in this court. *Smith v. The State of Maryland*, 6 Cranch, 230, *Martin v. Hunter's Lessee*, 1 Wheat. 355, *Miller v. Nichols*, 4 Wheat. 311, *Williams v. Norris*, 12 Wheat. 117, *Wilson et al. v. The Black Bird Creek Marsh Company*, 2 Peters, 245, and *Harris v. Dennie*, in this term, are all, we think, expressly in point. There has been perfect uniformity in the construction given by this court to the twenty-fifth section of the Judicial Act. That construction is, that it is not necessary to state, in terms, on the record, that the Constitution or a treaty or law of the United States has been drawn in question, or the validity of a State law, on the ground of its repugnancy to the Constitution. It is sufficient if the record shows that the Constitution, or a treaty or law of the United States must have been construed, or that the constitutionality of a State law must have been questioned, and the decision has been in favor of the party claiming under such law.

We think, then, that the facts stated on the record presented the question of repugnancy between the Constitution of the United States and the act of Missouri to the court for its decision. If it was presented, we are to inquire.

2. Was the decision of the court in favor of its validity?

The judgment in favor of the plaintiff is a decision in favor of the validity of the contract, [30] and, consequently, of the validity of the law by the authority of which the contract was made.

The case is, we think, within the twenty-fifth section of the Judicial Act, and, consequently, within the jurisdiction of this court.

This brings us to the great question in the cause: Is the act of the Legislature of Missouri repugnant to the Constitution of the United States?

The counsel for the plaintiffs in error maintain that it is repugnant to the Constitution, because its object is the omission of bills of credit contrary to the express prohibition contained in the tenth section of the first article.

The Act under the authority of which the certificates loaned to the plaintiffs in error were

issued was passed on the 20th of June, 1831, and is entitled "An Act for the establishment of loan-offices." The provisions that are material to the present inquiry are comprehended in the third, thirteenth, fifteenth, sixteenth, twenty-third, and twenty-fourth sections of the act, which are in these words:

Section the third enacts "that the auditor of public accounts and treasurer, under the direction of the governor, shall, and they are hereby required to issue certificates, signed by the said auditor and treasurer, to the amount of two hundred thousand dollars, of denominations not exceeding ten dollars, nor less than fifty cents (to bear such devices as they may deem the most safe), in the following form, to wit: "This certificate shall be receivable at the treasury, or any of the loan-offices of the State of Missouri, in the discharge of taxes or debts due to the State, for the sum of \$—, with interest for the same, at the rate of two per centum per annum from this date, the — day of — 1832."

The thirteenth section declares "that the certificates of the said loan-office shall be receivable at the treasury of the State, and by all tax-gatherers and other public officers, in payment of taxes or other moneys now due to the State or to any county or town therein, and the said certificates shall also be received by all officers, civil and military, in the State, in the discharge of salaries and fees of office."

The fifteenth section provides "that the commissioners of the said loan-offices [§ 15] shall have power to make loans of the said certificates to citizens of this State, residing within their respective districts only, and in each district a proportion shall be loaned to the citizens of each county therein, according to the number thereof," etc.

Section sixteenth. "That the said commissioners of each of the said offices are further authorized to make loans on personal securities by them deemed good and sufficient for sums less than two hundred dollars; which securities shall be jointly and severally bound for the payment of the amount so loaned, with interest thereon," etc.

Section twenty third. "That the General Assembly shall, as soon as may be, cause the salt springs and lands attached thereto, given by Congress to this State, to be leased out, and it shall always be the fundamental condition in such leases that the lessee or lessees shall receive the certificates hereby required to be issued in payment for salt, at a price not exceeding that which may be prescribed by law; and all the proceeds of said salt springs, the interest accruing to the State, and all estates purchased by officers of the said several offices under the provisions of this act, and all the debts now due or hereafter to be due to this State, are hereby pledged and constituted a fund for the redemption of the certificates hereby required to be issued, and the faith of the State is hereby also pledged for the same purpose."

Section twenty-fourth. "That it shall be the duty of the said auditor and treasurer to withdraw annually from circulation one-tenth part of the certificates which are hereby required to be issued," etc.

The clause in the Constitution which this act

is supposed to violate is in these words: "No State shall "emit bills of credit."

What is a bill of credit? What did the Constitution mean by this?

In its ordinary and proper sense, the term "bill of credit" comprehends any instrument by which a State engages to pay money in future, thus including a certificate given for money borrowed, &c. [§ 432] It is prohibited by the Constitution itself, and the mischief to be prevented, which we find in the history of our country, naturally limit the interpretation of the term. The word "emit" is never employed in describing these contracts by which a State binds itself to pay money at a future day, or to receive actually received, or for money borrowed for any other purpose, in common language denominated "bills of credit." To "emit bills of credit," conveys to the mind the idea of issuing paper intended to circulate through the community for the ordinary purposes of money, which paper is to remain in circulation for ever. This is the sense in which the term has been always understood.

At an early period of our colonial history the attempt to supply the want of the precious metals by a paper medium was made to a considerable extent, and the bills emitted for this purpose have been frequently denominated bills of credit. During the war of our revolution we were driven to this expedient, and necessity compelled us to make it the most substantial. The term was applied in appropriate meanings, and "bills of credit" signify paper mediums intended to circulate between individuals and between governments and individuals, for the ordinary purposes of society. Such mediums have been always liable to considerable fluctuations. It is value is continually changing, and these changes are of great and sudden scope, individual to immense loss, or the source of ruinous speculations, and destroy all confidence between man and man. To suppress this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interests and prosperity of all the people, became in the Constitution what no State should emit bills of credit. If the prohibition was anything, if the words were not empty sounds, it must comprehend the emission of any paper medium by a State government for the purpose of currency circulation.

What is the character of the certificates issued by authority of the act under consideration? What office are they to perform? Certificates signed by the auditor and treasurer of the State are to be issued by those officers [§ 433] to the amount of two hundred thousand dollars, of denominations not exceeding ten dollars, nor less than fifty cents. The paper purports on its face to be receivable at the treasury, or at any loan-office of the State of Missouri, in discharge of taxes or debts due to the State.

The law makes them receivable in discharge of all taxes or debts due to the State, or any county or town therein; and of all salaries and fees of office to all officers, civil and military, within the State, and for salt sold by the lessees of the public salt-works. It also

pledges the faith and funds of the State for their redemption.

It seems impossible to doubt the intention of the Legislature in passing this act, or to mistake the character of these certificates, or the office they were to perform. The denominations of the bills—from ten dollars to fifty cents—fitted them for the purpose of ordinary circulation and their reception in payment of taxes, and debts to the government and to corporations, and of salaries and fees, would give them currency. They were to be put into circulation; that is, emitted, by the government. In addition to all these evidences of an intention to make these certificates the ordinary circulating medium of the country, the law speaks of them in this character, and directs the auditor and treasurer to withdraw annually one-tenth of them from circulation. Had they been termed "bills of credit," instead of "certificates," nothing would have been wanting to bring them within the prohibitory words of the Constitution.

And can this make any real difference in the proposition to be maintained, that the Constitution meant to prohibit names and nothing else? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the Constitution is one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so. We think the certificates emitted under the authority of this act are as entirely bills of credit as if they had been so denominated in the act itself.

But it is contended that though these certificates should be deemed bills of credit, [§ 434 according to the common acceptance of the term, they are not so in the sense of the Constitution, because they are not made a legal tender.

The Constitution itself furnishes no countenance for this distinction. The prohibition is general; it extends to all bills of credit, not to bills of a particular description. That technical subtleties should be held instead, which, without the aid of other explanatory words, could venture on this construction, is in the least admissible in this case, because the same clause of the Constitution contains a substantive prohibition to the enactment of tender laws. The Constitution, therefore, considers the emission of bills of credit and the enactment of tender laws as distinct operations, independent of each other, which may be separately performed. Both are forbidden. To sustain the one because it is not also the other; to say that bills of credit may be emitted if they be not made a tender in payment of debts, is, in effect, to expunge that distinct independent prohibition, and to read the clause as if it had been entirely omitted. We are not at liberty to do this.

The history of paper money has been referred to for the purpose of showing that its great mischief consists in being made a tender, and that, therefore, the general words of the Constitution may be restrained to a particular intent.

Was it even true that the evils of paper money resulted solely from the quality of its being made a tender, this court would not feel

itself authorized to disregard the plain meaning of words, in search of a conjectural intent to which we are not conducted by the language of any part of the instrument. But we do not think that the history of our country proves either, that being made a tender in payment of debts is an essential quality of bills of credit, or the only mischief resulting from them. It may, indeed, be the most pernicious; but that will not authorize a court to convert a general into a particular prohibition.

We learn from Hutchinson's History of Massachusetts (Vol. I. p. 402), that bills of credit were emitted for the first time in that colony in 1690. An army returning unexpectedly from an expedition against Canada (which had proved as disastrous as the plan was magnificent) found the government totally unprepared to meet their claims. Bills of credit were resorted to for relief from this embarrassment. They do not appear to have been made a tender, but they were not on that account the less bills of credit, nor were they absolutely harmless. The emission, however, not being considerable, and the bills being soon redeemed, the experiment would have been productive of not much mischief had it not been followed by repeated emissions to a much larger amount. The subsequent history of Massachusetts abounds with proofs of the evils with which paper money is fraught, whether it be or be not a legal tender.

Paper money was also issued in other colonies, both in the north and south; and whether made a tender or not, was productive of evils in proportion to the quantity emitted. In the war which commenced in America in 1763, Virginia issued paper money at several successive sessions under the appellation of treasury notes. This was made a tender. Emissions were afterwards made in 1769, in 1771, and in 1773. These were not made tender, but they circulated together; were equally bills of credit, and were productive of the same effects. In 1775 a considerable emission was made for the purposes of the war. The bills were declared to be current, but were not made a tender. In 1776, an additional emission was made, and the bills were declared to be a tender. The bills of 1775 and 1776 circulated together, were equally bills of credit, and were productive of the same consequences.

Congress emitted bills of credit to a large amount, and did not, perhaps could not, make them a legal tender. This power resided in the States. In May, 1777, the Legislature of Virginia passed an Act for the first time making the bills of credit issued under the authority of Congress a tender so far as to extinguish interest. It was not until March, 1781, that Virginia passed an Act making all the bills of credit which had been emitted by Congress, and all which had been emitted by the State, a legal tender in payment of debts. Yet they were, in every sense of the word, bills of credit previous to that time, and were productive of all the consequences of paper money. We cannot, then, assent to the proposition [430] that the history of our country furnishes any just argument in favor of that restricted construction of the Constitution for which the counsel for the defendant in error contends.

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The certificates for which this note was given, being in truth "bills of credit" in the sense of the Constitution, we are brought to the inquiry: Is the note valid of which they form the consideration?

It has been long settled that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned that an act forbidden by the Constitution of the United States, which is the supreme law, is against law. Now, the Constitution forbids a State to "emit bills of credit." The issue of these certificates is the very act which is forbidden. It is not the making of them while they lie in the loan-offices, but the issuing of them, the putting them into circulation, which is prohibited by the Constitution. The consideration of this note is the emission of bills of credit by the State. The very act which constitutes the consideration is the act of emitting bills of credit in the mode prescribed by the law of Missouri, which act is prohibited by the Constitution of the United States.

Cases which we cannot distinguish from this in principle have been decided in State courts of great respectability, and in this court. In the case of *The Springfield Bank v. Herrick et al.*, 14 Mass. Rep. 322, a note was made payable in certain bills, the loaning or negotiating of which was prohibited by statute, inflicting a penalty for its violation. The note was held to be void. Had this note been made in consideration of those bills, instead of being made payable in them, it would not have been less repugnant to the statute; and would consequently have been equally void.

In *Hunt v. Knickerbocker*, 5 Johns. Rep. 327, it was decided that an agreement for the sale of tickets in a lottery not authorized by the Legislature of the State, although instituted under the authority of the government of another State, is contrary to the spirit and policy of the law, and void. The consideration on which the agreement was founded being illegal, the agreement was void. The books, both of Massachusetts and New York, abound [437] with cases to the same effect. They turn upon the question whether the particular case is within the principle, not on the principle itself. It has never been doubted that a note given in consideration of an act which is prohibited by law, is void. Had the issuing or circulation of certificates of this or of any other description been prohibited by a statute of Missouri, could a suit have been sustained in the courts of that State on a note given in consideration of the prohibited certificates? If it could not, are the prohibitions of the Constitution to be held less sacred than those of a State law?

It had been determined, independently of the acts of congress on that subject, that sailing under the license of an enemy is illegal. *Patton v. Nicholson*, 3 Wheat. 204, was a suit brought in one of the courts of this district on a note given by Nicholson to Patton, both citizens of the United States, for a British license. The United States were then at war with Great Britain, but the license was procured without any intercourse with the enemy. The judgment of the Circuit Court was in favor of the defendant, and the plaintiff sued out a writ of error. The counsel for the de-

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defendant in error was stopped, the court declaring that the use of a license from the enemy being unlawful, one citizen had no right to purchase from or sell to another such a license, to be used on board an American vessel. The consideration for which the note was given being unlawful, it followed of course that the note was void.

A majority of the court feels constrained to say that the consideration on which the note in this case was given is against the highest law of the land, and that the note itself is utterly void. In rendering judgment for the plaintiff, the court for the State of Missouri decided in favor of the validity of a law which is repugnant to the Constitution of the United States.

In the argument we have been reminded by one side of the dignity of a sovereign state; of the humiliation of her submitting herself to this tribunal; of the dangers which may result from inflicting a wound on that dignity; by the other, of the still superior dignity of the (438) people of the United States, "who have spoken their will in terms which we cannot misunderstand.

To these admonitions we can only answer, that if the exercise of that jurisdiction which has been imposed upon us by the Constitution and laws of the United States shall be calculated to bring on those dangers which have been indicated, or if it shall be indispensable to the preservation of the Union, and consequently, of the independence and liberty of these States, these are considerations which address themselves to those departments which may with perfect propriety be influenced by them. This department can listen only to the mandates of law, and can tread only that path which is marked out by duty.

The judgment of the Supreme Court of the State of Missouri for the First Judicial District is reversed, and the cause remanded, with directions to enter judgment for the defendants.

Mr. Justice Johnson.

This is a case of a new impression and intrinsic difficulty, and brings up questions of the most vital importance to the interests of this Union.

The declaration is in the ordinary form, and the part of the record of the State court which raises the questions before us, is expressed in these words: "At a court, etc., came the parties, etc., and neither party requiring a jury, the cause is submitted to the court; therefore, all and singular, the matters and things, and evidences, being seen and heard by the court, it is found by them that the said defendants did assume upon themselves in the manner and form as the plaintiffs by their counsel allege; and the court also find that the consideration for which the writing declared upon and the assumpsit was made, was for the loan of loan-office certificates, loaned by the State at her loan-office at Chariton; which certificates were issued and the loan made in the manner pointed out by an Act of the Legislature of Missouri, approved, etc. And the court do further find that the plaintiff hath sustained damages by reason of the nonperformance of the assumptions and un-

dertakings aforesaid, of them the said defendants, "to the sum, etc.; and therefore it is considered that the plaintiff recover," etc.

In order to understand the case, it may be proper to premise that the territory now occupied by the State of Missouri having been subject to its Spanish government, was at the time of its cession governed by the civil law as modified by the Spanish government; that it so continued, subject to certain modifications introduced by act of Congress, until it became a State; when the people incorporated into their institutions as much of the civil law as they thought proper; and hence, their courts of justice now partake of a mixed character, perhaps combining all the advantages of the civil and common law forms. By one of the provisions of this law the trial by jury is forced upon no one; is yet open to all, and when not demanded, the court acts the double part of jury and judge.

It is obvious, therefore, that the matter certified from the record of the State court before recited is in nature of a special verdict, and the judgment of the court is upon that verdict, and in this light it shall be examined.

The purport of the finding is that the vote declared upon was given "for a loan of loan-office certificates loaned by the State under certain State acts, the caption of which is given."

Some doubts were thrown out in the argument whether we could take notice of the State laws thus found without being set out at length; but in this there can be no question; whatever laws that court would take notice of, we must of necessity receive and consider, as if fully set out.

By the acts of the State designated by the court in their finding, the officers of the treasury department of the State were authorized to create certificates of small denominations—from ten dollars down to fifty cents—bearing interest at two per centum per annum, and to loan these certificates to individuals; taking in lieu thereof promissory notes, payable not exceeding one year from the date, with not more than six per cent. interest, and redeemable by installments not exceeding ten per cent. every six months, giving mortgages of landed property for security.

"These certificates were in this form: [§440 "This certificate shall be receivable at the treasury, or any of the loan-offices of the State of Missouri, in the discharge of taxes or debts due the State, for the sum of \$—, with interest for the same, at the rate of two per centum per annum from this date, the — day of —, 182 ;" which form is set out in and prescribed by the act designated in the finding of the court.

This writ of error is sued out under the twenty-fifth section of the Judiciary Act, upon the supposition that the State act is in violation of that provision in the Constitution which prohibits the States from emitting bills of credit; and that the note declared on is void, as having been taken for an illegal consideration, or without consideration.

As a preliminary question, it has been argued that the case is not within the provisions of the twenty-fifth section; because it does not

appear from anything on the record that this ground of defense was specially set up in the courts of the State. But this we consider no longer an open question; it has repeatedly been decided by this court, that if a special verdict or the instruction of a court involve such facts as that the judgment must necessarily affirm the validity of the State law, or invalidity of a right set up under the laws or Constitution of the United States, the case is sufficiently brought within the provisions of the twenty-fifth section.

The judgment of the court in this case affirms the validity of the contract on which the suit is instituted. And this could not have been affirmed unless on the assumption that the act in which it had its origin was constitutional.

In the argument of counsel the objections to this contract were presented in the form of objections to the consideration. But this was unnecessary to his argument, since even a valuable consideration will not make good a contract in itself illegal. These notes originate directly under the law of Missouri; they are taken in pursuance of its provisions; have their origin in it; and rest for their validity upon it; and if that law be void, must fall 441] with it. Whether, therefore, "the bills for which they were given be void or valid, if the law be void, the notes would be so.

There are some difficulties on the subject of consideration, for which I would reserve myself until they become unavoidable. But it is not one of those difficulties that, as a guide for the State, the power of the States over the law of contracts will legalize a contract made, under whatever law, or for whatever consideration. That argument makes the act to justify itself, and is a direct recurrence to that exercise of sovereign power which it was the leading principle of the Constitution that each should renounce, so far as it was incompatible with the provisions of the Constitution; the objects of which were the security of individual right and the perpetuation of the Union.

The instrument is a dead letter, unless its effects be to invalidate every act done by the State in violation of the Constitution of the United States. And as the universal modus operandi by free States must be through their Legislature, it follows that the laws under which any act is done, importing a violation of the Constitution, must be a dead letter. The language of the Constitution is, "no State shall emit bills of credit;" and this, if it means anything, must mean that no State shall pass a law which has for its object an emission of bills of credit.

It follows that when the officers of a State undertake to act upon such a law, they act without authority; and that the contracts entered into, direct or incidental to such their illegal proceedings, are mere nullities.

This leads us to the main question: "Was this an emission of bills of credit in the sense of the Constitution?" And here the difficulty which presents itself is to determine whether it was a loan or an emission of paper money; or, perhaps, whether it was not an emission of paper money, under the disguise of a loan. There cannot be a doubt that this latter view of the subject must always be examined; for that

which it is not permitted to do directly cannot be legalized by any change of names or forms. Acts done in fraudem legis, are acts in violation of law.

The great difficulty, as it is here, must ever be to determine, "in each case, whether [442 it be a loan, or an emission of bills of credit. That the States have an unlimited power to effect the one, and are de vested of power to do the other, are propositions equally unquestionable; but where to draw the discriminating line is the great difficulty. I fear it is an insuperable difficulty.

~~The terms, bills of credit, were used by the framers of the Constitution, and at the present day almost universally from the same language. It is, then, only by resorting to the nomenclature of the day of the Constitution, that we can hope to get at the idea which the framers of the Constitution attached to it. The quotation from Hutchinson's History of Massachusetts, therefore, was a proper one for this purpose; inasmuch as the sense in which a word is used by a distinguished historian, and a man in public life in our own country, not long before the Revolution, furnishes a satisfactory criterion for a definition. It is there used as synonymous with paper money; and we will find it distinctly used in the same sense by the first Congress which met under the present Constitution.~~

~~The whole history and legislation of the time prove that by bills of credit, the framers of the Constitution meant paper money, with reference to that which had been used in the States from the commencement of the century down to the time when it ceased to pass, before it had lost its innate worthlessness.~~

It was contended, in argument for the defendant in error, that it was essential to the description of bills of credit in the sense of the Constitution that they should be made a lawful tender. But his own quotations negative that idea; and the Constitution does the same in the general prohibition in the States to make anything but gold or silver a legal tender. If, however, it were otherwise, it would hardly avail him here, since these certificates were, as to their officers' salaries, declared a legal tender.

The great end and object of this restriction on the power of the States, will furnish the best definition of the terms under consideration. The whole was intended to exclude everything from use as a circulating medium except gold and silver, and to give to the United States the exclusive control over the coining and [443 valuing of the metallic medium. That the real dollar may represent property, and not the shadow of it.

Now, if a State were to pass a law declaring that this representative of money shall be issued by its officers, this would be a palpable and tangible case; and we could not hesitate to declare such a law, and every contract entered into on the issue of such paper purporting a promise to return the sum borrowed, to be a mere nullity. But suppose a State enacts a law authorizing her officers to borrow a hundred thousand dollars, and to give in lieu thereof certificates of one hundred dollars each, expressing an acknowledgment of the debt; it is presumed there could be no objection to this. Then

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suppose that the next year she authorizes these certificates to be broken up into ten, five, and even one-dollar bills. Where can be the objection to this? And if, at the institution of the loan, the individual had given for the scrip his note at twelve months, instead of paying the cash; it would be but doing in another form what was here done in Missouri; and what is often done, in principle, where the loan is not required to be paid immediately in cash.

Pursuing the scrutiny farther, and with a view to bringing it as close home to the present case as possible: a State having exhausted its treasury, proposes to anticipate its taxes for one, two, or three years; its citizens, or others, being willing to aid it, give their notes payable at sixty days, and receive the scrip of the State at a premium for the advance of their credit, which enables the State, by discounting these notes, to realize the cash. There could be no objection to this negotiation; and their scrip being by contract to be receivable in taxes, nothing would be more natural than to break it up into small parcels in order to adapt it to the payment of taxes. And if in this State it should be thrown into circulation by passing into the hands of those who would want it to meet their taxes, I see nothing in this that could amount to a violation of the Constitution. Thus far the transaction partakes of the distinctive features of a loan; and yet it cannot be denied that its adaptation to the payment of taxes does give it one characteristic [4-14*] of a circulating medium. And another point of similitude, if not of identity, is the provision for forcing the receipt of it upon those to whom the State had incurred the obligation to pay money.

The result is, that these certificates are of a truly amphibious character; but what, then, should be the course of this court? My conclusion is, that as it is a doubtful case, for that reason we are bound to pronounce it innocent. It does indeed approach as near to a violation of the Constitution as it can well go without violating its prohibition, but it is in the exercise of an unquestionable right although in rather a questionable form; and I am bound to believe that it was done in good faith, until the contrary shall more clearly appear.

Believing it, then, a candid exercise of the power of borrowing, I feel myself at liberty to go further, and briefly to suggest two points, on which these bills vary from the distinctive features of the paper money of the Revolution:

1. On the face of them they bear an interest, and for that reason vary in value every moment of their existence; this disqualifies them for the uses and purposes of a circulating medium, which the universal consent of mankind declares should be of an uniform and unchanging value, otherwise it must be the subject of exchange, and not the medium.

2. All the paper medium of the Revolution consisted of promises to pay. This is a promise to receive, and to receive in payment of debts and taxes due the State. This is not an immaterial distinction; for the objection to a mere paper medium is, that its value depends upon mere national faith. But this certainly has a better dependence; the public debtor who purchases it may tender it in payments; and upon a suit brought to recover against him, Peters 4.

the Constitution contains another provision to which he may have recourse. As far as the feeble powers of this court extend, he would be secured (if he could ever need security) from a violation of his contracts. This approximates them to bills on a fund, and a fund not to be withdrawn by a law of the State.

Upon the whole, I am of opinion that the judgment of the State court should be affirmed.

*Mr. Justice Thompson]

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This case comes up by writ of error from the State court of Missouri, on a judgment recovered against the plaintiffs in error in the highest court in that State; and the first question that has been made here, is whether this court has jurisdiction of the case, under the twenty-fifth section of the Judiciary Act of 1789.

If the construction of this twenty-fifth section was now for the first time brought before this court, I should entertain very serious doubts whether this case came within it. The fair, and, as I think, the clear import of that section is, that some one of the cases therein stated did, in point of fact, arise, and was drawn into question, and did receive the judgment and decision of the State court. It is not enough that such question might have been made. A party may waive the right secured to him under this section. This would not in any manner affect the jurisdiction of the State court, and might of course be waived. In the present case, there is no doubt but the facts which appeared before the State court presented a case which might properly fall within this section. The defendants might have insisted that the State law was unconstitutional, and that the certificates issued in pursuance of its provisions were void. And if the court had sustained the act, it would have been one of the cases within the twenty-fifth section. But the court was not bound to call upon the party to raise the objection for the purpose of putting the cause in a situation to be brought here by writ of error. It cannot be doubted but that there might have been an express waiver of this right, and I should think an implied waiver would equally preclude a review of the case by this court; and that such a waiver ought to be implied in all cases where it does not appear that in point of fact the question was made, and received the judgment of the State court. But to entertain jurisdiction in this case is perhaps not going farther than this court has already gone; and I do not mean to call in question these decisions; but have barely noticed the question for the purpose of stating the rule by which I think all cases under this section should be tested.

*The more important question upon [*446 the merits of the case is, whether the Constitution of the United States interposes any impediment to the plaintiff's right of recovery in this case. And this question has been presented at the bar under the following points:

1. Whether the certificates issued under the provisions of the law of the State of Missouri are bills of credit, within the sense and meaning of the Constitution.

2. If so, whether, as they formed the consideration of the note on which the judgment below was recovered, the note was rendered thereby void and irrecoverable.

The first is a very important question, and not free from difficulty; and one upon which I have entertained serious doubts; but looking at it in all its bearings, and considering the consequences to which the rule established by a majority of the court will lead when carried out to its full extent, I am compelled to dissent from the opinion pronounced in this case.

The limitation upon the powers of the State of Missouri, which is supposed to have been transcended, is contained in the tenth section of the first article of the Constitution of the United States. "No State shall emit bills of credit." Are the certificates issued under the authority of the Missouri law, bills of credit, within this prohibition?

The form of the certificate is prescribed in the third section of the act, Act 27th of June, 1821, as follows:

"This certificate shall be receivable at the treasury or any of the loan-officers of the State of Missouri in the discharge of taxes or debts due to the State, for the sum of \$—, with interest for the same at two per centum per annum from this date," etc. And the thirteenth section declares, "that the certificates of the said loan-office shall be receivable at the treasury of the State, and by all tax-gatherers and other public officers, in payment of taxes or other moneys now due, or to become due to the State, or any county or town therein; and the said certificates shall also be received by all officers, civil and military, in the State, in the discharge of salaries and fees of office." It is proper here to notice that if the latter branch of this section should be considered as conflicting with that "prohibition in the Constitution which declares that no State shall make anything but gold and silver coin a tender in payment of debts, no such question is involved in the case now before the court, and the law may be good in part, although bad in part.

The precise meaning and interpretation of the terms "bills of credit" has nowhere been settled; or if it has, it has not fallen within my knowledge. As used in the Constitution, it certainly cannot be applied to all obligations, or vouchers, given by, or under the authority of a State for the payment of money. The right of a State to borrow money cannot be questioned; and this necessarily implies the right of giving some voucher for the repayment; and it would seem to me difficult to maintain the proposition that such a voucher cannot legally and constitutionally assume a negotiable character; and as such, to a certain extent, pass as, or become a substitute for money. The act does not profess to make these certificates a circulating medium or substitute for money. They are (except as relates to public officers) made receivable only for taxes and debts due to the State, and for salt sold by the lessees of salt springs belonging to the State. These are special and limited objects, and these certificates cannot answer the purpose of a circulating medium to any considerable extent.

A simple promise to pay a sum of money, a bond or other security given for the payment of the same, cannot be considered a bill of credit within the sense of the Constitution. Such a construction would take from the States all power to borrow money or execute any obligation for the repayment. The natural and lit-

eral meaning of the terms import a bill drawn on credit merely, and not bottomed upon any real or substantial fund for its redemption. There is a material and well-known distinction between a bill drawn upon a fund and one drawn upon credit only. A bill of credit may therefore be considered a bill drawn and resting merely upon the credit of the drawer, as contradistinguished from a fund constituted or pledged for the payment of the bill. Thus, the Constitution vests in Congress the power to borrow money on the credit of the United States. A bill drawn "under such authority" would be a bill of credit. And this idea is more fully expressed in the old confederation, Art 9: "Congress shall have power to borrow money or emit bills on the credit of the United States." Can the certificates issued under the Missouri law, according to the fair and reasonable construction of the act, be said to rest on the credit of the State? Although the securities taken for the certificates loaned are not in terms pledged for their redemption, yet these securities constitute a fund amply sufficient for that purpose, and may well be considered a fund provided for that purpose. The certificates are a mere loan upon security in double the amount loaned. And in addition thereto (section 29), provision is made expressly for constituting a fund for the redemption of these certificates. These are guards and checks against their depreciation, by insuring their ultimate redemption.

The emissions of paper money by the States previous to the adoption of the Constitution, were, properly speaking, bills of credit; not being bottomed upon any fund constituted for their redemption, but resting solely for that purpose upon the credit of the State issuing the same. There was no check, therefore, upon excessive issues, and a great depreciation and loss to holders of such bills followed as matter of course. But when a fund is pledged, or ample provision made for the redemption of a bill or voucher, whatever it may be called, there is but little danger of a depreciation or loss.

But should these certificates be considered bills of credit? Under an enlarged sense of such an instrument, it does not necessarily follow that they are bills of credit within the sense and meaning of the Constitution. In no precise and technical meaning or interpretation of a bill of credit has been shown, we may with propriety look to the state of things at the adoption of the Constitution to ascertain what was probably the understanding of the convention by this limitation on the power of the States. The State emissions of paper money had been excessive, and productive of great mischief. In some States, and at some times, such emissions were, by law, made a tender in payment of private debts; in others not so. But the great evil that existed was, that "creditors were compelled to take such a depreciated currency and articles of property in payment of their debts. This being the mischief, is it an unfair construction of the Constitution to restrict the intended remedy to the acknowledged and real mischief. The language of the Constitution may perhaps be too broad to admit of this restricted application. But to consider the certificates in question bills of

credit within the Constitution, is, in my judgment, a construction of that instrument which will lead to serious embarrassment with State legislation, as existing in almost every member of the Union.

~~If these certificates are bills of credit, intro-~~
~~duced by the Constitution, it appears to me diffi-~~
~~cult to see how the conclusion that bills of~~
~~credit issued either by the States or under~~
~~their authority and permission are bills of~~
~~credit falling within the prohibition. They~~
~~are certainly, in point of form as much bills~~
~~of credit; and if being used as a circulating~~
~~medium, or substitute for money makes these~~
~~certificates bills of credit bank notes are more~~
~~emphatically such. And not only the notes of~~
~~banks directly under the management and con-~~
~~trol of a State (of which description of banks~~
~~there are several in the United States), but all~~
~~notes of banks established under the authority~~
~~of a State, must fall within the prohibition.~~
~~For the States cannot certainly do that in-~~
~~directly which they cannot do directly. And, if~~
~~they cannot issue bank notes because they are~~
~~bills of credit, they cannot authorize others to~~
~~do it. If this circuitous mode of doing the busi-~~
~~ness would take the case out of the prohibition,~~
~~it would equally apply to the Missouri certifi-~~
~~cates; for they were issued by persons acting~~
~~under the authority of the State, and, indeed,~~
~~could be issued in no other way.~~

This prohibition in the Constitution could not have been intended to take from the States all power whatever over a local circulating medium, and to suppress all paper currency of every description. The power is given to Congress to coin money, and the States are prohibited from coining money. But to construe this as embracing a paper circulating medium of every description, and thereby render illegal 450] the issuing of all bank notes by or under the authority of the States, will not, I presume, be contended for by anyone. And I am unable to discover any sound and substantial reason why the prohibition does not reach all such bank notes, if it extends to the certificates in question.

The conclusion to which I have come on this point renders it unnecessary for me to examine the second question made at the argument. I am of opinion that the judgment of the State court ought to be affirmed.

Mr. Justice McLean.

Several cases, depending upon the same principles, were brought into this court from the Supreme Court of the State of Missouri by writs of error.

In the case of Hiram Craig and others, the declaration sets forth the cause of action in the following terms, viz: "For that whereas, heretofore, on the 1st day of August, in the year of our Lord 1822, at the county, etc., the said Craig, John Moore, and Ephraim Moore, made their certain promissory note in writing, bearing date, etc., and then and there, for value received, jointly and severally, promised to pay to the State of Missouri, on the 1st day of November, 1822, at the loan-office in Chariton, the sum of one hundred and ninety-nine dollars and ninety-nine cents, and the two per centum per annum, the interest accruing on the certificates Peters 4.

borrowed from the 1st day of October, 1821, nevertheless," etc.

The general issue of non assumpsit having been pleaded in each case, the Circuit Court of Chariton, in which the suits were commenced, rendered judgments in favor of the plaintiff. The following entry, in the case of Craig and others, was made on the record: "And afterwards at a court begun and held at Chariton, on Monday, the 1st of November, 1821, and on the second day of said court, the parties, by their attorneys, appeared, and neither party requiring a jury, the cause is submitted to the court; therefore, all and singular the matters and things and evidences being seen and heard by the court, it is found by them that the said defendants did assume upon themselves in manner and form as the plaintiff's counsel allege; and the court also find that the consideration for which the writing de- [*451] clared upon and the assumpsit was made, was for the loan of loan-office certificates, loaned by the State, at her loan-office at Chariton; which certificates were issued, and the loan made in the manner pointed out by an Act of the Legislature of the State of Missouri, approved the 27th day of June, 1821, entitled 'An Act for the establishment of loan-offices, and the acts amendatory and supplementary thereto.' And the court do further find that the plaintiff hath sustained damages, by reason of the non-performance of the assumptions and undertakings of the said defendants, to the sum of two hundred and thirty-seven dollars and seventy-nine cents. Therefore, it is considered," etc.

An appeal was taken to the Supreme Court of Missouri, in which this judgment and the others were affirmed.

The first question which this case presents for consideration, arises under the twenty-fifth section of the Judiciary Act of 1790; which provides "that a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity," may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.

Had not the point been settled by several adjudications in similar cases, I should entertain strong doubts whether it sufficiently appeared on the record that the validity of the statute of Missouri was drawn in question, on account of its repugnance to the Constitution. In the finding of the Chariton Circuit Court the act is referred to and the consideration of the note is stated; but it nowhere appears in the record that the validity of the statute was contested. And as this is the only ground on which this court can take jurisdiction of the case, it would seem to me that it should not be left to inference, but be clearly stated in the proceeding.

In the Supreme Court of Missouri the judgment of the Circuit Court was affirmed; but it does not appear what objections to the [*452] affirmance were urged before the court. This question, however, seems not to be open, and I yield to the force of prior adjudications. Two

points must necessarily be considered in the investigation of the merits of this case.

1. Are the certificates authorized to be issued by the law of Missouri, bills of credit, within the meaning of the Constitution?

2. If they are bills of credit, is the note on which this suit was brought void?

It is contended by the counsel for the plaintiffs in error that any paper issued by a State that contains a promise to pay a certain sum, and is intended to be used as a medium of circulation, is a bill of credit, and comes within the mischief against which the Constitution intended to guard. In illustration of this position, a reference is made to the depreciated currency of the Revolution.

During that most eventful period of our history, bills of credit formed the currency of the country, and every thing of greater value was exchanged for circulation. These bills were so multiplied by the different States and by Congress that their value was greatly impaired. This loss was attempted to be covered, and the growing wants of the government supplied, by increased emissions. These caused a still more rapid depreciation, until the credit of the bills sunk as low as not to be current at any price. Various statutes were passed to force their circulation and sustain their value, but they proved ineffectual. For a time, creditors were compelled to receive these bills under the penalty of forfeiting their debt, losing the interest, being denounced as enemies to the country, or some other penalty. These laws destroyed all just relations between creditor and debtor, and so debased a currency produced the most serious evils fit almost all the relations of society. Nothing but the ardor of the most elevated patriotism could overcome the difficulties and embarrassments growing out of this state of things.

It will be found somewhat difficult to give a satisfactory definition of a bill of credit. In what sense it was used in the Constitution, is the object of inquiry.

153.] "Different nations of Europe have emitted on various emergencies, three descriptions of paper money: 1. Notes stamped with a certain value, which contained no promise of payment, but were to pass as money. 2. Notes receivable in payment of public dues, with or without interest. 3. Notes which the government promised to pay at a future period, specified, with or without interest, and which were made receivable in payment of taxes and all debts to the public.

Bills of the last class were issued during the Revolution; and in some of the colonies they had been emitted long before that time. In 1690 bills of credit were for the first time issued, as a substitute for money, in the Colony of Massachusetts Bay, as stated in Hutchinson's History. In 1716 a large emission was made and lent to the inhabitants, to be paid at a certain period; and in the meantime to pass as money. For forty years, the historian says, the currency was in much the same state as if an hundred thousand pounds sterling had been stamped on pieces of leather or paper of various denominations, and declared to be the money of the government, without any other sanction than this: that when there should be taxes to pay, the treasury would receive this

sort of money, and that every creditor should be obliged to receive it from his debtor.

The bills issued during the Revolution were denominated bills of credit. In 1780 the United States guaranteed the payment of bills emitted by the States. They all contained a promise of payment at a future day; and where they were not made a legal tender, creditors were often compelled to receive them in payment of debts, or subject themselves to great inconvenience and peril.

The character of these bills, and the evils which resulted from their circulation, give the true definition of a bill of credit, within the meaning of the Constitution, and of the mischief against which the Constitution provides.

The following is the form of the bills emitted in 1780, under the guarantee of Congress: "The possessor of this bill shall be paid Spanish milled dollars by the 31st day of December, 1780, with interest, in like money, at the rate of five per cent. per annum, by [§ 454] the State of _____, according to an act," etc.

Bills of credit were denominated current money, and were often referred to in the proceedings of Congress by that title, in contradistinction to loan office certificates. It is reasonable to suppose that in using the term bills of credit in the Constitution, such bills were meant as were known at the time by that denomination. If the term be susceptible of a broader signification, it would not be safe so to construe it, as it would extend the provision beyond the evil intended to be prevented, and instead of operating as a salutary restraint, might be productive of serious mischief. The words of the Constitution must always be construed according to their plain import, looking at their connection and the object in view. Under this rule of construction, I have come to the conclusion that to constitute a bill of credit, within the meaning of the Constitution, it must be issued by a State, and its circulation as money enforced by statutory provisions. It must contain a promise of payment by the State generally, when no fund has been appropriated to enable the holder to convert it into money. It must be circulated on the credit of the State; not that it will be paid on presentation, but that the State, at some future period, on a time fixed, or resting in its own discretion, will provide for the payment.

If a more extended definition than this were given to the term, it would produce the most serious embarrassments to the fiscal operations of a State. Every State in the transactions of its moneyed concerns has one department to investigate and pass accounts, and another to pay them. Where a warrant is issued for the amount due to a claimant, which is to be paid on presentation to the treasurer, can it be denominated a bill of credit? And may not this warrant be negotiated, and passed in ordinary transactions, as money? This is very common in some of the States; and yet it has not been supposed to be an infraction of the Constitution.

Audited bills are often found in circulation, in which the State promises to pay a certain sum, at some future day specified. If these are inhibited by the Constitution, can a State make loans of money? Can there be any difference between borrowing money from a cred. [§ 455]

itor, and any other person who does not stand in that relation? The amount cannot alter the principle. If a State may borrow one hundred thousand dollars, she may borrow a less sum; and if an obligation to pay with or without interest may be given in the one case, it may in the other.

Where money is borrowed by a State, it issues scrip which contains a promise to pay, according to the terms of the contract. If the lender, for his own convenience, prefers this scrip in small denominations, may not the State accommodate him? This may be made a condition of the loan. If a State shall think proper to borrow money of its own citizens in sums of five, ten, or twenty dollars, may it not do so? If it be unable to meet the claims of its creditors, shall it be prohibited from acknowledging the claims, and promising payments with interest at a future day? The principles of justice and sound policy alike require this; and unless the right of the State to do so be clearly inhibited, it must be admitted.

In the adjustment of claims against a county, orders are issued on the county treasury; and it is common for these to circulate, by delivery or assignment, as bank notes or bills of exchange.

May a State do, indirectly, that which the Constitution prohibits it from doing directly? If it cannot issue a bill or note which may be put into circulation as a substitute for money, can it, by an act of incorporation, authorize a company to issue bank bills on the capital of the State? It will thus be seen that if an extended construction be given to the term "bills of credit," as used in the Constitution, it may be made to embrace almost every description of paper issued by a State.

The words of the Constitution are, that "no State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debt; pass any bill of attainder, ex post facto law; or law impairing the obligations of contracts; or grant any title of nobility."

156*] *Under the statute of Missouri, certificates in the following forms were issued: "This certificate shall be receivable at the treasury, or any of the loan-offices of the State of Missouri, in the discharge of taxes or debts due to the State, for the sum of _____ dollars, with interest for the same, at the rate of two per centum per annum, from this date, the _____ day of _____, 182_____."

It appears by the third section of the act, that two hundred thousand dollars were authorized to be issued of the above certificates, each not exceeding ten dollars, nor less than fifty cents. By the thirteenth section, these certificates were made receivable at the State treasury by tax-gatherers and other public officers, in payment of taxes or money due to the State, or any county or town therein; and they were made receivable by all officers in payment of salaries and fees of office.

Under the fifteenth section, commissioners were authorized to loan these certificates to the citizens of the State; apportioning the amount among the several counties according to the population, on mortgages or personal se-

curity. The act provides the means by which these certificates shall be paid, and the fact is admitted that at this time they are all redeemed by the State.

The design in issuing these certificates seems to have been to furnish the citizens of Missouri with the means of paying to the State the taxes which it imposed, and other debts due to it. It was, in effect, giving a credit to the debtors of the State, provided they would give good real or personal security. Had the arrangement been confined to those who owed the State, and had certificates been required of them, promising to pay the amount, with interest; no objection could have been urged to the legality of the transaction. And even if the State, in the discharge of its debts, had paid such certificates, the act would not have been illegal.

The State of Missouri adopted as a measure to force the circulation of the above certificates. No creditor was under any obligation to receive them. By refusing them, his debt was not postponed, nor the interest upon it suspended. The object was a benign one, to relieve [157] the citizens from an extraordinary pressure produced by the failure of local banks, and the ~~unprofitableness of the currency.~~ Without aid from the government, the citizens of Missouri could not have paid the taxes or debts which they owed to the State, in a medium of any value. At such a crisis the law was enacted; and, as contemplated in its passage, so soon as the necessary relief was afforded, the paper was withdrawn from circulation. The measure was only felt in the benefits it conferred. No loss was sustained by the public or by individuals, unless, indeed, the State shall lose by the unconscionable defense set up to these actions.

It is admitted that the expediency or in expediency of a measure cannot be considered, in giving a construction to the Constitution. But when, in giving a construction to that instrument, it becomes necessary, as it does in some instances, to look into the mischiefs provided against; and the application becomes, to some extent, a matter of inference, the question of expediency must be considered.

If the act of Missouri conferred benefits upon the people of the State, and was so guarded in its provisions as to protect them from all possible evil, no court would feel inclined to declare it to be unconstitutional and void, unless it was directly opposed to the letter and spirit of the Constitution. As the spirit of that provision was to protect the citizens of the States against the evils of a debased currency, and as the act under consideration, so far as it operated upon the people of Missouri, had no tendency to produce this evil, but to relieve against it, the spirit of the Constitution was not violated. Was the act of Missouri against its letter? Were the certificates issued by the State "bills of credit?" They were not, if the definition of a bill of credit, as now given, be correct. Their circulation was not forced by statutory provision, in any form; there was no promise on their face to pay at any future day; in their form and substance they bore little or no resemblance to the continental bills. They were calculated, from the manner in which they were created and circulated, to introduce none

of the evils so deeply felt from the currency of the revolution.

458*) "Suppose the State of Missouri had stamped certificates with a certain value, and provided that they should be received as money, according to the denominations given them, could they have been called bills of credit? Certainly not; for they contained no promise of payment, to which the holder could give credit. Such an act by a State would most clearly be void; but not under the provision of the Constitution, which prohibits a State from issuing "bills of credit."

Can any certificate or bill be considered a bill of credit, within the meaning of the Constitution, to which the receiver must not give credit to the promise of the State? Must it not, literally, be a "bill of credit?" Not a bill which will be received in payment of public dues when presented, but which the State promises to redeem at a future day.

A substitution of the credit of the State for money, may be considered as an essential ingredient to constitute a "bill of credit." When this is wanting, whatever other designation may be given to the thing—whether it be called paper money or a State bill—it cannot be called a "bill of credit." The credit refers to a future time of payment and not to the confidence we feel in the punctuality of the State, in paying the bill when presented. A bill, therefore, which is payable on presentation, is not a bill of credit, within the meaning of the Constitution; nor is a bill which contains no promise to pay at a future day, but a simple declaration, that it will be received in payment of public dues.

If this course of argument appears somewhat technical, it must be recollected that the question under consideration involves the validity of an act of a State, which is sovereign in all matters, except where restrictions are imposed, and an express delegation of power is made to the federal government. The solemn act of a State, which has been sanctioned by all the branches of its power, cannot, under any circumstances, be lightly regarded. The act of Missouri having received the sanction of the legislative, executive, and judicial departments of the government, cannot be set aside and disregarded under a doubtful construction of the Constitution. Doubts should lead to an acquiescence in the act. The power which declares it null and void should be exercised only where the right to do so is perfectly clear.

~~That such a power is vested in this tribunal~~ by the Constitution, which received the sanction of all the States, can only be doubted by those who are incapable of comprehending the plainest principle in constitutional law. It is a question arising under the Constitution, and all such questions of power, whether in the general or State government, belong to the tribunal. The policy of this investiture of power may be questioned; but the fact of its existence cannot be. Believing that in every point of view in which the paper issued by the State of Missouri may be considered, it is at least doubtful whether it comes within the meaning of a "bill of credit" prohibited by the Constitution; I am inclined to affirm the judgment of the State court. But if this ground of the defense be admitted, does it follow that the judg-

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ment must be reversed. This presents for consideration the second proposition stated.

If the certificates under consideration were "bills of credit" within the meaning of the Constitution, is the note on which this suit is brought void?

~~The position assumed in the argument that~~ no contract can be valid that is founded upon a consideration which is contrary to good morals, against the policy of the law, or a positive statute, cannot be sustained to the extent as urged. The ground is admitted to be correct generally; but there are exceptions which it becomes important to notice.

In the State of Pennsylvania usury is prohibited under the sanction of certain penalties, but usury does not render the contract void; a recovery may be had upon it, with the legal rate of interest. It is competent for a State to prohibit gambling by a severe penalty; and yet to provide that an obligation given for money lost at gambling shall be valid. It may declare, by law, that all instruments for the payment of money, signed by the party, shall be held valid without reference to the consideration. The legislative power of a State over contracts is without restriction by the Constitution of the United States; except that their obligation cannot be impaired. § 460 With this single exception, a State Legislature may regulate contracts, both as to their form and substance, as may be thought advisable.

Suppose the constitution of Missouri had prohibited the emission of bills of credit without going further; might not the Legislature provide by law that obligations given on a loan of such bills should be valid? There would be no more inconsistency in this than in the law of Pennsylvania, which forbids usury, and yet holds the instrument valid. If the Constitution of the United States had provided that all obligations given for bills of credit, or where they formed a part of the consideration, should be void, there could have existed no doubt on the subject. But there is no such provision; and if the obligation be held void, its invalidity is a matter of inference, arising from the supposed illegality of the consideration. The Constitution prohibits a State from "emitting bills of credit." The law of Missouri declares, substantially, that obligations given, where these bills form the consideration, shall be held valid. Is there an incompatibility in these provisions? Does the latter destroy the former, or render it ineffectual?

Suppose a State should coin money, would such money not constitute a valuable consideration for a promissory note? Would not the intrinsic value of the silver, as bullion, be a sufficient consideration? Would such a construction conflict with the Constitution?

A State is prohibited from coining money; consequently the money which it may coin cannot be circulated as such. A creditor will be under no obligation to receive it in discharge of his debt. If any statutory provision of the State should be formed, with a view of forcing the circulation of such coin, by suspending the interest or postponing the debt of a creditor where it was refused, such statute would be void, because it would act on the thing prohibited, and come directly in conflict with the Constitution. Such would not be the case in

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reference to the obligation given for this coin.

In the first place, the act would be voluntary on the part of the purchaser; and in the second, the consideration would be a valuable one. The statute sanctions not the coin but the [461] obligation which was given for it. The act of creating the consideration may be denounced and punished, as in the case of usury in Pennsylvania, and yet the obligation held good. Would this construction render ineffectual the prohibition of the Constitution? This may be answered by considering how ineffectual this provision must be, if its efficacy depend on making void the contract.

The loaning of this coin is only one of many modes which a State might adopt to circulate it. In the payment of its creditors, and in works of improvement, the State could always find the most ample means of circulation.

Effect is given to this provision of the Constitution by limiting it to the thing prohibited. If a State emit bills of credit, or coin money, neither can pass as money, whatever may be the regulation on the subject. No penalties have been provided to prevent such a circulation; no sanctions to enforce it would be valid.

But, it is contended that the offense consists in circulating the bills; that being the meaning of the word "emit." Congress may issue bills of credit, and perhaps have done so in the emissions of treasury notes; is a State prohibited from circulating them? If not, it must be admitted, the violation of the Constitution consists, not in the circulation of such bills, but in their creation.

~~The prohibition of the Constitution was intended to protect the sovereignty of a State in its legislative capacity. But there is no power in the federal government which can act upon this sovereignty. It is only when its prohibitions affect the rights of individuals, that the judicial power of the Union can be interposed.~~

If a State Legislature pass an ex post facto law, or a law impairing the obligation of contracts, it remains a harmless enactment on the statute book, until it is brought into operation, on individual rights. So, if a State coin money or emit bills of credit, the question of right must be raised before this tribunal, in the same manner.

The law of Missouri expressly sanctions the obligations given on a loan of these certificates. Had not this been done, and if the certificates [462] were bills of credit within the meaning of the Constitution, the obligations might have been considered void, as against the policy of the supreme law of the land.

There is no pretense that there has been a failure of consideration for which the notes in controversy were given. The certificates have long since been received by the State as money, and the promisors have realized their full value. If they can avoid the payment of their notes, as they wish to do by the defense set up, it must be alone on the ground of the illegality of the consideration. Suppose the notes had been given, under the same circumstances, payable to an individual, from whom the consideration had been received; could the defense be sustained?

In such a case there could be no allegation of a failure of consideration. The Constitution Peters 4.

prohibits the State from issuing the certificates; but the law of Missouri declares, that obligations given for these certificates shall be valid. These notes, being given for a valuable consideration, may be enforced, unless the Constitution makes them void. This it does not do by express provision; and can they be avoided by inference? An inference which does not necessarily follow, as has been shown, from the prohibition; because such a consequence is prevented by the act of Missouri. This act may be void as to the emission of the bills, but it does not follow that the part which relates to the notes must also be void. It would seem, therefore, that effect may be given to the provision of the Constitution so as to prevent the mischief, by operating upon the circulation of the bills, without extending the consequence so as to make void the contract expressly sanctioned by the law of Missouri. And if such a construction may be given, will not the court incline to give it, in order that both laws may be carried into full effect, where their provisions do not come directly in conflict?

The passing of counterfeit money is prohibited under severe penalties by the laws of every State; and is it not in the power of a State to provide by law, that every obligation given for counterfeit paper, known to be such by both parties, shall be valid. This will scarcely be denied. And if a State may do this, [463] under its sovereign power to regulate contracts, may it not give validity to the notes under consideration. Had not the State of Missouri a right to provide that every citizen who should voluntarily execute an obligation for the payment of money to the State, should be held bound to pay it, although given without consideration. If this do not come within the province of legislation in a sovereign State, I know not where its powers may not be restricted. And if this may be done, can the notes under consideration be held void? If the certificates were illegally created, they were of value, and under the law of Missouri constituted a valuable consideration for the notes given. In any view, the notes which were executed being sanctioned by law, and consequently valid even without consideration, cannot be less so when given for the certificates. I am, therefore, inclined to say, not without great hesitation, as I differ with the majority of the court, that the judgment should be affirmed on this ground.

In the first place, then, from the consideration which I have been able to give this case, I am not convinced that the certificates issued by the State of Missouri were bills of credit, within the meaning of the Constitution. And unless my conviction was clear on this point, my duty and inclination unite to sustain the judgment of the Supreme Court of Missouri. And second, as has been shown, it appears to me that the contract on which this action is founded is not void; even admitting that the certificates were bills of credit.

All questions of power arising under the Constitution of the United States, whether they relate to the federal or a State government, must be considered of great importance. The federal government being formed for certain purposes, is limited in its powers, and can in no case exercise authority where the power

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has not been delegated. The States and foreign, with the exception of certain powers, which have been invested in the general government, and inhibited to the States. No State can coin money, emit bills of credit, pass ex post facto laws, or laws impairing the obligation of contracts, etc. If any State violate a provision of the Constitution, or be charged with such violation to the injury of ~~the~~ private rights, the question is made before this tribunal; to whom all such questions, ~~under the Constitution, ought to belong.~~ In such a case, this court is to the State what its own Supreme Court would be, where the constitutionality of a law was questioned under the constitution of the State. And within the delegation of power, the decision of this court is as final and conclusive on the State as would be the decision of its own court in the case stated.

That distinct sovereignties could exist under one government, emanating from the same people, was a phenomenon in the political world which the wisest statesmen in Europe could not comprehend; and of its practicability many in our own country entertained the most serious doubts. Thus far the friends of liberty have had great cause of triumph in the success of the principles upon which our government rests. But all must admit that the purity and permanency of this system depend on its faithful administration. The States and the federal government have their respective orbits, within which each must resolve. If either cross the sphere of the other, the harmony of the system is destroyed, and its strength is impaired. It would be as gross usurpation on the part of the federal government to interfere with State rights by an exercise of powers not delegated, as it would be for a State to interpose its authority against a law of the Union.

The judiciary of a State, in all cases brought before them, have a right to decide whether or not an act of the federal government be constitutional, the same as they have a right to determine on the constitutionality of an act under the State constitution; but, in all such cases, this tribunal may supervise the decisions. It is often a difficult matter to define the limitations of the legislative, the executive, and the judicial powers of a State; and this difficulty is greater in defining the limitations of the federal government. In both cases, the respective constitutions must be looked to as the source of power; but in the latter, it is often necessary to determine not only whether the power be vested, but whether it is inhibited to the State. Some powers in the general government are exclusive; others concurrent with the States. The experience of many years may be necessary to establish, by practical illustrations, the exact boundaries of these powers, if, indeed, they can ever be clearly and satisfactorily defined. Like the colors of the rainbow they seem to intermix, so as to render a separation extremely difficult, if not impracticable. By the exercise of a spirit of mutual forbearance, the line may be ascertained with sufficient precision for all practical purposes. In a State where doubts exist as to the investiture of power, it should not be exercised, but referred to the people; in the general government, should similar doubts arise, the powers should be referred to the States and the people.

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This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Missouri for the First Judicial District, and was argued by counsel; on consideration whereof, this court is of opinion that there is error in the rendition of the judgment of the said court in this, that in affirming the judgment rendered by the Circuit Court for the County of Chariton, that court has given an opinion in favor of the validity of the Act of the Legislature of Missouri, passed on the 27th of June, 1821, entitled "An Act for the establishment of loan-officers," which act is, in the opinion of this court, repugnant to the Constitution of the United States; whereupon it is considered by the court, that the said judgment of the said Supreme Court of the State of Missouri for the First Judicial District ought to be reversed and annulled; and the same is hereby reversed and annulled, and the cause remanded to that court, with directions to enter judgment in favor of the defendant to the original action.

*HENRY HOLLINGSWORTH, Heir of [460
Levi Hollingsworth, Appellant,

v.

PHILIP BARDOUR et al., Appellees.

Purchase of land warrants by parol agreement—bill in equity against "unknown heirs" of vendor—Kentucky laws as to absent defendants—claim of a "locator."

II. entered, with the proper surveyor for the District of Kentucky, forty-five thousand acres of land, in the County of Washington in that State, by virtue of treasury warrants. A survey was made thereon in 1780, and a patent for the land issued to II. in 1797. The warrants were purchased by the ancestor of the complainant by a parol agreement with II. previous to their entry. Before this agreement, II. in connection with a person who owned other warrants, had made an agreement with I. to locate their respective warrants, which agreement was ratified by the complainant, who paid a sum of money to I. for fees of patenting, and agreed to make I. a liberal compensation for his services; and I. located and surveyed under the warrants, forty-five thousand acres, returned the surveys to the office, and paid the fees of office. The locating and surveying of the warrants, and all the necessary steps for completing the title, were done by I., who was employed first by II., and afterwards by the complainant, who paid in money for the same. II. being deceased, and having made no conveyance of the legal title to the lands, the com-

NOTE.—Judgments, service of notice to appear and defend, when necessary to their validity.

A judgment in personam, recovered without any notice, and without any attachment of property on mesne process, though authorized by a law of the territory in one of the courts in which it was rendered, is a nullity. *Webster v. Reid*, 11 How. 437.

The rule that a judgment or decree of one State must receive full faith in the courts of another State, does not apply to judgments rendered in proceedings instituted without personal notice to the defendant. Such judgments, though they may be authorized by statutes of the States in which they are rendered, are not within the meaning of the rule. To render a judgment binding outside the State, it must be founded on personal notice to the party to be affected. *Gurner v. United States*, 11 How. 163; *D'Arcy v. Ketchum*, 11 How. 163; *Harris v. Hardeman*, 14 How. 334; *Warren Manufacturing Co. v. Mina Ins. Co.* 2 Paine, 501.

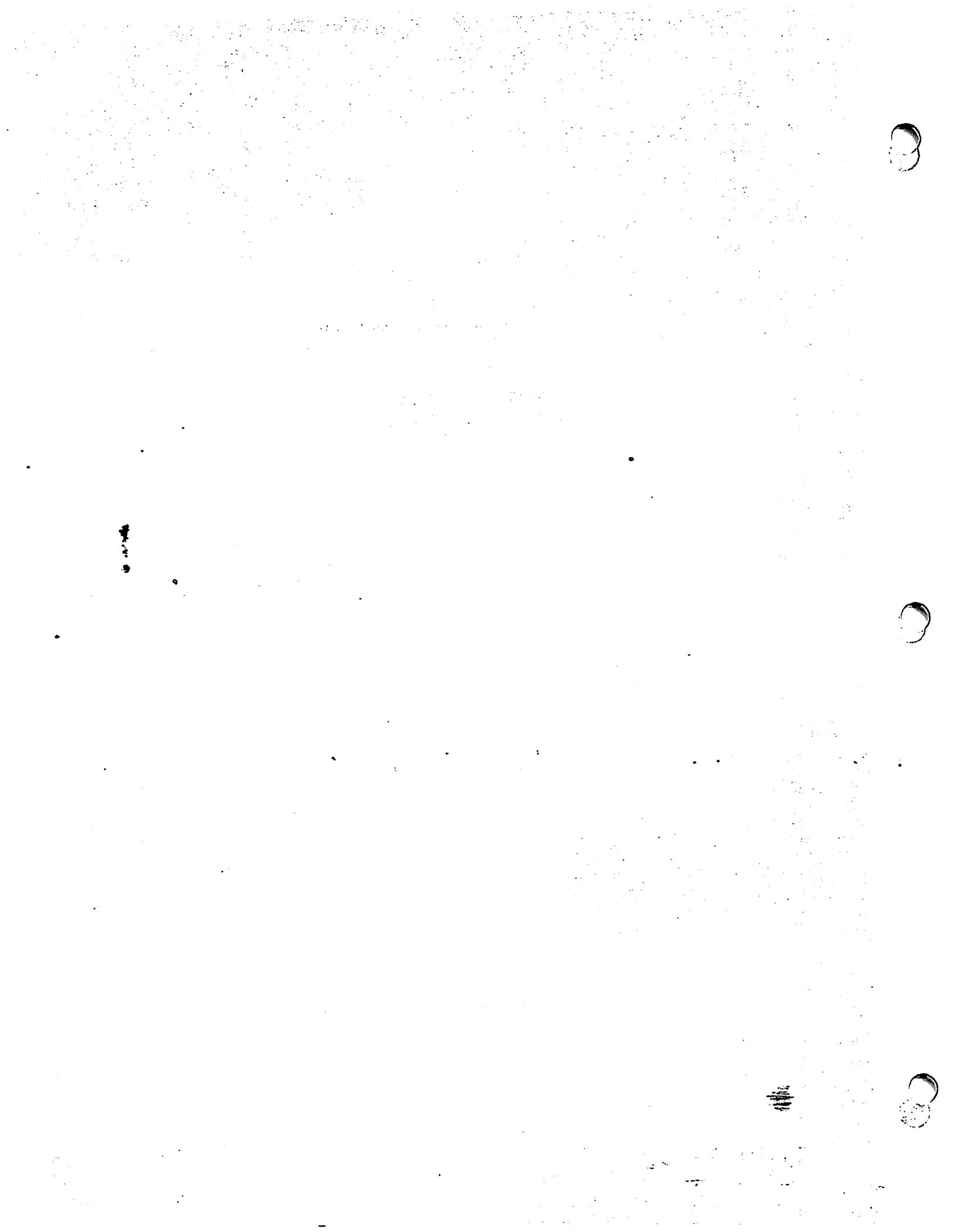
That a decree, obtained without service, may be impeached, and to what extent the jurisdiction of the court rendering a judgment may be inquired into collaterally, see note to *Mills v. Duryee*, 3 L. ed. U. S. 411.

Petors 4

"DISHONORED BANK NOTES"
(Fraud - Not Money)

10 Ohio 188
75 American Decisions 509
(1859)

WESTFALL VS. BRALEY



before he could be charged with those claims, to contest their validity and amount. We do not think he can be called upon to enter into such a contest in this case with the defendant Miller. It cannot be pretended that the defendant, or any of the parties under whom he claims, were authorized by the plaintiff, either expressly or by implication, to pay his debts. The defendant, therefore, could only claim as being subrogated to the part of the several claims of which the supposed payment has been made. Now, there would be an insuperable difficulty in allowing him to sue the plaintiff for a fractional part of twenty different claims.

The act for the protection of purchasers at judicial and tax sales, on which the defendant relies in his answer, has, we think, no application to this case. That act, so far as it affects judicial sales, supposes that the plaintiff or the defendant has title to the property, and that it is liable for the debt due to the plaintiff, but from some defect in the proceedings the attempt to make it liable has failed. The defect here is not a defect in the proceedings, which are all regular enough, but a defect in the title of all the parties to those proceedings, as against the plaintiff in this action.

In every view we can take of the counterclaim of the defendant, we see no ground upon which it can be sustained. A judgment will be rendered finding that the notes given to the plaintiff by Carmichael and Wiley are due and unpaid; that they are secured by a mortgage on the premises; and unless the amount due shall be paid, the mortgaged premises shall be sold. In view of the circumstances of the case, a longer time than usual will be allowed before an order of sale is to be issued. The time will be six months. And we shall also order that each party pay his own costs.

BRINKERHOFF, C. J., and SCOTT, SUTLIFF, and PECK, JJ., concurred.

LAW OF DOMICILE GOVERNS VOLUNTARY TRANSFER AND SUCCESSION TO PERSONAL PROPERTY: *McCune's Devises v. House*, 31 Am. Dec. 438; *Fletcher's Adm'r v. Sanders*, 32 Id. 96; *Frencl. v. Hall*, Id. 341; *McCullum v. Smith*, 33 Id. 147; *Gravillon v. Richard's Ex'r*, Id. 563; *Goodall v. Marshall*, 35 Id. 472; *Lowry v. Bradley*, 39 Id. 142; *Succession of Packwood*, 41 Id. 341; *Vroom v. Van Horns*, 42 Id. 94; *Atchison's Heirs v. Lindsey*, 43 Id. 163; *Montgomery v. Milliken*, Id. 507; *Richardson v. Leavitt*, 45 Id. 90; *Mahorner v. Hooe*, 48 Id. 706; *Weatherby v. Covington*, 49 Id. 623; *Speed v. May*, 55 Id. 540; *Lawrence v. Kitteredge*, 56 Id. 385; *Smith v. Eaton*, 58 Id. 746; *Hairton v. Hairton*, 61 Id. 630; *Wheeler v. Hollis*, 70 Id. 363, and notes thereto.

WESTFALL v. BRALEY.

(10 OHIO STATE, 122.)

DEBTOR MUST BEAR LOSS WHERE HE MAKES PAYMENT IN BILLS OF SUSPENDED BANK, although the suspension was not known at the place of payment, nor to either of the parties, if the creditor offers to return the bills without unreasonable delay.

AMICABLE action. The petition alleged that the defendant, being indebted to the plaintiffs, delivered to them in payment bills of a bank in Kentucky; that the bank on the preceding day had suspended, but that this fact was unknown at the place of payment, and to both of the parties; and that as soon as the suspension became known, the plaintiffs offered to return the bills, and demanded payment, which the defendant refused. The defendant demurred to the petition, and the question thus raised was reserved for the decision of the supreme court.

Levi Dungan and William T. McClintick, for the plaintiffs.

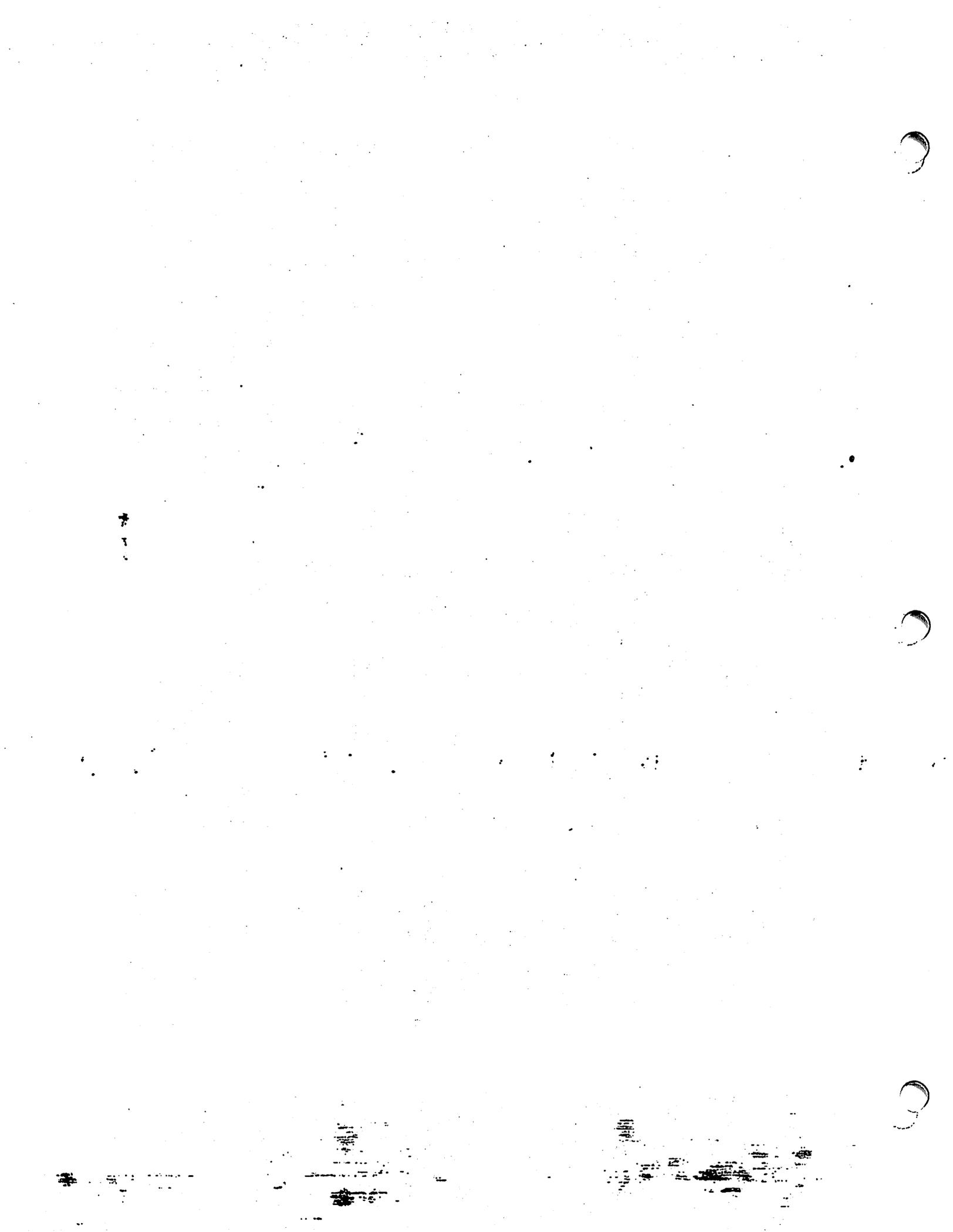
H. S. Bundy, for the defendant.

By Court, SCOTT, J. The allegations of this petition are, in some respects, not as definite and specific as they should be, and perhaps, upon motion, they might be required to be made more so.

But regarding the petition as formally sufficient, it shows that certain bank notes were transferred by the defendant to the plaintiffs in payment of a pre-existing debt; that at the time of such payment, the bank which issued the notes had in fact stopped payment, although its failure was not then known at the place of payment, nor to either of the parties; and that the plaintiffs, upon learning the failure of the bank, without unreasonable delay, offered to return the notes to the defendant; and the question raised by the demurrer is, whether, under these circumstances, the loss falls upon the plaintiffs or upon the defendant.

This question does not appear to have been settled by any decision of this court, or of the former supreme court in bank; though conflicting decisions of the question seem to have been made by that court upon the circuit. There is also a want of harmony in the decisions of the several states upon the subject.

In Pennsylvania, it has been held that such a payment is valid, and that the loss must be borne by the party receiving the bills: *Bayard v. Shunk*, 1 Watts & S. 92 [37 Am. Dec. 411].



The same rule seems to prevail in Alabama and Tennessee: *Lowrey v. Murrell*, 2 Port. 280 [27 Am. Dec. 651]; *Scruggs v. Gass*, 3 Yerg. 175 [29 Am. Dec. 114]; and was also approved, *obiter*, in *Young v. Adams*, 6 Mass. 182.

On the other hand, it has been held in New York that the loss in such a case must fall on the party making the payment: *Lightbody v. Ontario Bank*, 11 Wend. 1, affirmed upon error, 13, Id. 107. And such is the rule in Vermont, New Hampshire, Maine, and South Carolina: *Wainwright v. Webster*, 11 Vt. 576 [34 Am. Dec. 707]; *Fogg v. Sawyer*, 9 N. H. 265; *Frontier Bank v. Morse*, 22 Me. 88; *Harley v. Thornton*, 2 Hill (S. C.), 509, note.

As to the opinion of the elementary writers on this question, it is said by Mr. Chitty: "It should seem that if, on discounting a bill or note, the promissory note of country bankers be delivered after they have stopped payment, but unknown to the parties, the person taking the same, unless guilty of laches, might recover the amount from the discounteer, because it must be implied that, at the time of the transfer, the notes were capable of being received if duly presented for payment." Ch. Bills, 247. And Mr. Story, after stating the very question now under consideration, says that the weight of reasoning and of authority seems to favor the doctrine that the loss must be borne by the party transferring, and not by him who receives the bills: Story on Promissory Notes, p. 123, sec. 119.

Such, we think, is the correct doctrine, though it must be admitted that plausible, if not forcible, reasons may be suggested against it. Bank notes are the representative of money, and circulate as such, only by the general consent and usage of the community. But this consent and usage are based upon the convertibility of such notes into coin, at the pleasure of the holder, upon their presentation to the bank for redemption. This fact is the vital principle which sustains their character as money. So long as they are in fact what they purport to be, payable on demand, common consent gives them the ordinary attributes of money. But upon the failure of the bank by which they were issued, when its doors are closed, and its inability to redeem its bills is openly avowed, they instantly lose the character of money, their circulation as currency ceases with the usage and consent upon which it rested, and the notes become the mere dishonored and depreciated evidences of debt. When this change in their character takes place, the loss must necessarily fall upon him who is the owner of them at the

time; and this, too, whether he is aware or unaware of the fact. His ignorance of the fact can give him no right to throw the loss, which he has already incurred, upon an innocent third party.

In the absence of any special agreement, the very offer of bank notes, as a payment in money of a pre-existing debt, is a representation that such notes are what they purport to be, the representative of money, and that they have the quality of convertibility, upon which their currency as money depends. It is only upon this idea that they can be honestly tendered as money, and when accepted as such, under the same supposition, the mutual mistake of facts should no more be permitted to benefit one party, or prejudice the other, than if the notes had been spurious, or the payment had been made in base or adulterated coin. That money paid under a mistake of facts may be recovered back, is a familiar principle, and the application of the same equitable rule must be permitted to correct the mutual mistake of the parties in a case like the present. Besides, a contrary doctrine would present temptations, and afford facilities for the practice of fraud and imposition. A party might fraudulently pass the paper of a broken bank, and yet it might be difficult to prove his knowledge of the previous failure. Or if his victim should succeed in passing it to one equally ignorant of the facts with himself, the last recipient would be left to bear the loss, and the fraud be crowned with success.

We think justice and sound policy require the demurrer to be overruled, which is accordingly done, and the cause remanded, with leave to answer.

BRINKERHOFF, C. J., and SUTLIFF, PECK, and GHOLSON, JJ., concurred.

PAYMENT IN BILLS OF INSOLVENT BANK, EFFECT OF: See *Ontario Bank v. Lightbody*, 27 Am. Dec. 179, and note, in which the question is discussed; *Lowrey v. Murrell*, Id. 651; *Corbit v. Bank of Smyrna*, 30 Id. 635; *Gilman v. Peck*, 34 Id. 702; *Wainwright v. Webster*, Id. 707; *Bayard v. Shunk*, 37 Id. 441, and note; *Frontier Bank v. Morse*, 38 Id. 284.

"DISHONORED BANK NOTES"
(Fraud - Not Currency)

47 WIS. 551
3 N.W. 357 -- 32 American Reports 773
(1879)

KLAUBER VS. BIGGERSTAFF

WALKER vs. BICCHERMAN

U.S. District Court
District of Columbia
No. 100-100000

DISHONORED BANK NOTES
(Not Currency)

SUPREME COURT OF WISCONSIN.

SAMUEL KLAUBER and another, Respondents, vs. ARTHUR
BIGGERSTAFF, Garnishee of DAVID S. SLATER,
and another, Appellants.

Filed November 23, 1879.

1. The word "currency" in a certificate of deposit means *money*, including bank-notes issued by authority of law and in actual and general circulation at their legal standard value. RYAN, C. J., *arguendo*.
2. A certificate of deposit promising payment to order of a certain number of dollars "in currency" is negotiable. (*Ford v. Mitchell*, 15 Wis. 305; *Platt v. Bank*, 17 Wis. 223; and *Lindsey v. McClelland*, 18 Wis. 481, explained and criticised.)
3. Chapter 5, Laws of 1868, is also construed as declaring negotiable all notes or certificates of deposit of the character above described.—[STATE KEPT.]

Appeal from Dane circuit court.

Gregory & Pinney, for respondents.

Smith & Lamb, for appellants.

RYAN, C. J. The controlling question in this case is whether the certificate of deposit stated in the proceedings is negotiable.

"A promissory note may be defined to be a written engagement by one person to pay another person therein named, absolutely and unconditionally, a certain sum of money at a time specified therein." Story on Prom. Notes, § 1. The ordinary form of a certificate of deposit of money falls precisely within the definition, and it seems strange that there ever was a doubt that it was in law a negotiable promissory note. *O'Neil v. Bradford*, 1 Pin. 390, and cases there cited. Such doubt, however, may now be considered at rest. *Kilgore v. Bulkley*, 14 Conn. 362; *Bank v. Merrill*, 2 Hill, 295; *Miller v. Austen*, 13 How. 218.

The learned counsel for the respondents concedes this; but he takes the position that the certificate of deposit in question is not a promissory note, because it is not payable in money. It is for so many dollars, payable in currency; and the learned counsel contends that the word *currency* does not express or imply money. It must be conceded that the cases in this court, (*Ford v. Mitchell*, 15 Wis. 305; *Platt v. Bank*, 17 Wis. 223; and *Lindsey v. McClelland*, 18 Wis. 481,) which he cites in support of his position, lend strong sanction to it.

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These cases were decided, respectively, in 1862, 1863, and 1864, when the paper money, circulating in the state *de facto*, was of a very heterogeneous character. How much influence this fact had on those decisions, or on similar decisions elsewhere, it is impossible to say. It is, perhaps, not altogether an uncommon infirmity of judicial rules that they are made in view of exceptional conditions of things presently existing. Passing evils or exigencies should have little weight in general rules of decision. Judicial rules ought properly to be based upon the general condition of society, and to be broad enough to meet occasional derangements incident to it.

In *Ford v. Mitchell* the certificate of deposit was payable in "currency," and protested for non-payment. It had been received by the plaintiff upon a sale made by him to the defendant. A majority of the court concurred in the judgment, on the ground that the plaintiff might recover for the original consideration. So *Dixon*, C. J., who delivered the principal opinion, holds. But his opinion also holds that the defendant was liable as a guarantor by force of his indorsement of paper not negotiable. *Paine and Cole, JJ.*, decline to express any opinion on the latter point.

In *Platt v. Bank* the certificate of deposit was payable in "current funds." The chief justice delivered the opinion of the court, stating that such paper had been held not to be negotiable in *Ford v. Mitchell*, and that the cases were not distinguishable; adding that the rule is sustained by an almost unbroken current of authority. In this the learned chief justice was not, perhaps, quite as accurate as usual; and he was manifestly mistaken in his statement of *Ford v. Mitchell*. Though the decision appears to have been unanimous, it plainly proceeded somewhat upon a mistake.

In *Lindsey v. McClelland* the certificate of deposit was payable in "current funds," and was protested for non-payment. The opinion of the court is delivered by Mr. Justice Cole, who not unnaturally falls again into the mistake that the court (in *Mitchell v. Ford*) had held that the words "payable in current funds" rendered the instrument not negotiable. *Platt v. Bank* is not cited. The opinion states that the certificate "is not payable in money, or what the court is bound to consider equivalent to money." The opinion then proceeds to show that if the certificate had been negotiable it had been protested so as to hold the defendant as indorser; and further that it had not been received in payment, imply-

ing that the plaintiff might recover on the original consideration.

It is thus seen that *Platt v. Bank* is perhaps the only case in this court positively adjudging that an instrument payable in *current funds* is not negotiable, and that there is no case so holding of an instrument payable in *currency*. *Prima facie* there might seem to be little difference in the two terms; but the opinion of the court in *Platt v. Bank* gives a construction to the term, *current funds*, which the term *currency* could not properly bear. "It was suggested at the bar that the certificates might be deemed payable in the treasury notes of the United States, and therefore negotiable, since the law of congress declares such notes to be equivalent to gold and silver coin in payment and tender for debts. But the words 'current funds' cannot be so construed. They were undoubtedly intended to include all funds bankable in this state, and any such funds would answer the description and satisfy the contract. A tender in any of the notes of the banks of this state passing as currency would have discharged the obligation."

With such a construction of the term used the instrument was not payable in money, and therefore not negotiable. So are nearly all of the authorities on paper positively payable in specific kinds of bank-notes, or in bank-notes generally, because not necessarily money.

The true and only test in this respect of the question whether an instrument be negotiable under the statute of Anne, is always whether it is payable in money.

Money is a generic and comprehensive term. It is not a synonym of coin. It includes coin, but is not confined to it. It includes whatever is lawfully and actually current in buying and selling of the value and as the equivalent of coin. By universal consent, under the sanction of all courts everywhere, or almost everywhere, bank-notes lawfully issued, actually current at par in lieu of coin, are money. The common term, paper money, is in a legal sense quite as accurate as the term coined money.

The question whether bank notes are money or only *choses in action*, was directly involved in *Miller v. Race*, 1 Burr. 452.

"The whole fallacy of the argument," says Lord Mansfield, in delivering the unanimous opinion of the court, "turns upon comparing bank-notes to what they do not resemble and what they ought not to be compared to, viz: to goods, or to securities, or documents for debts.

"Now they are not goods, not securities, nor documents for debts, nor are so esteemed; but are treated as *money, as cash*, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and *currency* of money to all intents and purposes. They are as much money as guineas themselves are, or any *current* coin that is used in common payments as money or cash.

"They pass by a will, which bequeaths all the testator's money or cash, and are never considered as securities for money, but as money itself. Upon Lord Ailesbury's will £900 in bank-notes was considered as cash. On payment of them, wherever a receipt is required, the receipts are always given as for money, not as for securities or notes.

"So, on bankruptcies, they cannot be followed as identical and distinguishable from money, but are always considered as money or cash.

"It is pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench, and mistake their meaning. It has been quaintly said 'that the reason why money cannot be followed is because it has no ear-mark;' but this is not true. The true reason is, upon account of the *currency* of it it cannot be recovered after it has passed in *currency*. So, in case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration; but before money has passed in *currency* an action may be brought for the money itself. . . .

"Apply this to the case of a bank-note: an action may lie against the finder, it is true, (and it is not at all denied), but not after it has been paid away in *currency*. And this point has been determined, even in the infancy of bank-notes, for 1 Salk. 126, M. 10, W. 3, at *nisi prius*, is in point. . . .

"Another case cited was a loose note in 1 Ld. Raym. 738, ruled by Ld. Ch. J. Holt, at Guildhall, in 1698, which proves nothing for the defendant's side of the question; but it is exactly agreeable to what is laid down by my Ld. Ch. J. Holt in the case I have just mentioned. The action did not lie against the assignee of the bank-bill because he had it for a valuable consideration.

"In that case he had it from the person who found it; but the action did not lie against him because he took it in the course of *currency*, and, therefore, it could not be followed in his hands. It never shall be followed into the hands of a

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person who, *bona fide*, took it in the course of *currency*, and in the way of his business.

"A bank-note is constantly and universally, both at home and abroad, treated as money—as cash; and paid and received as cash; and it is necessary for the purposes of commerce that their *currency* should be established and secured."

This case was approved or followed in *Clark v. Shee*, Cowper, 197; *Loundes v. Anderson*, 13 East. 130; *Solomons v. The Bank*, Id. 135; *Wright v. Reed*, 3 D. & E. 554; *Camidge v. Allenby*, 6 B. & C. 373; *De La Chaumette v. The Bank*, 9 B. & C. 208; *Snow v. Peacock*, 3 Bing. 406; *Strange v. Wigency*, 6 Bing. 667, and other cases. And the opinion of Lord Mansfield goes far to make the word "*currency*" equivalent to the word "*money*."

It has also been very generally followed in this country. In *Bank of U. S. v. Bank of Georgia*, 10 Wheat. 333, Mr. Justice Story, in delivering the opinion of the court, says: "Bank-notes constitute a part of the common *currency* of the country, and, ordinarily, pass as money. When they are received as payment the receipt is always given for them as money. They are a good tender as money, unless specially objected to; and, as Lord Mansfield observed, in *Miller v. Race*, 1 Burr. Rep. 457, they are not, like bills of exchange, considered as mere securities or documents for debts."

Here is a distinction, recognized in many of the cases, between *currency* which is money and *currency* which is legal tender. To be money, part of the circulating medium, it is not essential that *currency* should be legal tender against the wishes of the person to whom it is tendered. Even coined money is not, under all circumstances, legal tender. *Scars v. Dewing*, 14 Allen, 413; *Mather v. Kinnick*, 51 Pa. St. 425.

But paper *currency*—bank-notes—which are current *de jure et de facto*, are legal tender unless specially objected to at the time of tender, for the reason that they are money, though not absolutely legal tender. With some exceptions this doctrine is general in this country. *Thompson v. Riggs*, 5 Wall. 663; *Veazie Bank v. Tenno*, 8 Wall. 533; *Hepburn v. Griswold*, Id. 603; *Legal Tender Cases*, 12 Wall. 457; *Young v. Adams*, 6 Mass. 182; *Snow v. Perry*, 9 Pick. 539; *Wood v. Bullens*, 6 Allen 516; *Bush v. Baldrey*, 11 Allen 367; *Moody v. Mahurin*, 4 N. H. 296; *Cummings v. Putnam*, 19 N. H. 569; *Brown v. Simons*, 44 N. H. 475; *Frothingham v. Morse*, 45 N. H. 545; *Keith v. Jones*, 9 John. 120; *Julah v. Harris*, 19 John. 144; *Leiber v. Goodrich*, 5 Cow. 186; *Pardce v. Fish*, 60 N. Y. 265;

Ehle v. Bank, 24 N.Y. 548; *Mann v. Mann*, 1 John. Ch. 231; *Bayard v. Shunk*, 1 W. & S. 92; *Legal Tender Cases*, 52 Pa. St. 9; *Buchegger v. Shultz*, 13 Mich. 420; *Williams v. Rorer*, 7 Mo. 556; *Seawell v. Henry*, 6 Ala. 226; *Ball v. Stanley*, 5 Yerger 199; *Coolcy v. Weeks*, 10 Yerger 141; *Noe v. Hodjes*, 3 Humph. 162. Several of these cases will be found to hold that while gold and silver were at a high premium above paper, and not circulated as money, coin was not to be considered as currency, but as a commodity; that the whole currency of the country then consisted of paper money, circulation at par being an essential quality of currency.

In fact almost all civilized countries, including this country, have a mixed circulation of coin and bank-notes. These constitute the currency of the country—its money; and the general term, currency, includes both. Currency, therefore, means money—coined money and paper money equally. But it means money only; and the only practical distinction between paper money and coined money, as currency, is that coined money must generally be received, paper money may generally be specially refused, in payment of debt; but a payment in either is equally made in money—equally good. The confusion in the cases appears to have arisen for want of proper distinction between money which is current and money which is legal tender. The property of being legal tender is not necessarily inherent in money; it generally belongs no more to inferior coin than to paper money,

~~In the use of the term, currency does not necessarily include all bank-notes in actual circulation; for all bank-notes are not necessarily money. In this use of the term, currency includes only such bank-notes as are current de jure et de facto at the locus in quo, that is, bank-notes which are issued for circulation by authority of law, and are in actual and general circulation at par with coin, as a substitute for coin, interchangeable with coin; bank-notes which actually represent dollars and cents, and are paid and received for dollars and cents at their legal standard value. Whatever is at a discount—that is, whatever represents less than the standard value of coined dollars and cents at par—does not properly represent dollars and cents, and is not money; is not properly included in the word currency.~~ In this sense national bank-notes, which are not legal tender, are now as much currency as treasury notes, which are legal tender.

This construction of the term currency might, perhaps, properly be extended to the term current funds. It must ex-

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it is therein mentioned. That cannot mean the terms or conditions of payment, as both the original and the amended section declare that the money shall be due and payable as therein expressed; and the words *as therein mentioned*, in the amended section, appear susceptible of no construction except the kind of money therein mentioned.

The learned counsel for the respondent was at the pains of showing that the amended section, as introduced in the legislature, read any sum of money, *in coin or currency*, as therein mentioned; and that the words in coin or currency were stricken out before the passage of the section. And he argued with great force that the legislature had refused to make negotiable paper payable in currency. But the argument would apply as well to coin. It is impossible now to say why the words were stricken out. It may have been because they were considered unnecessary, as this court considers them, to the purpose of the section. It may have been, as was suggested from the bench during the argument, because the legislature feared that the words might restrict the negotiability of instruments to such as should be expressly payable either in coin or in currency. Certainly the meaning of the section is broader without the words than it would have been with them. As it is, it extends negotiability to all instruments payable in money, without reference to the kind of money, unless the kind be mentioned in the instrument itself. In *Platt v. Bank*, Judge Dixon had said: "If the legislature deem it expedient to declare such instruments negotiable, they have the undoubted power to do so." Perhaps the amendment was in answer to that suggestion, and was intended to overrule *Ford v. Mitchell*, *Platt v. Bank*, and *Lindsey v. McClelland*. It was certainly intended to change the statute, and perhaps did change it as now indicated.

The amendment has no further effect on this decision than to relieve the court of the responsibility, and lay it on the legislature, for the amended section in effect declares the law to be what this court declares it was without the amendment.

The negotiability of certificates of deposit is of vast importance in commerce. Their want of negotiability upon slight grounds would go largely to prevent their usefulness in the course of business; and this court considers it far wiser to hold them payable in money, when the terms used will admit of that construction, than to hold them not to be negotiable on the ground of the particular terms used.

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17-444



WARD vs. SMITH

74 U.S. (7 Wall) 207
(1869)

"DISHONORED BANK NOTES"
(Fraud - Not Currency - Not Tender)

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535
MEMORANDUM FOR THE DIRECTOR
SUBJECT: [Illegible]

of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as a part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted a part of their case. The plea of res judicata applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

A party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction. *Brandenbale v. Coeks*, 19 Wend. 207. The judgment at law established conclusively the original validity of the securities described in the bill and the liability of the Town to pay them. Nothing is disclosed in the case which affects this condition of things.

II. The City of Beloit was chartered by the Legislature of Wisconsin in 1850. It embraces a part of the territory which previously belonged to the Town of Beloit. In the 17th section of the charter it is enacted that "All principal and interest upon all bonds which have heretofore been issued by the Town of Beloit for railroad stock or other purposes, when the same or any portion thereof shall fall due, shall be paid by the City and Town of Beloit in the same proportions as if said Town and City were not dissolved," etc.

This provision was re-enacted in 1857 in an Act amending the charter of the City. No bonds were issued in payment for railroad stock but those to a part of which this controversy relates. The language used by the Legislature is clear and explicit. No guess can raise a doubt as to its meaning. It distinctly affirms, and the affirmation is repeated, that the bonds shall be paid.

The only point to be considered is the effect of this provision. "That is not an open question in this court. Whenever it has been presented, the ruling has been that, in cases of bonds issued by municipal corporations, under a statute upon the subject, ratification by the Legislature is in all respects equivalent to original authority, and cures all defects of power if such defects existed, and all irregularities in its execution. *Gelpeke v. Dubuque*, 1 Wall. 220, 18 L. ed. 530; *Thompson v. Lee Co.* 3 Wall. 327, 18 L. ed. 177. The same principle has been applied in the courts of the States. *Wilson v. Hardesty*, 1 Md. Ch. Dec. 66; *Shaw v. Norfolk Co. R. Co.* 5 Gray, 180. This court has repeatedly recognized the validity of private and curative statutes, and given them full effect, where the interests of private individuals were alone concerned, and were largely involved and affected. *Satterlee v. Matthewson*, 2 Pet. 380; *Wilkinson v. Leland*, 2 Pet. 627; *Leland v. Wilkinson*, 10 Pet. 224; *Watson v. Mercer*, 3 Pet. 88; *Charles River Bridge v. War-*

ren Bridge, 11 Pet. 420; *Stanley v. Colt*, 5 Wall. 119, 18 L. ed. 502; *Coxall v. Shererd*, 5 Wall. 268, 18 L. ed. 572. The earlier and more important of these authorities are so well known to the profession, and are so often referred to, that it would be waste of time to comment upon them. We hold this objection also fatal to the appellant's case.

Several other important propositions have been discussed by the learned counsel for the appellee. They have not been considered, and we express no opinion in regard to them.

The decree of the Circuit Court is affirmed.

*WILLIAM WARD and Francis [447
X. Ward, Pliffs. in Err.,

v.
FRANCIS L. SMITH.

(See S. C. 7 Wall. 447-463.)

Effect of designation of place of payment in bond—tender at place—bank, when agent for collection—authority of agent to receive currency in payment—bank notes, when not good tender—bonds due enemy, when draw interest—interest between alien enemies.

The designation of a place of payment in a bond imports a stipulation that its holder should have it at such place when due, to receive payment, and that the obligors would produce there the funds to pay it.

If the instrument be not lodged there, and the obligor is there at its maturity, with the necessary funds to pay it, he cannot be made responsible for any future costs of suit or interest.

When the instrument is lodged with a bank for collection, the bank becomes the agent of the payee or holder to receive payment.

Without special authority, an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value.

A bank is not agent of the payee for collection of bonds not deposited with it, although payable there.

Bank notes not current at their par value, nor redeemable on presentation, are not a good tender to principal or agent, whether they are objected to at the time or not.

A collecting agent can receive for the debt of his principal only legal tender, or money which passes at par.

Bonds drew interest pending the civil war when the principal debtor resided within the lines of the Union forces, and the bonds were there payable, although the creditor was within the Confederate lines.

The rule that interest is not recoverable on debts between alien enemies can only apply when the money is to be paid to the beneficiary directly.

[No. 117.]

Argued Mar. 10, 1869. Decided Mar. 20, 1869.

[N ERROR to the Circuit Court of the United States for the District of Maryland.

This action was brought in the court below, by the defendant in error, to recover the

NOTE.—Suspension of interest during war.
A prohibition of all intercourse with an enemy during a war, furnishes a just reason for the abatement of interest on debts due to subjects of the belligerent. *Conn. v. Penn.* Pet. C. C. 400; *Jackson Ins. Co. v. Stewart*, 8 Am. L. Reg. N. S. 732; *Bezier v. Waller*, 3 Am. L. T. Rev. 157.
This rule does not apply where creditor remains in debtor's country during war or has an agent

amount alleged to be due upon certain bonds. The trial below having resulted in a verdict and judgment for \$14,310, with costs, in favor of the plaintiff, the defendants sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. Arthur G. Brown and F. W. Brune, for plaintiffs in error:

1. When securities are left with a bank for collection, the bank is, ipso facto, made the agent of the payee, to receive payment thereof. It is the agent of the payee, not of the payer.

Grant, Bank., 2 J. 4; Dunt. Paley, Agt., 91, and notes; Pars. Merc. L. 144; Marine Bk. v. Fulton Bk. 2 Wall. 252, 17 L. ed. 785; Marine Bank v. Rushmore, 29 Ill. 463; Smith v. Essex Co. Bk. 22 Barb. 427; Bk. of Wash. v. Triplett, 1 Pet. 25; App. to Rowe v. Young, 2 Brod. & B. 184; 6 Eng. Com. L. 165; Best, J., in Filler v. Beckley, 2 Watts & S. 458.

2. The bank may receive the payer by receiving payment in gold, silver, copper, drafts, or checks on other banks, or private bankers, bank notes of its own or other banks, circulating at or below par.

It matters not what may be the particular kind or forms of money accepted by the bank; its relation of agent towards its principal and the debtor ceases, the moment the funds so received are mingled with its own funds and credit is given on its books for the amount so collected as cash.

The relationship of debtor and creditor from that moment subsists between the bank and its former principal, and the bank is liable for the whole amount so credited.

Edw. Nail, 58; Story, Bail. § 98; Pars. Merc. L. 144; Wallace v. McConnell, 13 Pet. 150, 150; Bk. of U. S. v. Bk. of Ga. 10 Wheat. 333; Levy v. Bk. of U. S. 4 Dall. 234; Marine Bk. v. Birney, 29 Ill. 30; Marine Bk. v. Rushmore, 29 Ill. 463; Tinkham v. Heyworth, 31 Ill. 522; Robison v. Benil, 26 Ga. 17; Marine Bk. v. Fulton Bk. supra; Lowrey v. Murrell, 2 Port. 250; Honore v. Colmesnil, 4 J. J. Marsh. 604, 523; Bk. of Northern Liberties v. Jones, 42 Pa. 337.

3. It was stipulated in the bonds, that they should be payable at the Farmers' Bank; and it was thus made part of the contract that all the bonds should be deposited in that bank by the payee, Smith, at maturity or before, so that the obligors might be able to make payment of them at that bank, according to the law and usage of banks, in making collections and receiving payments.

Wallace v. McConnell, 13 Pet. 150; Filler v.

there authorized to receive the debt. Conn. v. Pean, Pet. C. C. 469; Denniston v. Imbrie, 3 Wash. 396; Lamb v. Lambert, 15 Minn. 416, 2 Am. Rep. 142.

Nor does it apply; if an account contains a charge for interest during war and there is, after peace, a promise to pay the amount, or the account is in fact or law a settled account from which a promise results by operation of law. Dainbridge v. Willcocks, Bald. 336.

Interest is not allowed during the time the right of action is suspended by war. Mayer v. Reed, 37 Ga. 482; Seiden v. Preston, 11 Bush. 191; Begler v. Waller, 3 Am. L. T. Rep. 167.

Interest on loans made previous to and maturing after the commencement of war, ceases to run during the subsequent continuance of the war, although interest was stipulated in the contract.

Beckley, 2 Watts & S. 458; Brabston v. Gibson, 9 How. 203; Swift v. Hathaway, 1 Gall. 417.

4. Finally, the plaintiffs in error contend that the court below erred in instructing the jury that the plaintiffs in error were not entitled to the benefits of any of the credits or payments, either at their par or actual value, except the three credits mentioned in said instruction; and in holding plaintiffs in error liable for interest on the entire balance during the war.

Jackson Ins. Co. v. Stewart, 17 Am. Law Reg. (6 N. S.) 732, and note 735; Tucker v. Watson, 17 Am. Law Reg. 6 N. S. 220; Brewer v. Hastie, 3 Call. (Va.) 22; Hoars v. Allen, 2 Dall. 102; Foxcroft v. Nagle, 2 Dall. 132; Letter of Mr. Jefferson, 1 Am. St. Pap. 257, 304-312; Code of Va. 1860 tit. 18, ch. 53, p. 343, §§ 15, 16.

Messrs. R. J. and J. L. Brent, for defendant in error:

The question simply is, whether a debtor on three notes payable at a particular bank, where only one of the notes is left for collection, has a right to deposit depreciated notes of suspended banks in payment for one or all these notes.

The very statement of the question would seem to furnish its own answer.

So far as relates to the first note which was deposited for collection, the bank may have had an implied authority to collect in currency; but that did not authorize a receipt of notes of insolvent banks.

13 Wend. 101.

Chief Justice Holt declared, in Ward v. Evans, 2 Ld. Raym. 930, that "Where a servant is sent to receive money on a bill, he cannot accept a note instead of money without the particular directions of his master."

He further decided that, "If the master returns the note which his servant has taken, it is no payment."

To the same effect is Story, Ag. § 99, 101.

The principle of the case in 13 Wend. 105, so far as it ignores the scienter of the party paying current bank notes in ignorance of the stoppage of the bank, seems to be sanctioned by the courts of Me., Vt., and N. H.

22 Me. 88; 11 Vt. 576; 6 N. H. 362.

This is held to be the true doctrine.

2 Pars. N. 100, and notes; Story, Prom. N. § 359, note 2.

But it is denied in Pa., Tenn., Va., La., and Mass.

See Smith, Merc. L. 528, n. ch. 13, § 2.

But in our case, the scienter is not only shown by the stipulation of the parties as to the notorious depreciation of Virginia funds in

Brown v. Hlatka, 15 Wall. 177; Walker v. Beauchler, 27 Gratt. 511; Fred v. Dixon, 27 Gratt. 511.

Where the holder of a note parted with it before it fell due, entered the army of the other power, and after his return became repossessed of the note, which was then long past due, the maker during the whole time continuing a resident of the State, the holder recovered interest during the war. Thomas v. Hunter, 29 Md. 100.

Where a creditor resided within the territory of one and the debtor within the territory of the other of the belligerent powers, such debtor is, under the rules of public law, entitled to an abatement of interest during the war lasted. Roberts v. Cooke, 28 Gratt. 207; McVeigh v. Bk of Old Dow, 25 Gratt. 188.

the market, but by the evidence of the defendant, Ward, that he had purchased this paper at a large discount for the special purpose of making this payment.

There can be no doubt that a bank receiving notes for collection is agent for the owner, but only pro hac vice to receive payment in money, and when that is collected, the debtor is discharged. This principle explains 22 Barb. 627, and cognate cases.

Here, all the authority is to collect the note according to its tenor, and being payable in dollars on its face, there is no authority to take anything which is not dollars, or at least notes of solvent banks, current as money:

13 Iowa, 250.

Again; upon the conceded facts in this case, the defendant, Ward, knew that the bank held his note, payable in dollars, and that he was offering and the officers of the bank were receiving, less than dollars.

The holder, Smith, was not bound by this improper tender or deposit, until he had an opportunity to accept or reject.

Sloan v. Petric, 16 Ill. 262.

Interest was legally due on all these notes.

The first note matured in February, 1861, and the defendants failed to pay it, although it remained overdue, and in the Federal lines during the whole war.

All liquidated demands bear interest in law. 7 Wend. 109; 20 Wend. 151; Sipperly v. Stewart, 50 Barb. 82.

But it will be argued that interest is suspended during the war because Smith, the legal holder, was in the Confederate lines.

All the learning in favor of this proposition will be found embodied in the following cases: Tucker v. Watson, 6 Am. Law Reg. (N. S.) 223; Hanger v. Abbott, 6 Wall. 636, 18 L. ed. 941.

To apply such a principle to this case would be grossly unjust, because Ward was the vendor, in full possession of the land in payment of which these notes were given.

In such a case the courts of Va. have held that interest will run, though the payment of the principal was delayed by an adverse claim:

Selden v. James, 6 Rand. 405; Brockenbrough v. Blythe, 3 Leigh, 619; Oliver v. Hallam, 1 Grt. 293.

In this case the principal debtor, Ward, could have protected himself from interest by paying the money at Alexandria, where it was made payable, and which was in the lines. The property sold and the place of payment were all on this side of the belligerent lines, and Smith but a naked trustee.

Surely Ward ought to pay interest, as an equivalent for the use of the land. But one of the makers, Francis X. Ward, was with the plaintiff, Smith, on the other side of the lines, and in such a case the interest runs, as decided in Paul v. Christie, 4 H. & Mell. 161.

No principle of public policy was contravened if Ward had paid or tendered the money at the office of the Farmers' Bank at Alexandria, because the agent and himself were both in the Federal jurisdiction; and the reason of the rule prohibiting intercourse with the enemy applied as between Mr. Marbury, the cashier, and Mr. Smith, inhibiting any intercourse between them, and to the relation of Ward and the bank. This is clear upon authority.

7 WALL.

U. S., BOOK 19.

Conn. v. Pa. Pat. (C. C.) 496; Denniston v. Lubric, 3 Wash. (C. C.) 399.

Mr. Justice Field delivered the opinion of the court:

In August, 1860, the defendant, William Ward, purchased of the plaintiff, then administrator of the estate of William Leggett, deceased, certain real property, situated in the State of Virginia, and gave him for the consideration money, the three joint and several bonds of himself and co-defendant, upon which the present action is brought. These bonds, each of which is for a sum exceeding \$4,000, bear date on the 22d of that month, payable with interest, in six, twelve and eighteen months after date, "at the office of discount and deposit of the Farmers' Bank of Virginia, Alexandria."

In February, 1861, the first bond was [\$448 deposited at the bank designated for collection. At the time there was indorsed upon it a credit of over \$500, and it is admitted that subsequently the further sum of \$2,500 was received by the plaintiff, and that the amount of certain taxes on the estate purchased, paid by the defendants, is to be deducted.

In May, 1861, the plaintiff left Alexandria, where he then resided, and went to Prince William County and remained within the Confederate military lines during the continuance of the civil war. He took with him the other two bonds which were never deposited at the Farmers' Bank for collection. Whilst he was thus absent from Alexandria, the defendant, William Ward, deposited with the bank to his credit, at different times between June, 1861, and April, 1862, various sums in notes of different banks of Virginia, the nominal amount of which exceeded by several thousand dollars the balance due on the first bond. These notes were at a discount at the times they were deposited, varying from eleven to twenty-three per cent. The cashier of the bank indorsed the several sums thus received as credits on the first bond; but he testifies that he made the indorsement without the knowledge or request of the plaintiff. It was not until June, 1863, that the plaintiff was informed of the deposits to his credit, and he at once refused to sanction the transaction and accept the deposits, and gave notice to the cashier of the bank and the defendants of his refusal. The cashier thereupon erased the indorsements made by him on the bond.

The defendants now claim that they are entitled to have the amounts thus deposited and indorsed, credited to them on the bonds, and allowed as a set-off to the demand of the plaintiff. They make this claim upon these grounds: that by the provision in the bonds, making them payable at the Farmers' Bank in Alexandria, the parties contracted that the bonds should be deposited there for collection either before or at maturity; that the bank was thereby constituted, whether the instruments were or were not deposited with it, the agent of the plaintiff for their collection; and that as such agent it could receive in payment, equally with gold and silver, the notes of any banks, whether circulating at par or below par, and discharge the obligors.

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We do not state these grounds in the precise language of counsel, but we state them substantially.

It is immaterially true that the depositaries of the bank of payment... that their bonds should have been... that the bank... (51*)... the interest... in such cases... the bank... and the party... agreement... there... if the... just... be not... longer... and the... obligation... of the... maturity... funds... to... the... contract... that... not... be made... responsible... for... any... loss... incurred... either... as... a... result... of... the... delay... which... the... interest... is... due... to... the... bank... for... collection... the... agent... of... the... bank... is... authorized... to... receive... the... money... without... special... authority... and... need... only... make... payment... of... the... debt... due... the... principal... in... the... local... currency... of... the... country... in... which... the... bonds... were... made... payable... by... the... common... consent... of... the... community... in... the... case... of... the... bank... the... bond... was... deposited... with... the... Farmers... Bank... That... instruction... therefore... was... given... to... the... agent... for... its... collection... It... had... no... authority... to... receive... payment... of... the... other... bonds... for... which... the... agent... was... authorized... to... receive... payment... The... rule... may... have... received... from... the... obligors... to... be... applied... on... the... other... bonds... if... received... by... the... agent... not... the... agent... of... the... obligor... If... the... notes... have... depreciated... since... their... issue... the... rule... may... not... be... applied... between... the... bank... and... the... depositor... it... cannot... fall... upon... the... holder... of... the... bond.

But even as agents of the payee of the first bond... the bank... did not... authorize... to... receive... in... its... payment... depreciated... notes... of... the... banks... of... Virginia... The... fact... that... these... notes... constituted... the... principal... currency... in... which... the... ordinary... transactions... of... business... were... conducted... in... that... country... cannot... alter... the... law... The... notes... were... not... a... legal... tender... for... the... debt... until... they... have... been... sold... for... the... amount... due... in... legal... tender... The... doctrine... that... bank... bills... are... a... legal... tender... is... not... subject... to... at... the... time... on... the... ground... that... they... are... not... money... only... applies... to... current... bills... which... are... received... of... the... counter... of... the... bank... on... presentation... and... pass... at... par... in... business... transactions... at... the... place... where... offered... Notes... not... thus... received... at... their... place... of... issue... (52*)... admissible... on... presentation... are... not... good... tender... to... principal... or... agent... whether... they... are... subject... to... at... the... time... or... not.

In Ontario Bank v. Lightbody, 13 Wend. 105, it was held that the payment of a check in the bill of a bank which had previously suspended was not a satisfaction of the debt, though the suspension was unknown by either of the parties, and the bill was current at the time, the court observing that the bills of banks could only be considered and treated as money so long as they are redeemed by the bank in specie.

That the power of a collecting agent, by the general law, is limited to receiving for the debt of his principal that which the law declares to be a legal tender, or which is by con-

mon consent considered and treated as money, and passes as such at par, is established by all the authorities. The only condition they impose upon the principal, if anything else is received by his agent, is, that he shall inform the debtor that he refuses to sanction the unauthorized transaction within a reasonable period after it is brought to his knowledge. Story, Prom. N. §§ 115, 390; Graydon v. Patterson, 13 Iowa, 256; Ward v. Evans, 2 Ld. Raym. 930; Howard v. Chapman, 4 Carr. & P. 503.

The objection that the bonds did not draw interest... is not... tenable... The... interest... which... was... paid... to... the... principal... debtor... and... he... resided... within... the... lines... of... the... Union... forces... and... the... bonds... were... there... payable... It... is... not... necessary... to... consider... whether... the... rule... that... interest... is... not... recoverable... on... debts... between... alien... enemies... during... war... of... their... respective... countries... is... applicable... to... debts... between... citizens... of... States... in... rebellion... and... citizens... of... States... adhering... to... the... National... Government... in... the... late... civil... war... This... rule... can... only... apply... when... the... money... is... to... be... paid... to... the... obligor... directly... When... an... agent... appointed... to... receive... the... money... resides... within... the... same... jurisdiction... with... the... debtor... the... latter... cannot... justify... his... refusal... to... pay... the... demand... and... of... course... the... interest... which... it... bears... It... does... not... follow... that... the... agent... if... he... receive... the... money... will... violate... the... law... by... remitting... it... to... his... alien... principal... "The... rule,"... says... Mr. Justice... Washington... in... Conn. v. Penn... "can... never... apply... in... cases... where... the... creditor... although... a... subject... of... the... enemy... remains... in... the... country... of... the... debtor... or... has... a... known... agent... there... authorized... to... receive... the... debt... because... the... payment... to... such... creditor... or... his... agent... could... in... no... respect... be... construed... into... a... violation... of... the... duties... imposed... by... a... state... of... war... upon... the... debtor... The... payment... in... such... cases... is... not... made... to... an... enemy... and... it... is... no... objection... that... the... agent... may... possibly... remit... the... money... to... his... principal... If... he... should... do... so... the... offense... is... imputable... to... him... and... not... to... the... person... paying... him... the... money... 1 Pet. (C. C.) 406; Denniston v. Imbrie, 4 Wash. (C. C.) 395. Nor... can... the... rule... apply... when... one... of... several... joint... debtors... resides... within... the... same... country... with... the... creditor... or... with... the... known... agent... of... the... creditor... It... was... so... held... in... Paul v. Christie, 4 Carr. & Mell. 161.

Here the principal creditor resided, and the agent of the creditor for the collection of the first bond was situated within the Federal lines and jurisdiction. No rule respecting intercourse with the enemy could apply as between Marbury, the cashier of the bank at Alexandria, and Ward, the principal debtor residing at the same place.

The principal debtor being within the Union lines could have protected himself against the running of interest on the other two bonds, by attending on their maturity at the bank, where they were made payable, with the funds necessary to pay them. If the creditor within the Confederate lines had not, in that event, an agent present to receive payment and surrender the bonds, he would have lost the right to claim subsequent interest.

Judgment affirmed.

HOWE vs. HARTNESS, HILL & Co.

11 Ohio 449
(1860)

"BANK BILLS"

(Promises To Pay - Not Tender - Cannot Compel Acceptance)

1969

1969

"BANK FIELD"

(Promises to Pay - Not Tender - Cannot Compel Acceptance)

This view of the case overrules the demurrer to the cross-petition.

Demurrer to cross-petition overruled, and cause remanded, with leave to plaintiff to answer cross-petition.

SCOTT, SCRIFFF, PECK, and GHOLSON, JJ., concurred.

POWER OF COURT OF EQUITY TO CORRECT MISTAKE IN DEED: See *Lettersdorfer v. Deiply*, 35 Am. Dec. 137, and note. Mistake in description of premises in deed construction: *Wain v. Proprietors*, 38 Id. 354; *Clark v. Munyan*, 33 Id. 752. Correction of mistake in mortgage: *Ames v. N. J. F. Co.*, 72 Id. 365.

THE PRINCIPAL CASE IS CITED IN *Conover v. Porter*, 14 Ohio St. 454, as to construction of registry act. And in support of the doctrine of *stare decisis* is cited in *Widdie v. Sims*, 35 Id. 36; *Arrowsmith v. Harmoning*, 42 Id. 251. It is cited to the point that a mortgage has no effect, under the statute, either in law or equity, as against subsequently acquired liens, until its execution according to the statute, and its delivery to the recorder of the proper county for record, in *Juday v. Iron Co.*, 38 Id. 312; and in *Fleeman v. Donnel*, 40 Id. 293, to the point that if the name of the grantee be omitted from a mortgage by mistake or inadvertence, the defect may be corrected by proof.

HOWE v. HARTNESS, HILL, & Co.

[11 OHIO STATE 442.]

DEFENDANTS, A BANKING COMPANY, issued a certificate of deposit for four thousand dollars in currency, to plaintiff's debtor, payable in like funds to the order thereof of the depositor, with interest: *Held*, that the certificate is to be regarded as a negotiable promissory note, notwithstanding the term "currency" was deemed at time and place of transaction to include the bank bills of sundry specie-paying banks outside the state, as well as those of the same character within the state.

REASONABLE TIME MUST ELAPSE FOR PURPOSE OF NEGOTIATION, or presentment for payment, before negotiable certificate of deposit will be regarded as overdue, and it will not be so regarded two days after its date, when negotiated to a party receiving it in good faith, for a valuable consideration.

ASSIGNEE OF NEGOTIABLE CERTIFICATE OF DEPOSIT CAN ENFORCE PAYMENT by the maker thereof, and the latter cannot be held liable to an attaching creditor of the depositor.

PLAINTIFF brought suit against one Marzham, a non-resident of the state, and prosecuted the same to final judgment. Writ of attachment was issued, at the commencement of the suit, and garnishee process was served on the defendants by which it was sought to hold a certificate of deposit issued by the defendants to Marzham in the following :
 "Hartness, Hill, & Co., bankers, Cleveland, Ohio, Ma.

1856. — \$4,000. F. C. Markham has deposited in this bank four thousand dollars in currency, payable in like funds, to the order hereon of himself, with inta. Hartness, Hill, & Co." This certificate was negotiated to the Peninsular Bank, in good faith, and for good consideration. The opinion states other facts clearly presenting the case.

S. J. Andrews, and Mason and Estep, for the plaintiff.

Wiley and Carey, for the Peninsular Bank.

H. Griswold, for Hartness, Hill, & Co.

By Court, Scott, C. J. The certificate of deposit issued by the defendants; Hartness, Hill, & Co., to the plaintiff's debtor, contains an unconditional promise to pay to the order of F. C. Markham four thousand dollars in currency, with interest upon presentation of the certificate, either by himself or his assignee. Such is clearly the legal import of its terms; and there can be no doubt that it possesses all the characteristics of a negotiable promissory note, unless the fact that it is payable in currency affects its negotiability. The question, then, is, whether a note drawn for a specified sum payable in currency is a note drawn for a sum of money, within the meaning of the statute.

In *Dugan v. Campbell*, 1 Ohio, 115, it was said by the court that the term "currency" means current money; where this interpretation is not controlled by the positive terms of the contract.

~~This authority might, perhaps, have justified the court below in excluding evidence explanatory of the term "currency" in this case. But the plaintiff was permitted to show that the term "currency," at the time and place of the contract, was understood to mean bank bills of sundry specie-paying banks, which were then received and paid out by the banks in Cleveland, and he claims that bank bills are not money. The question, then, is, Can bank bills of specie-paying banks, which circulate through community as and for money, and perform all its offices, be considered by courts as money, within the meaning of the statute? Unquestionably, they are, strictly speaking, but promises to be money. They are not a legal tender. No one can be compelled to receive them as money. But we cannot shut our eyes to the fact that in the commercial and business transactions of every day life, they circulate as money throughout the commun. and are~~

by general consent and usage, so treated and received. In the language of Lord Mansfield, in *Miller v. Race*, 1 Burr. 457, "they are not like bills of exchange, mere securities, or documents for debts, nor are so esteemed; but are treated as money in the ordinary course and transaction of business by the general consent of mankind; and on payment of them, when a receipt is required, the receipts are always given as for money, not as for securities or notes." In New York, it has been held that a note payable in York state bills was the same as being made payable in money: *Feist v. Jones*, 9 Johns. 120. And in *Judah v. Harris*, 19 Id. 144, it was held that a note payable in bank notes current in the city of New York, was a negotiable note. Upon this question, it is true, conflicting decisions are to be found.

But in Ohio it has been quite uniformly held that promissory notes may be negotiable, though payable in current bank bills, and that such bills are money, within the meaning of the statute. In *Morris v. Edwards*, 1 Ohio, 189, it was held that a contract to pay two thousand dollars in current bank notes of the city of Cincinnati is a contract to pay money; and in that case, it was said by Judge Hitchcock that "a note drawn for a sum certain, payable in bank paper, is negotiable." The question was pretty fully considered in that case, which may be regarded as a leading one on the subject in this state. The same principle was followed, and controlled the decisions in the subsequent cases of *Sweetland v. Creigh*, 15 Id. 113, and *White v. Richmond*, 16 Id. 5; in the former of which, it was held that a note payable in current Ohio bank notes is a note payable in money; and in the latter, that a note payable in current funds of the state of Ohio is a note for a sum certain, within the meaning of the statute, and negotiable. And the reasoning of the court in all these cases makes the rule applicable not merely to Ohio bank bills, but to all such bank notes as, by general usage and consent, are regarded by community as money. In the case last cited, it was said by Judge Birchard, delivering the opinion of the court, "the supreme court of this state have, on the circuit, repeatedly held that a note payable in current bank notes was payable in money, and negotiable; and the authority of our own court, for many years, should not be departed from, when no evil is seen to grow out of its adjudications on this subject."

On a question affecting the character of commercial paper,

tions, and ignore the general understanding of the business community. And so long as the general consent of mankind, in all business transactions, gives to current bank bills the character of money, we see no good reason why courts, when the question is presented in a commercial point of view, should regard them otherwise.

But it is claimed that the certificate, if negotiable, was overdue when negotiated to the Peninsular Bank. This position, we think, cannot be maintained. In England, a promissory note, payable on demand, with interest, does not become overdue by mere lapse of time: *Barough v. White*, 4 Barn. & Cress. 325; S. C., 10 Eng. Com. L. 345. But in this country, a note payable on demand, unless indorsed within a reasonable time, is considered as overdue and dishonored. What shall be regarded as reasonable time must depend to a great extent on circumstances. In *Ranger v. Cary*, 1 Met. (Mass.) 369, it was held that one month would not be unreasonable time. In the present case, the certificate was drawn bearing interest, showing that immediate presentation for payment was not contemplated by the parties. It was drawn and dated at Cleveland, and negotiated by the payee to the Peninsular Bank, at Detroit, where the payee resided, on the second day after its date. It could not have been offered for negotiation at Detroit earlier than the preceding day. There was clearly no such lapse of time as should have put the Peninsular Bank upon inquiry, or would justify a court in regarding the paper as overdue when negotiated.

The facts stated in the answer of the garnishees in the attachment suit, and which the court below has found to be true, clearly show that at the time of service of process upon them under the attachment proceedings, the certificate had passed completely beyond their control. It had been deposited in the post-office, in an envelope directed to Markham, the payee, in pursuance of his orders. This was, in law, a delivery to him, and the certificate thereby became his absolute property. It is true that Hartness, Hill, & Co., the garnishees, were, at the time, indebted to Markham; but their indebtedness was evidenced by a negotiable promissory note, then in his possession, and which, within a reasonable time, he might transfer so that his assignee would have the right to demand and enforce its payment by the makers. It was so negotiated by the payee, within two days after its date, and received by the Peninsular Bank in the regular course of business, in good faith, and for

a valuable consideration. As such assignee, the Peninsular Bank was not chargeable with constructive notice of the proceedings in attachment then pending. In the case of *Stone v. Elliott*, 11 Ohio St. 252, we have held that the doctrine of *pendens* does not apply to negotiable paper before due. And the garnishees being, therefore, liable to the assignee, the court below properly held that they could not be made liable to account for the same debt to the attaching creditor, under the section 205 of the code.

Judgment of the court below affirmed.

SCHUYLER, PUGH, GARDNER, and BARKERHOFF, JJ., concurred.

THE REVERSAL CASE IS MADE IN *Stone v. Elliott*, 11 Ohio St. 252, to the point that the assignee of the plaintiff in attachment is liable to be discharged by one who, before due, without actual notice of the proceedings in attachment, becomes the bona fide holder of a negotiable instrument.

FRUIT V. SANDERS.

IN OHIO STATE COURTS.

A DEED WAS CONVEYED INTO POSSESSION OF LAND UNDER AGREEMENT TO purchase from B, the owner, and made valuable improvements in 1843. In 1849 he executed a mortgage of the land to C, to secure the payment of a note made to C for six hundred dollars payable in 1850. In 1851 he received a deed of conveyance in fee from B, and in 1854 executed a mortgage of the land to D, to secure the payment of a note made by him for one thousand eight hundred dollars. Deeds were all duly recorded. The mortgages not being paid, and the lands being insufficient to satisfy both mortgages. Held: 1. That mortgage to C, as between the parties, conveyed to C the legal possessory right of the grantor, and his equitable interest in the lands; 2. Upon execution of the deed by B to A, the fee so conveyed to A, by estoppel arising from his prior deed of warranty in fee to C, inured to C, who, as between the parties, thereby became vested with the fee; 3. That the obligation of estoppel became to C a muniment of title, adhering to and transmissible with the land, and obligatory upon the grantees of A, as well as upon his heirs; 4. That the deed to C, having priority of record of the deed to D, was entitled to the same respect in law and equity as against D that it was entitled to against B, his grantor.

Civil action. Reserved in district court of Warren county upon an agreed statement of facts. The case is stated in head-note, and opinion.

J. K. O'Neall, for the plaintiff.

Dustin Ward, J. D. Wallace, and Lauren Smith, for the de-

JANUARY, 1792.]

Proceedings.

[SENATE.]

Sec. 4. *And be it further enacted*, That any person who shall declare falsely in any oath or affirmation required by this act, being duly convicted thereof in any court of the United States having jurisdiction of such cases, shall suffer the same penalties as are provided to him swearing by the act before mentioned, and to be in the manner sued for, recovery, and appropriation.

Sec. 9. *And be it further enacted*, That this act shall continue and be in force for the term of seven years, and from thence to the end of the next session of Congress.

The bill establishing a Mint, and regulating the coins of the United States, was taken up, and, *Ordered*, That the further consideration thereof be postponed until to-morrow.

THURSDAY, JANUARY 12.

The Senate resumed the consideration of "the bill establishing a Mint, and regulating the coins of the United States;" and, after agreeing further to amend the same.

Resolved, That this bill pass; that the title thereof be "An act establishing a Mint, and regulating the coins of the United States;" that it be engrossed; and that the Secretary desire the concurrence of the House of Representatives therein.

The bill is as follows:

An Act establishing a Mint, and regulating the coins of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, and it is hereby enacted and declared, That a mint, for the purpose of a national coinage, be, and the same be established, to be situate and carried on at the seat of the Government of the United States, for the time being; and that, for the well conducting of the business of the said mint, there shall be the following officers and persons, namely:

A Director, an assayer, a chief coiner, an engraver, a treasurer.

Sec. 2. *And be it further enacted*, That the director of the mint shall employ as many clerks, workmen, and servants, as he shall, from time to time, find necessary, subject to the approbation of the President of the United States.

Sec. 3. *And be it further enacted*, That the respective functions and duties of the officers above mentioned shall be as follow. The director of the mint shall have the chief management of the business thereof, and shall superintend all other officers and persons who shall be employed therein. The assayer shall receive and give receipts for all metals which may lawfully be brought to the mint to be coined; shall assay all such of them as may require it; and shall deliver them to the chief coiner, to be coined. The chief coiner shall cause to be coined all metals which shall be received by him for that purpose, according to such regulations as shall be provided by this or any future law. The engraver shall cut and prepare the necessary dies for such coinage, with the proper devices and inscriptions; but it shall be lawful for the functions and duties of chief coiner and engraver to be performed by one person. The treasurer shall receive from the chief coiner all the coins which shall have been struck, and shall pay or deliver them to the persons respectively to whom the same ought to be

paid or delivered: he shall, moreover, receive and safely keep all moneys which shall be for the use, maintenance, and support of the mint, and shall disburse the same upon warrants signed by the director.

Sec. 4. *And be it further enacted*, That every officer and clerk of the said mint shall, before he enters upon the execution of his office, take an oath or affirmation, before some Judge of the United States, faithfully and diligently to perform the duties thereof.

Sec. 5. *And be it further enacted*, That the said assayer, chief coiner, and treasurer, previously to entering upon the execution of their respective offices, shall each become bound to the United States of America, with one or more sureties, to the satisfaction of the Secretary of the Treasury, in the sum of ten thousand dollars, with condition for the faithful and diligent performance of the duties of his office.

Sec. 6. *And be it further enacted*, That there shall be allowed and paid, as compensations for their respective services:

To the said director, a yearly salary of two thousand dollars;

To the said assayer, a yearly salary of fifteen hundred dollars;

To the said chief coiner, a yearly salary of fifteen hundred dollars;

To the said engraver, a yearly salary of twelve hundred dollars;

To the said treasurer, a yearly salary of twelve hundred dollars;

To each clerk, who may be employed, a yearly salary not exceeding five hundred dollars; and, to the several subordinate workmen and servants, such wages and allowances as are customary and reasonable, according to their respective stations and occupations.

Sec. 7. *And be it further enacted*, That the accounts of the officers and persons employed in and about the said mint, and for services performed in relation thereto, and all other accounts concerning the business and administration thereof, shall be adjusted and settled in the Treasury Department of the United States; and a quarterly yearly account of the receipts and disbursements of the said mint shall be rendered at the said Treasury for settlement, according to such forms and regulations as shall have been prescribed by that department; and that once in each year a report of the transactions of the said mint, accompanied by an abstract of the settlements which shall have been from time to time made, duly certified by the Comptroller of the Treasury, shall be laid before Congress for their information.

Sec. 8. *And be it further enacted*, That, in addition to the authority vested in the President of the United States, by a resolution of the last session, touching the engaging of artists, and the procuring of apparatus for the said mint, the President be authorized, and he is hereby authorized, to cause to be provided and put in proper condition such buildings, and in such manner as shall appear to him requisite for the purpose of carrying on the business of the said mint; and that as well the expenses which shall have been incurred pursuant to the said resolution, as those which may be incurred in providing and preparing the said buildings, and all other expenses which may hereafter accrue for the maintenance and support of the said mint, and in carrying on the business thereof, over and above the sums which may be received by reason of the rate per centum for coinage hereinafter mentioned, shall be defrayed from the Treasury of the United States, out of any moneys which, from time to time, shall be therein, not otherwise appropriated.

Sec. 9. And be it further enacted. That there shall be, from time to time, struck and coined at the said mint, coins of gold, silver, and copper, of the following denominations, values, and descriptions, viz:

Eagles; each to be of the value of ten dollars or units, and to contain two hundred and forty-seven grains and four-eighths of a grain of pure, or two hundred and seventy-five grains of standard, gold.

Half eagles; each to be of the value of five dollars, and to contain one hundred and twenty-three grains and six-eighths of a grain of pure, or one hundred and thirty-five grains of standard, gold.

Quarter eagles; each to be of the value of two dollars and a half dollar, and to contain sixty-one grains and seven-eighths of a grain of pure, or sixty-seven grains and four-eighths of a grain of standard, gold.

Dollars, or units; each to be of the value of a Spanish milled dollar as the same is now current, and to contain three hundred and seventy-one grains and four-sixteenth parts of a grain of pure, or four hundred and sixteen grains of standard, silver.

Half dollars; each to be of half the value of the dollar or unit, and to contain one hundred and eighty-five grains and ten-sixteenth parts of a grain of pure, or two hundred and eight grains of standard, silver.

Quarter dollars; each to be of one-fourth the value of the dollar or unit, and to contain ninety-two grains and thirteen-sixteenth parts of a grain of pure, or one hundred and four grains of standard, silver.

Dimes; each to be of the value of one-tenth of a dollar or unit, and to contain thirty-seven grains and two-sixteenth parts of a grain of pure, or forty-one grains and three-fifth parts of a grain of standard, silver.

Half dimes; each to be of the value of one-twentieth of a dollar, and to contain eighteen grains and nine-sixteenth parts of a grain of pure, or twenty grains and four-fifth parts of a grain of standard, silver.

Cents; each to be of the value of the one-hundredth part of a dollar, and to contain eleven pennyweights of copper.

Half cents; each to be of the value of half a cent, and to contain five pennyweights and one-half pennyweight of copper.

Sec. 10. And be it further enacted. That, upon the said coins, respectively, there shall be the following devices and legends, namely: Upon one side of each of the said coins there shall be an impression or representation of the head of the President of the United States for the time being, with an inscription which shall express the initial or first letter of his Christian or first name, and his surname at length, the succession of the Presidency numerically, and the year of the coinage; and upon the reverse of each of the gold and silver coins there shall be the figure or representation of an eagle, with this inscription—"United States of America;" and upon the reverse of each of the copper coins, there shall be an inscription which shall express the denomination of the piece, namely, cent, or half cent, as the case may require.

Sec. 11. And be it further enacted. That the proportional value of gold to silver, in all coins which shall by law be current as money within the United States, shall be as fifteen to one, according to quantity in weight, of pure gold or pure silver; that is to say, every fifteen pounds weight of pure silver shall be of equal value in all payments, with one pound weight of pure gold, and so in proportion as to any greater or less quantities of the respective metals.

Sec. 12. And be it further enacted. That the standard for all gold coins of the United States shall be eleven

parts fine to one part alloy; and accordingly that eleven parts in twelve of the entire weight of each of the said coins shall consist of pure gold, and the remaining one-twelfth part of alloy; and the said alloy shall be composed of silver and copper, in such proportions, not exceeding one half silver, as shall be found convenient; to be regulated by the director of the mint for the time being, with the approbation of the President of the United States, until further provision shall be made by law. And to the end that the necessary information may be had in order to the making of such further provision, it shall be the duty of the director of the mint, at the expiration of a year after commencing the operations of the said mint, to report to Congress the practice thereof during the said year, touching the composition of the alloy of the said gold coins, the reasons for such practice, and the experiments and observations which shall have been made concerning the effects of different proportions of silver and copper in the said alloy.

Sec. 13. And be it further enacted. That the standard for all silver coins of the United States shall be fourteen hundred and eighty-five parts fine to one hundred and seventy-nine parts alloy; and accordingly that fourteen hundred and eighty-five parts in sixteen hundred and sixty-four parts of the entire weight of each of the said coins shall consist of pure silver, and the remaining one hundred and seventy-nine parts of alloy; which alloy shall be wholly of copper.

Sec. 14. And be it further enacted. That it shall be lawful for any person or persons to bring to the said mint gold and silver bullion, in order to their being coined; and that the bullion so brought shall be there assayed and coined as speedily as may be after the receipt thereof, and that free of expense to the person or persons by whom the same shall have been brought; And as soon as the said bullion shall have been coined, the person or persons by whom the same shall have been delivered, shall, upon demand, receive in lieu thereof coins of the same species of bullion which shall have been so delivered, weight for weight, of the pure gold or pure silver therein contained: *Provided, nevertheless,* That it shall be at the mutual option of the party or parties bringing such bullion, and of the director of the said mint, to make an immediate exchange of coins for standard bullion, with a deduction of one-half per cent. from the weight of the pure gold, or pure silver, contained in the said bullion, as an indemnification to the mint for the time which will necessarily be required for coining the said bullion, and for the advance which shall have been so made in coins. And it shall be the duty of the Secretary of the Treasury to furnish the said mint, from time to time, whenever the state of the Treasury will admit thereof, with such sums as may be necessary for effecting the said exchanges, to be replaced as speedily as may be, out of the coins which shall have been made of the bullion for which the money so furnished shall have been exchanged; and the said deduction of one-half per cent. shall constitute a fund towards defraying the expenses of the said mint.

Sec. 15. And be it further enacted. That the bullion which shall be brought as aforesaid to the mint to be coined, shall be coined, and the equivalent thereof in coins rendered, if demanded, in the order in which the said bullion shall have been brought or delivered, giving priority according to priority of delivery only, and without preference to any person or persons; and if any preference shall be given contrary to the direction aforesaid, the officer by whom such undue preference shall be given, shall, in each case, forfeit and pay one thousand dollars, to be recovered with costs of suit. And to

the end that it may be known if such preference shall at any time be given, the assayer or officer to whom the said button shall be delivered to be coined, shall give to the person or persons bringing the same a memorandum in writing under his hand, denoting the weight, fineness, and value thereof, together with the day and order of its delivery into the mint.

Sec. 16. *And be it further enacted*, That all the gold and silver coins which shall have been struck at, and issued from, the said mint, shall be a lawful tender in all payments whatsoever: those of full weight according to the respective values hereinbefore declared, and those of less than full weight at values proportional to their respective weights.

Sec. 17. *And be it further enacted*, That it shall be the duty of the respective officers of the said mint, carefully and faithfully to use their best endeavors that all the gold and silver coins which shall be struck at the said mint shall be, as nearly as may be, conformable to the several standards and weights aforesaid, and that the copper, whereof the cents and half cents aforesaid may be composed, shall be of good quality.

And the better to secure a due conformity of the said gold and silver coins to their respective standards,

Sec. 18. *Be it further enacted*, That, from every separate mass of standard gold or silver, which shall be made into coins at the said mint, there shall be taken, set apart by the treasurer, and reserved in his custody, a certain number of pieces, not less than three; and that once in every year the pieces so set apart and reserved shall be assayed under the inspection of the Chief Justice of the United States, the Secretary and Comptroller of the Treasury, the Secretary for the Department of State, and the Attorney General of the United States, (who are hereby required to attend, for that purpose, at the said mint, on the last Monday in July in each year,) or under the inspection of any three of them, in such manner as they, or a majority of them, shall direct, and in the presence of the director, assayer, and chief coiner, of the said mint; and if it shall be found that the gold and silver so assayed shall not be inferme to their respective standards hereinbefore declared, more than one part in one hundred and forty four parts, the officer or officers of the said mint, whom it may concern, shall be held excusable; but if any greater infermity shall appear, it shall be certified to the President of the United States, and the said officer or officers shall be deemed disqualified to hold their respective offices.

~~Sec. 19. And be it further enacted, That the assayer or officer to whom the said button shall be delivered to be coined, shall give to the person or persons bringing the same a memorandum in writing under his hand, denoting the weight, fineness, and value thereof, together with the day and order of its delivery into the mint.~~

Sec. 20. *And be it further enacted*, That the money of account of the United States shall be expressed in dollars or units, dimes or tenths, cents or hundredths, and mills or thousandths; a dime being the tenth part of a dollar, a cent the hundredth part of a dollar, a mill the thousandth part of a dollar; and that all accounts

in the public offices, and all proceedings in the courts of the United States, shall be kept and had in conformity to this regulation.

FRIDAY, January 13.

The Senate took into consideration the Message of the President of the United States, of the 11th of January; and, after progress, the further consideration thereof was postponed.

MONDAY, January 16.

The Senate then proceeded to the second reading of the bill, sent from the House of Representatives for concurrence, entitled "An act to establish the Post Office and Post Roads within the United States."

Ordered, That this bill be committed to Messrs. BASSETT, BRADLEY, BURN, ELLSWORTH, FEW, FOSTER, HENRY, JOHNSON, IZARD, LANGOON, LEE, MORRIS, RUTHERFORD, and STRONG, to report thereon.

TUESDAY, January 17.

A message from the House of Representatives informed the Senate, that the House of Representatives have agreed to the amendments of the Senate on the bill, entitled "An act to extend the time limited for settling the accounts of the United States with the individual States."

Mr. BURN, from the committee appointed on the bill sent from the House of Representatives for concurrence, entitled "An act for the relief of certain widows, orphans, invalids, and other persons," reported the bill amended; and the report was adopted.

On motion that the bill be postponed, it passed in the negative; whereupon, the Senate proceeded in the second reading of the bill; and, after progress, *Ordered*, that the further consideration thereof be postponed.

The petition of John Harris and others, for the adjustment of an antiquated claim, on account of services during the late war, was read.

Ordered, That it be referred to the Secretary of War, to report thereon to the Senate.

The petition of John M'Vikar, executor of Archibald M'Vikar, for a Legislative act to enable the Auditor and Comptroller of the Treasury to liquidate his account against the United States, for certain supplies during the late war, was read; and,

Ordered, That it be referred to the Secretary of the Treasury, to report thereon to the Senate.

The petition of Christopher Marshall, Jr., and Charles Marshall, was read, praying for encouragement in preparing sal-ammoniac, Glauber's salt, and volatile spirits, having erected a chemical laboratory for those purposes, near the city of Philadelphia.

Ordered, That this petition lie on the table.

The memorial of Hannah Stevens, of Concord, in the State of Massachusetts, wife of Isaac Stevens, mariner, was read, praying that Govern-

copy of any public repository

§ 312. International monetary conference commissioners

Whenever the President of the United States shall determine that the United States should be represented at any international conference called by the United States or any other country with a view to securing by international agreement a fixity of relative value between gold and silver as money by means of a common ratio between these metals, with free mintage at such ratio, he may appoint five or more commissioners to such international conference; and for compensation of said commissioners, and for all reasonable expenses connected therewith, to be approved by the Secretary of State, including the proportion to be paid by the United States of the joint expenses of any such conference, the sum of \$100,000 or so much thereof as may be necessary, is appropriated.

Mar. 3, 1897, c. 376, § 1, 29 Stat. 624.

Historical Note

Codification. Section 2 of the Act of Mar. 3, 1897 authorized the President to call an international conference for the purposes specified in section 1, and to appoint special envoys to such of the nations of Europe as he might designate to

seek an agreement for said purposes. Section 3 repealed previous provisions for appointment of delegates to such international conference similar to those of that act. These sections were omitted, as temporary.

§ 313. International bimetallism

The provisions of sections 146, 313, 314, 320, 406, 408, 411, 429, 455, and 751 of this title and sections 51, 101, 178, and 542 of Title 12, are not intended to preclude the accomplishment of international bimetallism whenever conditions shall make it expedient and practicable to secure the same by concurrent action of the leading commercial nations of the world and at a ratio which shall insure permanence of relative value between gold and silver.

Mar. 14, 1900, c. 41, § 14, 31 Stat. 49.

Historical Note

References in Text. Section 320 of this title, referred to in text, was repealed by Pub.L. 89-81, Title II, § 203(b), July 23, 1965, 79 Stat. 256.

Section 108 of this title, referred to in text, was repealed by Pub.L. 90-200, § 10, Mar. 18, 1968, 82 Stat. 31.

Section 512 of Title 12, referred to in text, related to tax on circulating notes secured by 2 per centum bonds and has been omitted from the Code.

§ 314. Standard unit of value

~~The dollar of gold nine-tenths fine consisting of the weight determined under the provisions of section 621 of this title shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity of value with this stand-~~

§ 321: Standard for silver coins

~~The standard for silver coins of the United States shall be such that of one thousand parts by weight, nine hundred shall be of pure metal and one hundred of alloy. The alloy of the silver coins shall be of copper.~~

R.S. § 3514; Jan. 30, 1934, c. 6, § 5, 48 Stat. 340.

Historical Note

Derivation. Act Feb. 12, 1873, c. 131, § 13, 17 Stat. 426.

Codification. The following words were omitted from the original enactment of this section upon the discontinuance of the coinage of gold under section

315b of this title: "both gold and"
 * * * "The alloy of the gold coins shall be of copper, or of copper and silver; but the silver shall in no case exceed one-tenth of the whole alloy."

Notes of Decisions

1. Judicial notice

Courts will take judicial notice that purchasing power of money since 1917 has been much less than it was in 1912, and that cost of labor, materials, and supplies necessary for operation and maintenance of street railways has

greatly increased. *Hanton v. Belt Line Ry. Corporation*, N.Y. 1925, 45 S.Ct. 534, 268 U.S. 413, 60 L.Ed. 1020.

~~A court will take judicial notice of the worth of a dollar.~~ *Reed v. State*, 1902, 92 N.Y. 321, 60 Neb. 154.

§ 322. Coins prohibited

Except as otherwise authorized by Congress, no coins, either of silver or minor coinage, shall be issued from the Mint other than those of the denominations, standards, and weights set forth in this chapter.

R.S. § 3516; Jan. 30, 1934, c. 6, § 5, 48 Stat. 340.

Historical Note

Derivation. Act Feb. 12, 1873, c. 131, § 17, 17 Stat. 427.

References in Text. "This chapter", referred to in text, means Title 37 of Revised Statutes which is set out in sections 294 and 295 of Title 15, Commerce and Trade, sections 261, 263, 266, 272 to 279, 281, 283, 287, 314, 317, 321, 322, 324, 325, 327 to 332, 334, 335, 340, 341, 343 to 347, 349 to 352, 360, 363 to 365, 368, 369, 371, and 373 to 375 of this title.

Codification. Word "gold" appearing in original enactment of this section has been omitted. The coinage of gold was discontinued and existing gold coins were withdrawn from circulation by section 315b of this title and all laws inconsis-

ent therewith were repealed by section 410 of this title.

Transfer of Functions. All functions of all officers of the Department of the Treasury, and all functions of all agencies and employees of that Department, were transferred, with certain exceptions, to the Secretary of the Treasury, with power vested in him to authorize their performance or the performance of any of his functions, by any of those officers, agencies, and employees, by 1850 Reorg. Plan No. 26, § 1, 2, eff. July 31, 1950, 15 F.R. 4935, 61 Stat. 1280, 1291, set out as a note under section 1001 of this title.

Cross References

Power of President to fix weight of subsidiary coins, see section 821 of this title.

(5/6/91)

Congress, to Mrs. Jesse Owens a gold medal of appropriate design, in recognition of the late Jesse Owens' athletic achievements and humanitarian contributions to public service, civil rights, and international goodwill.

"(b) Design and striking. For purposes of the presentation referred to in subsection (a), the Secretary of the Treasury shall strike a gold medal with suitable emblems, devices, and inscriptions to be determined by the Secretary.

"(c) Authorization of appropriation. There are authorized to be appropriated not to exceed \$20,000 to carry out this section.

"Sec. 2. Duplicate medals.

"(a) Striking and sale. The Secretary of the Treasury may strike and sell duplicates in bronze of the gold medal struck pursuant to section 1 under such regulations as the Secretary may prescribe, at a price sufficient to cover the cost thereof, including labor, materials, dies, use of machinery, and overhead expenses, and the cost of the gold medal.

"(b) Reimbursement of appropriation. The appropriation used to carry out section 1 shall be reimbursed out of the proceeds of sales under subsection (a).

"Sec. 3. National medals.

"The medals struck pursuant to this Act [this note and other note to section] are national medals for purposes of chapter 51 of title 31, United States Code [31 USCS §§ 5101 et seq.]."

Authorization to award congressional gold medal to Andrew Wyeth. Act Nov. 9, 1988, P. L. 100-639, 102 Stat. 3331, provides:

"Section 1. Findings.

"The Congress finds that—

"(1) Andrew Wyeth has created artwork which is undeniably American and internationally admired;

"(2) Andrew Wyeth has received world-wide acclaim for his works including 'Christina's World', 'The Trodden Weed', and 'Wind from the Sea';

"(3) Andrew Wyeth has distinguished himself through his preeminence in the egg tempera technique;

"(4) Andrew Wyeth was chosen by President Kennedy in 1963 as the first artist to receive the Presidential Freedom Award, the country's highest civilian award;

"(5) Andrew Wyeth has received numerous international awards for his works; and

"(6) Andrew Wyeth has made outstanding and invaluable contributions to American art and culture.

"Sec. 2. Congressional gold medal.

"(a) Presentation authorized. The President is authorized to present, on behalf of the Congress, to Andrew Wyeth a gold medal of appropriate design, in recognition of his outstanding and invaluable contributions to American art and culture.

"(b) Design and striking. For purposes of the presentation referred to in subsection (a), the Secretary of the Treasury shall strike a gold medal with suitable emblems, devices, and inscriptions to be determined by the Secretary.

"(c) Authorization of appropriations. Effective October 1, 1987, there are authorized to be appropriated not to exceed \$20,000 to carry out this section.

"Sec. 3. Duplicate medals.

"(a) Striking and sale. The Secretary of the Treasury may strike and sell duplicates in bronze of the gold medal struck pursuant to section 2 under such regulations as the Secretary may prescribe, at a price sufficient to cover the cost thereof, including labor, materials, dies, use of machinery, and overhead expenses, and the cost of the gold medal.

"(b) Reimbursement of appropriations. The appropriation used to carry out section 2 shall be reimbursed out of the proceeds of sales under subsection (a).

"Sec. 4. National medals.

"The medals struck pursuant to this Act are national medals for purposes of chapter 51 of title 31, United States Code [31 USCS §§ 5101 et seq.]."

RESEARCH GUIDE

Am Jur Proof of Facts

5 Am Jur Proof of Facts 3d, Value of Coin Collection, p. 577.

§ 5112. Denominations, specifications, and design of coins

(a) The Secretary of the Treasury may mint and issue only the following coins:

(1)-(6) [Unchanged]

(7) A fifty dollar gold coin that is 32.7 millimeters in diameter, weighs 33.931 grams, and contains one troy ounce of fine gold.

(8) A twenty-five dollar gold coin that is 27.0 millimeters in diameter, weighs 16.966 grams, and contains one-half troy ounce of fine gold.

(9) A ten dollar gold coin that is 22.0 millimeters in diameter, weighs 8.483 grams, and contains one-fourth troy ounce of fine gold.

(10) A five dollar gold coin that is 16.5 millimeters in diameter, weighs 3.393 grams, and contains one-tenth troy ounce of fine gold.

(b) The dollar, half dollar, quarter dollar, and dime coins are clad coins with 3 layers of metal. The 2 identical outer layers are an alloy of 75 percent copper and 25 percent nickel. The inner layer is copper. The outer layers are metallurgically bonded to the inner layer and weigh at least 30 percent of the weight of the coin. The 5-cent coin is an alloy of 75 percent copper and 25 percent nickel. In minting 5-cent coins, the Secretary shall use bars that vary not more than 2.5 percent from the percent of nickel required. Except as provided under subsection (c) of this section, the one-cent coin is an alloy of 95 percent copper and 5 percent zinc. In minting gold coins, the Secretary shall use alloys that vary not more than 0.1 percent from the percent of gold required. The specifications for alloys are by weight.

(c), (d) [Unchanged]

(e) Notwithstanding any other provision of law, the Secretary shall mint and issue, in quantities sufficient to meet public demand, coins which—

(1) are 40.6 millimeters in diameter and weight 31.103 grams;

(2) contain .999 fine silver;

(3) have a design—

(A) symbolic of Liberty on the obverse side; and

(B) of an eagle on the reverse side;

(4) have inscriptions of the year of minting or issuance, and the words "Liberty", "In God We Trust", "United States of America", "1 Oz. Fine Silver", "E Pluribus Unum", and "One Dollar"; and

(5) have reeded edges.

(f) Silver coins. (1) Sale price. The Secretary shall sell the coins minted under subsection (e) to the public at a price equal to the market value of the bullion at the time of sale, plus the cost of minting, marketing, and distributing such coins (including labor, materials, dies, use of machinery, and promotional and overhead expenses).

(2) Bulk sales. The Secretary shall make bulk sales of the coins minted under subsection (e) at a reasonable discount.

(3) Numismatic items. For purposes of section 5132(a)(1) of this title, all coins minted under subsection (e) shall be considered to be numismatic items.

(g) For purposes of section 5132(a)(1) of this title [31 USCS § 5132(a)(1)], all coins minted under subsection (e) of this section shall be considered to be numismatic items.

(h) The coins issued under this title shall be legal tender as provided in section 5103 of title 31, United States Code [31 USCS § 5103].

(i)(1) Notwithstanding section 5111(a)(1) of this title [31 USCS § 5111(a)(1)], the Secretary shall mint and issue the gold coins described in paragraphs (7), (8), (9), and (10) of subsection (a) of this section, in quantities sufficient to meet public demand, and such gold coins shall—

(A) have a design determined by the Secretary, except that the fifty dollar gold coin shall have—

(i) on the obverse side, a design symbolic of Liberty; and

(ii) on the reverse side, a design representing a family of eagles, with the male carrying an olive branch and flying above a nest containing a female eagle and hatchlings;

(B) have inscriptions of the denomination, the weight of the fine gold content, the year of minting or issuance, and the words "Liberty", "In God We Trust", "United States of America", and "E Pluribus Unum"; and

(C) have reeded edges.

(2)(A) The Secretary shall sell the coins minted under this subsection to the public at a price equal to the market value of the bullion at the time of sale, plus the cost of minting, marketing, and distributing such coins (including labor, materials, dies, use of machinery, and promotional and overhead expenses).

(B) The Secretary shall make bulk sales of the coins minted under this subsection at a reasonable discount.

(3) For purposes of section 5132(a)(1) of this title [31 USCS § 5132(a)(1)], all coins minted under this subsection shall be considered to be numismatic items.

(As amended July 9, 1985, P. L. 99-61, Title II, § 202, 99 Stat. 115; Dec. 17, 1985, P. L. 99-185, § 2(a), (b), 99 Stat. 1177; Mar. 31, 1988, P. L. 100-274, §§ 4(a), 6, 102 Stat. 50.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Reference is to:

"This title", referred to in subsec. (h) may be either a reference to Title 31 USCS, which

Statutes concerning Eagles

Silver Eagle

REED Et Al. vs. STATEILL & Co.

92 N.W. 321
(1902)

Courts Will Take Judicial Notice

*are to take
judicial notice of
the value of
the dollar*

instruction with reference to the care that should be taken in weighing the testimony of hired detectives should be given with all the force and virility that this case has ever exacted. Paragraph No. 1 of the instructions requested by the defendant below was drafted in the language of an instruction on detective testimony which was approved by this court in *Pruitt v. State*, 54 Neb. 377, and has been quoted with commendation in many other cases, and including *Sandage v. State*, 81 Neb. 240; 85 N.W. 35. The court, however, refused to give this approved instruction, but in its stead told the jury with reference to detective testimony that: "You are at liberty and ought to treat such testimony in the light of testimony given by interested witnesses, and give their testimony closer scrutiny before accepting its truth, than if they were wholly disinterested witnesses. Let you have no right, as jurors, to disbelieve such witnesses solely for the reason that they have been thus employed; but you should give to their testimony the same consideration as to any other testimony in the case, giving it such weight as, considering the nature of the same, their opportunities for knowing the facts of which they testify, and their appearance and demeanor upon the witness stand, and all the other elements which go to their credibility, including their interest and bias, and to give their testimony such weight as, under all the circumstances, the same is, in your judgment, entitled to receive." It will be noticed that this instruction simply classifies detectives as interested witnesses, and tells the jury that such evidence should receive the same consideration as any other testimony in the case; that is, that they should simply consider the bias or prejudice that the witness might have in the case. If we have not mistaken the rule established by this court in *Pruitt v. People*, supra, and *Sandage v. State*, supra, this court has set apart the testimony of hired detectives in a class separate and apart from that of ordinarily interested witnesses who have a bias or prejudice for one or the other of the contending parties; and to give full force to an instruction on the caution to be used in weighing detective testimony, the reason for such caution should be contained in the instruction; and especially is this true where a proper instruction, containing the reason, has been requested by the defendant, as in the instant case. In the case of *Sandage v. State*, supra, the defendant had requested an instruction similar to the one requested in this case, and the court refused to give it. Its action in the matter was assigned as error, and this court, speaking through *Holcomb, J.*, says: "The defendant on the trial, and after the introduction of such testimony, requested an instruction to the jury to the effect that in weighing such testimony, greater care should be exercised in

relation to the testimony of a detective employed in hunting up evidence, who is interested in or employed to find evidence against the accused, than in other cases, because of the natural and unavoidable tendency and bias of the mind of such person to construe everything as evidence against the accused, and to disregard everything which does not tend to support a preconceived opinion of the matter in which such person is engaged. The instruction was drawn in conformity with the rule as announced by *Lake, C. J.*, in *Pruitt v. People*, 5 Neb. 377, and should have been given." We are therefore of the opinion that it was error in the trial court to refuse instruction No. 1 requested by the defendant below, and give in its stead the part of paragraph No. 9 of instructions set forth in this opinion.

It is therefore recommended that the judgment be reversed, and the cause remanded for further proceedings.

BARNES and POUND, CO., concur.

PER CURIAM. For the reason stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed, and the cause remanded for further proceedings according to law.

NEED et al. v. STATE

(Supreme Court of Nebraska, Nov. 6, 1902.)
 CRIMINAL LAW—TRIAL—INSTRUCTIONS—MISCONDUCT OF COUNSEL—WITNESS—CREDIBILITY—CONVICTION OF CRIME—CONCLUSIVE—EVIDENCE.

1. The objection that the issue in a criminal case was not formally made up before trial must be first raised in the district court.

2. Hurling of the trial court not alleged as error in the petition in error will not be reviewed.

3. A motion for a new trial is properly dealt with as an entirety. If it cannot be sustained in the form in which it is presented, it is not error to overrule it.

4. It is not error for the court in a criminal case to say to the jury as part of its charge: "You are not at liberty to disbelieve as jurors, if, from all the evidence, you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered."

5. The giving of an instruction which is an inaccurate statement of the law is not reversible error if it is immediately withdrawn, and a proper instruction given in its stead.

6. A request for an instruction to the effect that defendants should be acquitted if there is evidence supporting any theory of their innocence is rightly refused.

7. The fact that the defendant in a criminal case stood his ground until an accusation was lodged against him is not, under all circumstances, evidence of innocence.

8. Where a defendant in a criminal case was asked on cross-examination whether he did not serve a term in a reformatory institution, and an objection to the question was sustained, and the jury directed to disregard it, held, that the incident was too trivial to exert any influence in the decision of the case.

9. While considerable allowance is made for professional enthusiasm in the argument of a

*Rehearing denied February 4, 1903.

criminal case, it is never permissible to ground an appeal for conviction upon facts not given in evidence at the trial.

10. It is highly improper for the prosecuting attorney in a criminal case to declare to the jury his personal belief in defendant's guilt, unless such belief is given as a deduction from the evidence.

11. Under the rule that error must affirmatively appear, the burden is on the complaining party to show that an assertion of personal belief by counsel for the opposing party was not given as a deduction from the evidence.

12. A party desiring to take advantage of the misconduct of opposing counsel in the argument of a case should seasonably object to the remarks complained of, and then enter an exception if the court rule adversely, or refuse to make a ruling.

13. It is not necessary that a jury in a criminal case should, in their verdict, fix the value of money stolen or embezzled. Courts will take judicial notice of the worth of a dollar.

14. Objection by an accused on the ground that there has been no preliminary examination for the crime charged should be by a plea in abatement. *Cowan v. State*, 35 N. W. 405, 22 Neb. 510.

15. For the purpose of lessening the credibility of a witness, a record of his conviction of a felony may be given in evidence; but such record is not conclusive, and the witness may show, notwithstanding the record, that he was in fact innocent.

16. Evidence examined, and found sufficient to support the verdict.

(Syllabus by the Court.)

Error to district court, Douglas county; Baxter, Judge.

William Reed and Reid Yates were convicted of larceny, and bring error. Affirmed.

MacFarland & May, for plaintiffs in error. Frank N. Prout, Atty. Gen., Norris Brown, Dep. Atty. Gen., and William B. Rose, Asst. Atty. Gen., for the State.

SULLIVAN, C. J. In this case we reach the conclusion, though with some doubt and hesitation, that there was before the jury sufficient evidence to warrant the verdict rendered. The defendants, William Reed and Reid Yates, were tried in Douglas county upon an information charging robbery, and were found guilty of larceny from the person. The testimony of the principal witnesses on both sides is far from satisfactory. Much of it is extremely improbable, and some of it altogether incredible. The conceded facts are these: On Friday afternoon, December 27, 1901, the complaining witness, Henry Bigel, an inexperienced and stupid old man, went down from Wisner to Omaha, and put up at the City Hotel. The next morning after breakfast he went out and visited some of the saloons in the neighborhood. He seems to have inhaled rather freely, and by 2 o'clock p. m. was considerably exhilarated, but not quite drunk. About this time he went into the saloon kept by defendants, and ordered drinks for himself, William Carter, and one or two other persons who were standing around. When called upon to settle his bill, which was 65 cents, he said he

had no money with him, but saw some in his trunk at the Webster street depot. It was then arranged that Carter and Reed should go with him to the station, and bring the trunk back. Who suggested this arrangement does not appear, but it was satisfactory to all concerned, and was at once carried out. When the trunk was brought to the saloon, it was set down in an adjoining room, and opened in the presence of Reed and Carter. At the bottom was found an old rubber boot, from which Bigel extracted \$250 in bills. He put \$275 in his vest pocket, and handed Reid Yates \$5 for the purpose of paying his account at the bar. The change was returned to him, and he then, after treating everybody in the saloon, paid Reed and Carter 75 cents each for their services. Beyond this point the evidence is conflicting. The testimony of Bigel is that he was robbed and beaten by the defendants, and then thrown into the street. This also is Carter's version of the affair. On the other hand, the testimony of the defendants and their witnesses is to the effect that Bigel was neither robbed, beaten, nor ejected, but that he continued to drink until he fell into a drunken stupor at a table in one corner of the room, where he remained until evening. Evidently the jury, while believing that Bigel lost his money in the saloon, regarded the story of the robbery as incredible, and rejected it altogether. Their conclusion was that Reed and Yates got the money, but got it by theft, instead of robbery. Defendants contend that this conclusion does not rest upon any legal evidence, but we think it does. They either induced, encouraged, or permitted the old man to bring his trunk to their saloon, knowing that it contained money; and this of itself was a criminalizing circumstance. With knowledge of the fact that he had a large amount of money on his person, they furnished him intoxicants, until, according to their own testimony, his senses were benumbed to such an extent that he could neither perceive the dangers to which he was exposed nor guard against them. Their conduct was the conduct of conscienceless men. It was so reprehensible and wicked as to suggest the probability that it was inspired by a criminal motive. Worthy of consideration, too, is the circumstance that Carter and the defendants were the only persons who knew Bigel had money on his person. It is intimated by counsel that Carter, who is apparently a disreputable character, may have, unknown to defendants, committed the crime. That is possible, but it is not probable. He could hardly have taken Bigel's money without being detected. He may be guilty, but that does not imply that defendants are innocent. After a careful reading of all the evidence, we are disposed to believe that the defendants committed the theft, and that Carter had knowledge of it, and shared in the proceeds.

It is contended that William Reed was not

arraigned, and did not plead to the information, and that there was, therefore, as to him, no issue presented for trial. This point is technical, and the decision of it may properly rest upon technical grounds. The objection that the issue submitted to the jury was not formally made up was not raised in the trial court, and consequently cannot be considered here. Another answer to counsel's argument is that the motion for a new trial, being the joint motion of both defendants, was rightly dealt with as an entirety. *Dunn v. Gibson*, 9 Neb. 513, 4 N. W. 211; *Long v. Clapp*, 15 Neb. 417, 10 N. W. 407; *Dutcher v. State*, 16 Neb. 30, 10 N. W. 612.

The eighth paragraph of the courts' charge was excepted to, and in, in the brief of defendants' counsel, subjected to severe animadversion. The instruction, which is an elaborate definition of a reasonable doubt, has been frequently challenged in this court, but never condemned. The giving of it was not reversible error.

There is a general complaint against other instructions, but we discover nothing in them that we think ought to have been omitted. Considered as a whole, the charge is an exceptionally good one. It is claimed that the court erred in giving instruction No. 17 requested by the state. This instruction was to the effect that a police officer might, without a warrant, arrest any person suspected, upon reasonable grounds, of being guilty of a felony. This was not an accurate statement of the law, but it was afterwards withdrawn, and a proper instruction given in its stead. There was, we think, no special reason for giving either the original or substituted instruction, and we are not able to see how either could have influenced the action of the jury in the slightest degree.

Defendants requested the court to charge: (1) That they should be acquitted if any theory of their innocence was supported by evidence; and (2) that the fact that they made no attempt to escape should be considered as evidence of innocence. Both requests were rightly refused. The proposition embodied in the first is obviously unsound, and with respect to the second it is only necessary to remark that, when defendants learned that they were under suspicion, the opportunity to escape was gone.

Another reason advanced for a reversal of the judgment is that the deputy county attorney was guilty of prejudicial misconduct. One of the acts of alleged misconduct consisted in asking Yates, while on the witness stand in his own behalf, whether he had not served a term in the reform school. This question was not answered. An objection to it was sustained, and the jury directed to disregard it. In our opinion, the incident was too trivial to be counted as a possible factor in the decision of the case. A more serious question arises out of an expression used by the public prosecutor in his closing argument to the jury. In the course of his remarks

he touched his faith in the state's case by declaring that he believed the defendants guilty, and that he hoped God would send lightning from heaven and strike him dead if he did not so believe. Considerable allowance is made for professional enthusiasm, even in criminal cases, but it is not permissible to ground an appeal for conviction upon facts not given in evidence at the trial. We do not attach much importance to the offer of counsel to test the truth of his statement by ordeal. What he said in that behalf had no real significance. It was a mere rhetorical flourish. Calling spirits from the "vast deep" or lava from the sky is, in this materialistic age, a perfectly harmless diversion; for, however vehement the call may be, no answer is expected. But an assertion by the public prosecutor of his personal belief that an accused person is guilty as charged may, in a doubtful case, tell decisively in favor of the state, and, unless the belief is given as a deduction from the evidence, is, in the opinion of able courts, sufficient reason for reversing a conviction. In the present case, however, it does not affirmatively appear that counsel's assertion was not based entirely upon the evidence. From the record before us we are inclined to think it was. At any rate, we are not able to say that the error alleged is established. The court's attention was not directed to the remark at the time it was made, and it seems quite probable that this would have been done if it was regarded as unfair or unwarranted. It could hardly be made available as error if permitted to pass unchallenged. The rule upon this subject is thus stated in *Railroad Co. v. Kellogg*, 63 Neb. 713, 70 N. W. 462: "A party desiring to take advantage of the misconduct of opposing counsel in the argument of a case should reasonably object to the remarks complained of, and then enter an exception if the court rules adversely, or refuse to make a ruling."

Another ground upon which defendants claim a reversal of the judgment is that the jury did not fix the value of the money stolen. The verdict states that defendants are guilty "of larceny from the person to the amount of \$275." This was sufficient. It is not necessary for a jury in any case to fix the value or worth of a dollar. The judges, as well as other people, know what it is. *Bartley v. State*, 63 Neb. 310, 73 N. W. 744. Courts take judicial notice of whatever is generally known within the limits of their jurisdiction.

It is said that the court erred in putting the defendants upon trial without a preliminary examination. This point was first raised after the jury had been sworn to try the case. It was then too late to consider it. It should have been presented by plea in abatement. *Cowan v. State*, 22 Neb. 519, 35 N. W. 405; *Hill v. State*, 42 Neb. 503, 60 N. W. 916; *Whitner v. State*, 46 Neb. 111, 61 N. W. 701.

A further contention of counsel for de-

sentence is that the court erred in permitting Carter, who was a witness for the state, to testify on redirect examination that he was not guilty of an offense for which he had served a term in the penitentiary. In our opinion, the ruling was right. Carter was not a party to the action, and the judgment against him was not an estoppel. At common law conviction of an odious crime was a disqualification. It may now be considered only for the purpose of lessening the credibility of a witness. It was not, it seems, the fact of guilt that worked the disqualification, but only the sentence, based upon a judicial confession or the verdict of a jury. 1 Greenl. Ev. § 376; People v. Herrick, 13 Johns. 82, 7 Am. Dec. 361. One might admit that he was a felon without forfeiting the right to testify in court. The record of conviction is now evidence of guilt, and may be used to impeach a witness; but it is not conclusive evidence. It has the effect which the statute gives it, and no other or greater effect. But for section 330 of the Code of Civil Procedure, it would not be admissible for any purpose. Sims v. Sims, 75 N. Y. 472.

Other questions discussed by counsel are manifestly without merit, or else not raised by the petition in error.

The judgment is affirmed.

COLUMBUS STATE BANK v. CARRIG.
(Supreme Court of Nebraska. Nov. 6, 1902.)
ESTOPPEL—VOLUNTARY PAYMENT—HARMLESS ERROR.

1. The silence of one party does not operate as an estoppel in favor of another, unless it appear that such other party has been induced thereby to change his position to his injury.
2. On the facts stated, held that the question of the voluntary payment by one party of the debt of another does not arise.
3. When the undisputed facts entitle the successful party to the direction of a verdict, error in the giving or refusing to give certain instructions is error without prejudice as to the other party.

Commissioners' opinion. Department No. 3. Error to district court, Platte county; Grimsion, Judge.

"Not to be officially reported."
Action by David H. Carrig, against the Columbus State Bank. From a judgment for plaintiff, defendant brings error. Affirmed.

Whitnoyer & Gondring, for plaintiff in error. McAllister & Cornelius, for defendant in error.

AMES, C. This is an action for money had and received, brought by David Carrig against the Columbus State Bank. There was a verdict and judgment for the plaintiff. Defendant brings error.

The following facts are conclusively established by the evidence: The father of the plaintiff was the owner of certain cattle, on which he had given a mortgage to secure

certain indebtedness which he owed the defendant. It was agreed between the defendant and the mortgagor that the latter might ship the cattle to market and dispose of them. They were to be shipped in the name of the defendant, and the proceeds remitted to the bank to apply on the mortgage debt. Without the knowledge of the defendant, the mortgagor and the plaintiff arranged between themselves that five head of cattle belonging to the latter should be shipped with those of the mortgagor, in order to make two carloads. In pursuance of these two arrangements, the cattle, including those of the plaintiff, were shipped to market and sold about March 17, 1890. They could not be separately consigned, and, with the consent and under the direction of the plaintiff, they were all shipped in the name of the defendant. After they had been sold, and before the proceeds were remitted to the defendant, the plaintiff informed the purchaser that the five head belonged to him, and asked that payment therefor be made to him. The purchaser refused, but, at the request of the plaintiff, informed the defendant over the telephone of plaintiff's claim and request. The defendant refused to permit payment to the plaintiff for the five head, and directed the purchaser to inform him that if he had any claim to present it to defendant bank; whereupon the purchaser remitted the proceeds of the entire shipment to the defendant. Within two or three days thereafter the mortgagor, called on the defendant, and had a settlement with it, wherein he was credited with the whole of said proceeds, and certain evidences of indebtedness surrendered to him. The mortgagor died insolvent about three years after the settlement. The plaintiff made no further claim or demand for the proceeds of the five head of cattle until after the death of the mortgagor. The proceeds of the sale of the five head was \$185.00. It is strenuously insisted that the plaintiff, by his silence for more than three years, was estopped to claim the proceeds of the five head of cattle. There is an elementary principle of the law of estoppel which is peculiarly applicable to this case. It is thus stated in 1 Herm. Estop. § 7: "No body ought to be estopped from averring the truth or asserting a just demand, unless by his acts, or words, or neglect his now averring the truth or asserting the demand would work some wrong to some other person; who has been induced or do something or abstain from doing something by reason of what he had said or done or omitted to say or do." In recognition of this principle, this court has said: "To create an estoppel in pais, the party, in whose favor the estoppel operates, must have altered his position in reliance upon the words or conduct of the party estopped." Lingouner v. Ambler, 44 Neb. 810, 82 N. W. 480. In this case, before the defendant received the money in question, it was notified of plaintiff's claim. Within two days

¶ 1. See Estoppel, vol. 19, Cent. Dig. §§ 136, 143, 144.

1 COUNTY COURT, COUNTY OF JEFFERSON, STATE OF COLORADO

2 Case Number 86T 20037, Division D

3 -----
4 CLERK'S TRANSCRIPT
5 -----

6 THE PEOPLE OF THE STATE OF COLORADO

7 vs.

8 JOHN NELSON

9 defendant.
10 -----

11
12 A P P E A R A N C E S

13 John Nelson, defendant
14

15 BE IT REMEMBERED that on the 8th day of August, 1988,
16 the same being a regular day of Court, the above captioned
17 action came duly on for hearing on failure to pay fines and
18 costs before Kim H. Goldberger, Judge of the County Court,
19 First Judicial District, State of Colorado, and the following
20 proceedings were had to-wit:
21
22
23
24
25

1 COURT: John Nelson, 86T 20037. Mr. Nelson, this case
2 was transferred to this division pursuant to our reassignment
3 schedule. The matter comes up on your payment of fines, fees
4 and costs as a result of the trial that was held before Judge
5 Demlow on April 3rd of this year. The record reflects that you
6 were fined and the costs that were entered in the amount of
7 \$35.00. There was a stay of execution until July 1st of 1987
8 and on July 1st you failed to pay fines, fees and costs and
9 therefore a warrant was issued for your arrest. So the case
10 was assigned over here. What about this \$35.00?

11 MR. NELSON: Well, we had a major lack of due process
12 and we have numerous intentional constitutional tortius(sic)
13 effects done in this action, which have been taken up to the
14 United States District Court, and the case is '88'. The
15 designation has not been made yet, in 1250. It was filed
16 August 5th, 1988. Mr. Demlow was one of the parties named as
17 defendants in the action along with numerous other defendants.
18 First of all the problem that had arisen was, nexus of the
19 contract.

20 COURT: Was what?

21 MR. NELSON: Nexus to the contract.

22 COURT: What does that mean?

23 MR. NELSON: Well, it means that somewhere there had to
24 be a nexus to the contract in order for there to be that type
25 of summons, or citation issued. And it's, um, citations are,

1 um, and it's backing is in the Constitution of the State of
2 Colorado under Article 10 in taxation for ad valorem taxes.
3 And the ad valorem taxes the duty.

4 COURT: Okay, we're not talking about that. What we're
5 talking about is paying fines, fees and costs as a result of
6 the conviction for a traffic offense in April. Did you appeal
7 that?

8 MR. NELSON: The matter was, and there were numerous
9 matters being investigated at that time, and no there wasn't
10 an appeal. It was sued out in U.S. District Court.

11 COURT: Okay, but that...You still have to pay this
12 fine and costs if you didn't appeal this case to the District
13 Court. This is now a final judgement. Why didn't you pay your
14 fines?

15 MR. NELSON: Because if you're speaking about a dollar
16 which the economy of Jefferson has not dealt in in numerous
17 years then we have a problem with parity.

18 COURT: Well, I don't think there is a problem. You
19 pay \$35.00 in current money. Issued by...

20 MR. NELSON: We have a problem with this document right
21 here.

22 COURT: What document would that be?

23 MR. NELSON: I'll present one to the Court for evidence.

24 COURT: This is top secret, Silent Weapons for Quiet
25 Wars, that document? Okay, we'll mark this as the defendant's

1 exhibit one.

2 MR. NELSON: We have numerous problems with the felonious
3 monetary system that is functioning at this time. I do have
4 a ruling in County Court, Montezuma County, case number 87C 119,
5 that...it was stated by the Judge, one Mrs. Sharon Lions (phonetic)
6 Hansen, that the monetary system at this point in time is
7 arbitrary. Arbitrary is strictly forbidden to any public ser-
8 vant. And the issue is that that document, if you will open the
9 cover and approximately on page three you'll find security.
10 It is patently impossible to discuss social engineering or
11 automation of a society i.e. engineering a social automation
12 system, silent weapons on a National or World Wide scale without
13 implying extensive objectives of social control and destruction
14 of human life, i.e. slavery and genocide. The manual...

15 COURT: Wait, I can't go that fast. Would you explain
16 what that means?

17 MR. NELSON: They and...We'll have to get into it a
18 little bit farther before you would comprehend the extent of
19 the issue before the Court.

20 COURT: Well why don't you just explain it to me and tell
21 me why it is you don't want to, or not paying your fines and
22 costs?

23 MR. NELSON: Because it would be an assist in this
24 declaration of war. This manual in itself is analogue declara-
25 tion of intent. Such writing must be secured from public

1 scrutiny, otherwise it might be recognized as a technically
2 formal declaration of domestic war. The people who regulate
3 the monetary system under the Federal Reserve and the debasement
4 of the coinage in 1965 by our wonderful ex-president, Mr.
5 Lyndon Baines Johnson, had preplotted and preplanned this. And
6 it is a nondestructive mechanism of a social order and this is
7 a criminally psychotic writing. And it is an actual document.
8 I did have it checked out by the military. It is part of 50,
9 U.S.C., the war powers act.

10 COURT: Tell me why it is you don't...you're not going
11 to pay, in your own words, why you don't want to pay or don't
12 pay your fines and costs?

13 MR. NELSON: It isn't that I don't mind paying, but the
14 problem that we've run into, excuse me, is this: You said
15 dollars, those are dollars. Two things can not be the same
16 thing.

17 COURT: Yes, they can.

18 MR. NELSON: They can't.

19 COURT: Sure they can.

20 MR. NELSON: How many Federal Reserve notes does it
21 take to buy one?

22 COURT: Well, I'll tell you what. You have a choice;
23 Mr. Nelson, here's your dollar back.

24 MR. NELSON: Oh, well, I just...

25 COURT: I know, but you can pay it in any kind of money

1 you want. If you want to pay it in gold, you can pay it in
2 gold. If you want to pay it in silver, you can pay it in silver.
3 We don't care about that, or you can use...

4 MR. NELSON: That would be an issue then of unjust
5 enrichment.

6 COURT: It's, for whom? You're the one who is saying
7 that you want to pay something. I'll...The Clerk of the Court
8 will except any kind of payment you want to tender. You just
9 pick it out. Which one would you like to pay in?

10 MR. NELSON: I would like a determination under the
11 circumstances then...I do not have a copy of this. I didn't
12 get to...I'll leave it with the Court however.

13 COURT: I'll get it back to you.

14 MR. NELSON: You have it on your machine. 31 U.S.C.,
15 section 371, 1976, (inaudible), expressed and mandated that the
16 money on account of the United States shall be expressed in
17 dollars.

18 COURT: It is?

19 MR. NELSON: Yeah. The dollar of nine-tenths fine
20 consisting of the weight determined under 31 U.S.C., section
21 321 shall be the standard unit of value and all forms of money,
22 issued or coined, shall be maintained at a parity of value with
23 this standard, 31 U.S.C., section 314. I would like, due to the
24 fact that the Judges of the State of Colorado are bound by
25 oath to support the Constitution of the United States and the

1 Constitution of the State of Colorado, and the laws made in
2 pursuance thereof, I would like the determination of this matter
3 that I might pay the thing in lawful money without being induced
4 into committing a crime or induced into a violation of the
5 eighth amendment, which is basically, exorbitant fines.

6 COURT: Well, I want to tell you, Mr. Nelson, that I
7 don't print money. The State of Colorado doesn't, nor does
8 this County. This County is not...does not maintain...

9 MR. NELSON: Under the Constitution of the United States

10 COURT: This County does not maintain a separate monitar
11 system. We go by the same system that everybody else does, the
12 same dollars that you use at the Safeway Store or King Soopers
13 or where ever you trade, or where you buy gasoline at a gas
14 station.

15 MR. NELSON: I buy gasoline for ten cents a gallon with
16 dollars, with actual dollars.

17 COURT: That's fine.

18 MR. NELSON: And if I have to pay Federal Reserve notes
19 and debase coinage, and debase coinage is a felony, then what
20 we have here is an economic overthrow which is an act of seditio

21 COURT: Well, it could be but we only have one system
22 here and that's the system that we're going to use and that's
23 the system of dollars and coinage and printing of money that
24 the Federal Government uses. It's that system. And I've given
25 you an option. You can pay in gold and silver if you want.

You can pay it in American dollars. And in fact, because we have a bank down the street that has currency exchange, you can pay in any other kind of currency you want, any other foreign currency and we'll take it down to the bank and get it exchanged at the current exchange rate. So, I don't care what kind of funds you pay it in but...

MR. NELSON: Well, then, if we're dealing under U.C.C...

COURT: It's not a U.C.C. issue at all. It is an issue that you've been tried and convicted of an offense. You were given a fine and you were ordered to pay that fine in the current coinage or dollars at the time, regardless of what's happened to them, inflation, deflation, whatever, but you will be remanded into the custody of the sheriff and you can serve this out at \$5.00 a day in our currency and anytime you want to pay the balance...You're not being put in jail because you don't have money, you're being put in jail because you refuse to obey a lawful order of the Court. So at sometime down the line, if you decide that you want to pay it...And here are your choices, you can pay it in gold or silver, that's fine with me, if you have gold coins we'll take those, if you have silver..

MR. NELSON: At face value?

COURT: No, we'll take them at any value you want. You go get a...You have your friend over here go get somebody to tell me that gold is worth so much an ounce on the market, world market, we'll do that.

1 MR. NELSON: Well, hang on now. We have a National
2 Advertisement that says that there is twenty-eight to one.

3 COURT: What's twenty-eight to one?

4 MR. NELSON: The parity of value, basically, for Federal
5 Reserve note, how much of the paper has been issued past what
6 they actually have real dollars to...

7 COURT: Oh, that's not an issue that I'm dealing with
8 here.

9 MR. NELSON: What are we dealing with?

10 COURT: I'm telling you that if you want to put in gold,
11 I think it's three hundred and some dollars an ounce the other
12 day. That if you want to come up with gold that's...whatever
13 that works out to to pay your fees and costs, that's fine, we'll
14 take that. And if you want to do it in silver, I think it's
15 about four something an ounce, you can do that.

16 MR. NELSON: Well, now wait a minute here because I
17 buy dollars, actual silver dollars.

18 COURT: We'll take your silver dollars at...

19 MR. NELSON: Okay, that's all, I'm convinced...Now if
20 you'll take my silver dollars in silver coinage, do I get paid
21 or is that evaluated to an equal to what was paid for?

22 COURT: You want to do it your way?

23 MR. NELSON: Yes.

24 COURT: You bet. How much does he owe?

25 BAILIFF: \$35.00.

1 COURT: Well, plus a warrant fee.

2 BAILIFF: \$65.00.

3 COURT: \$65.00. How much is that in silver coinage?

4 MR. NELSON: I pay about ten a piece for the silver
5 dollars.

6 COURT: And how much does he owe?

7 BAILIFF: \$65.00.

8 COURT: Fine, I'll tell you what, I'll give you a break
9 today. You pay...if you pay ten for the silvers, you give the
0 clerk of the court six of your silver dollars and your fine is
1 paid. I'm not trying to set up any argument here.

2 MR. NELSON: You've got yourself a deal.

3 COURT: No, you got yourself a deal.

4 MR. NELSON: Okay.

5 COURT: In the meanwhile...

6 MR. NELSON: That was the issue before the Court.

7 COURT: I'm not here to argue and split that kind of
8 hair. I can't slice it that thin.

9 MR. NELSON: That's why I need to...

10 COURT: In the meanwhile you're in the custody of the
11 sheriff, pay the money and you're out of custody.

12 MR. NELSON: Okay, okay.

13 COURT: But, pay that to the clerk. He'll take you down
14 there, take your stuff with you.

15 MR. NELSON: All right, now I get ten to one for the

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silver coins?

COURT: That's what you told me, right?

MR. NELSON: Yeah.

COURT: Fine.

MR. NELSON: Okay, thank you.

COURT: Yes sir.

MR. NELSON: Okay. That's what I wanted anyway.

1 COUNTY COURT, COUNTY OF JEFFERSON, STATE OF COLORADO

2 Case Number 86T 20037, Division D

3 -----

4 CLERK'S CERTIFICATE

5 -----

6 THE PEOPLE OF THE STATE OF COLORADO

7 vs.

8 JOHN NELSON

9 defendant.

10 -----

11
12 I, Susan Broadfoot, Division Clerk of the County Court,
13 do hereby certify that the proceedings in this matter were
14 taken by a mechanical recording device; that I thereafter
15 typed the foregoing official transcript from said mechanical
16 recording device; and that the foregoing transcript is an
17 accurate record of the proceedings in this matter on the date
18 set forth.

19
20 Dated this 29th day of August, 1988.

21
22 

23 Susan Broadfoot
24 Division Clerk
25

DEBASEMENT OF CONSTITUTIONAL
GOLD AND SILVER COIN

COINAGE ACT OF 1963

COINAGE ACT OF 1965

For text of Act see p. 270

House Report (Banking and Currency Committee) No. 509,
June 11, 1965 [To accompany H.R. 8926]

Senate Report (Banking and Currency Committee) No. 317,
June 11, 1965 [To accompany S. 2080]

Cong. Record Vol. 111 (1965)

DATES OF CONSIDERATION AND PASSAGE

House July 14, 1965

Senate June 24, July 15, 1965

The Senate bill was passed in lieu of the House bill after substituting for its language the text of the House bill. The House Report is set out.

HOUSE REPORT NO. 509

THE Committee on Banking and Currency, to whom was referred the bill (H.R. 8926) to provide for the coinage of the United States, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

PURPOSE OF THE BILL

H.R. 8926 is intended to conserve this Nation's rapidly dwindling supply of silver—a metal essential to defense needs, to industry and the arts. Under our coinage laws going back to 1792, silver has been the major ingredient of our coinage alloys for all but the minor coins. At the present rate of silver consumption in the United States, chiefly for coinage, this Nation will run out of silver within 2 or 3 years.

H.R. 8926 as approved by your committee would eliminate the use of silver in all denominations of coins except the silver dollar (which is not now being minted and which would not be minted for at least 5 more years under the terms of this bill).

The bill would authorize minting of a new type of coin—a clad or "sandwich" coin consisting of a copper core between layers of cupro-nickel (75 percent copper and 25 percent nickel) to replace the present dime, quarter, and half dollar (which consist of an alloy of 90 percent silver and 10 percent copper). The new coins will be of such size and weight and electrical resistivity as to be compatible with silver coins in the rejector mechanisms of existing vending machines and other coin-operated devices.

THE TRANSITIONAL PERIOD

To assure a smooth and rapid transition from the present silver coinage to the proposed new system of clad coins containing no silver, the bill (1) permits for 5 years the continued production, if necessary, of 900 fine silver coins; (2) establishes standby authority to prohibit, curtail, or regulate

LEGISLATIVE HISTORY

the exportation, melting, or treating of any coin of the United States; (3) temporarily assigns powers to the Secretary of the Treasury to enter into contracts for the procurement of materials and technical information, without regard to any other provisions of law governing procurement of public contracts, in connection with the production of the unprecedented new clad coins; (4) discourages the hoarding of coins for their silver content by continuing the powers of the Treasury to prevent the market price of silver in the United States from exceeding silver's monetary value; and (5) reduces the quantity of new coins which the Nation's 10 million coin hobbyists would want or need in order to have complete sets for their private collections, by eliminating all mint marks on the clad coins for at least 5 years.

SATISFACTORY FOR COIN-OPERATED MACHINES

The new coins would be similar in design to the present coins of the same denominations. They will be legal tender for all debts, public and private. The Secretary of the Treasury has testified that in his judgment the proposed coins will meet the test of public acceptability as a medium of exchange, that they can be efficiently and rapidly manufactured by the mints from available materials, and that their electrical properties are such that they will work in existing merchandising machines. No change will be made in the nickel or the penny, since neither of these coins contains silver.

MINING INDUSTRY PROTECTED

An important provision of the legislation would protect the domestic silver mining industry against any precipitous decline in silver prices resulting from termination of the traditional use of the metal in coins by establishing a minimum price of \$1.25 per troy ounce at which the Treasury will purchase recently mined silver from domestic producers. However, the monetary value of silver would continue to be \$1.29+ (actually \$1.2929292) per fine troy ounce, which it has been ever since 1792. Outstanding silver certificates (of which there are approximately \$935 million worth still in circulation) will continue to be redeemable at that value. Moreover, the Secretary of the Treasury would retain the power to sell at its monetary value any silver of the United States in excess of that required to be held as reserves against outstanding silver certificates.

SCARCITY COMPELS ACTION

President Lyndon B. Johnson, in a message to Congress on June 3, 1965, recommending prompt action along the broad lines of this bill to prevent a crisis in our silver supply, said: "Silver is becoming too scarce for continued large-scale use in coins." While the President proposed the maintenance of some silver in the half dollar, at a ratio of 40 percent silver to 60 percent copper, your committee recommends that all three denominations of the new coins be made of the same metallic composition, using no silver. This step would conserve an estimated additional 15 million troy ounces of silver per year, over and above the estimated 285 million ounces to be saved per year at current rates of coinage by eliminating silver from dimes and quarters and reducing the silver content of half dollars from 90 to 40 per

COINAGE ACT OF 1965

cent. Except for this change, the bill as reported substantially conforms to the draft of legislation submitted by the President.

Among steps taken in the legislation to expedite the changeover to the new coins with a minimum of disruption are the following: the San Francisco assay office, which was deactivated as a mint in 1955 at a time when coin demand was only a fraction of present needs, would be reactivated for the production of coins until the Secretary of the Treasury determines that the mints of the United States are adequate for the production of ample supplies of coins; the appropriation of an additional \$15 million is authorized for the expansion of mint facilities, particularly at the new mint to be constructed in Philadelphia, where changes in design will be necessary in order to cope with the metallurgical and other technical problems resulting from the use of the new clad material; new coins, of course, will be protected by all laws applying to counterfeiting, use of slugs, etc.

JOINT COMMISSION ON THE COINAGE

H.R. S926 establishes a Joint Commission on the Coinage consisting of the Secretary of the Treasury, as Chairman; the Secretary of Commerce, the Director of the Bureau of the Budget, the Director of the Mint, the chairman and ranking minority member of the House and Senate Banking and Currency Committees, two additional Members each from the House and the Senate not serving on the Banking and Currency Committee, and four public members to be appointed by the President, "none of whom shall be associated or identified with or representative of any industry, group, business, or association directly interested as such in the composition, characteristics, or production of the coinage of the United States."

The role of this Commission will be an important one in helping to determine the future policy of the United States on coinage and the use of silver therein. It will study the progress made in the implementation of the coinage program established by this legislation; and review the needs of the economy for coins; technical developments in metallurgy and coin-selector devices, the availability of various metals, the eventual resumption of minting of the silver dollar, the time and circumstances under which the United States should cease to maintain the price of silver, "and other considerations relevant to the maintenance of an adequate and stable coinage system."

The Commission will advise the President, the Congress, and the Secretary of the Treasury on the results of its studies. Because of the importance of the work of this Commission and the influence its recommendations will carry, it is the opinion of your committee that while the use of alternates undoubtedly will be necessary from time to time in the conduct of the meetings of the Joint Commission, the Commission should not attempt to transact business without at least a quorum consisting of principal appointees.

BACKGROUND OF THE LEGISLATION

Since World War II, and particularly since 1958, there has been a widening gap between free world silver consumption and production. The expansion of silver production has been relatively sluggish, while consumption has been rapidly increasing. Since 1958, world consumption of silver

LEGISLATIVE HISTORY

has more than doubled while production has increased less than 15 percent. The result has been increasingly large annual deficits between production and consumption. The extent to which this deficit has been expanding is reflected in table 1.

TABLE 1.—Estimated free world silver consumption and production, 1919-63
(In millions of fine troy ounces)

	Industry and the arts	U.S.A.	Coinage demand, foreign	Total	Total consumption	New production	Indicated deficit (-)	Deficit excluding all coinage demand (-)
	(1)		(2)		(3)	(4)	(5)	(6)
1919-22 average ...	152.1	34.3	48.3	81.7	237.3	172.9	-64.9	20.3
1923-27 average ...	190.1	37.3	34.0	72.3	242.6	191.0	-72.6	9
1928	190.5	32.2	41.3	79.3	270.0	201.3	-68.2	13.3
1929	212.0	41.4	45.0	86.4	299.3	183.1	-110.0	-21.3
1930	221.6	40.0	37.9	103.9	323.3	208.0	-121.6	-17.7
1931	239.3	33.0	31.3	137.1	374.6	202.0	-172.6	-34.3
1932	247.3	77.1	38.2	137.0	373.4	204.9	-168.5	-40.9
1933	252.2	111.3	33.3	167.0	419.2	212.3	-206.4	-32.4
1944	253.9	202.0	61.3	264.3	330.1	313.3	-224.9	-70.6

Source: Cols. (1) and (2) are from Handy and Harman, Annual Reviews. Col. (1) is derived from the world totals published in the Annual Reports of the Director of the Mint and compiled by the Bureau of Mines. Production for the following countries has been subtracted from the world totals: Czechoslovakia, East Germany, Hungary, Rumania, Poland, U.S.S.R., China, and North Korea. The world production estimate for 1963 is from the Bureau of Mines, Mineral Industry Surveys, Aug. 21, 1964; and that for 1964 is from Handy and Harman, Annual Review, 1964, adjusted on the basis of the 1943-63 relationship between the Handy and Harman and Bureau of Mines estimates.

The tremendous expansion in the demand for silver coupled with the relatively static supply, and the importance of silver in industrial processes, such as photography, where no satisfactory substitute exists, have been responsible for a dramatic increase in the market price of silver over a period of only 4 years. Prior to 1962, the New York price of silver bullion had not reached or exceeded a dollar per fine troy ounce in more than 40 years. It was relatively stable in price from 1951 through most of 1961 in the neighborhood of 91 cents an ounce. Since late 1961 it has risen sharply to the monetary value of silver as used in the standard silver dollar.¹

The price of silver has been held at \$1.29 because the Treasury Department stands ready to redeem outstanding silver certificates at the monetary value of silver. The effect is that the Treasury Department has become the residual supplier to the market of the silver needed to make up the difference between consumption and production.

COINAGE NEEDS INCREASE

At the same time the needs of the U.S. economy for coinage have been rapidly increasing so that steadily larger amounts of silver have been consumed in coinage. Thus, from an annual average during the years 1958-60 of about 42 million fine troy ounces of silver used for coinage, there

¹ This value is derived from dividing 430, the number of grains in a troy ounce, by 371.25, the number of grains of silver contained in the standard silver dollar.

COINAGE ACT OF 1965

was an increase to 203 million fine troy ounces in 1964. The current rate is 300 million ounces a year.

With the Treasury Department acting as residual supplier to the market and using increasing amounts of silver in coinage, Treasury silver stocks have declined from 2,106 million fine troy ounces at the end of 1953 to 1,218 million fine troy ounces at the end of 1964. (See table 2.) A recent Daily Statement of the U.S. Treasury showed silver stocks down to \$1,000,064,173 ounces.

TABLE 2.--Analysis of changes in U. S. Treasury silver stocks since 1953

(In millions of fine troy ounces)

	Silver used in coinage	Bullion exchanged for silver certificates	Old silver dollars paid out	Other ¹ causes of change	Total change in silver stocks	Silver stock at end of period ²	Memorandum: Bullion equivalent of silver certificates ³ end of period		
							In circulation	Held by Federal Reserve banks and agents	Total
1953	-32.2	.....	-12.7	+112.8	+67.9	2,106.2	1,632.5	154.3	1,871.3
1959	-41.4	.....	-13.7	+10.8	-44.3	2,059.9	1,631.1	209.3	1,840.4
1960	-46.0	.....	-16.3	-3.5	-67.7	1,992.2	1,632.0	213.9	1,847.9
1961	-51.9	.....	-23.3	-12.3	-109.3	1,882.7	1,616.3	191.2	1,807.5
1962	-77.4	.....	-27.1	+10.4	-94.1	1,788.3	1,536.0	177.5	1,713.5
1963	-111.5	-19.0	-31.5	-2.0	-164.0	1,564.3	1,449.4	103.1	1,543.3
1964:									
January	-9.8	-3.5	-1.0	+3.1	-11.2	1,573.1	1,321.8	192.1	1,514.2
February	-11.3	-2.3	-2.3	+1.2	-14.6	1,558.3	1,317.4	175.0	1,492.4
March	-15.3	-2.9	-16.5	+1.9	-32.5	1,525.7	1,326.4	132.1	1,479.5
April	-16.4	-8.0	.....	-8	-24.3	1,499.3	1,311.1	112.5	1,426.6
May	-16.2	-3.4	.....	+1.4	-18.3	1,481.3	1,317.6	100.3	1,417.8
June	-11.5	-8.2	.....	-11.8	-31.5	1,449.3	1,321.1	80.3	1,401.4
July	-11.4	-3.4	.....	+3.0	-11.8	1,438.9	1,371.4	92.7	1,364.1
August	-12.9	-3.1	.....	+1	-22.9	1,414.1	1,345.3	100.0	1,345.3
September	-20.3	-21.4	.....	+2.7	-48.0	1,376.1	1,265.4	94.4	1,360.8
October	-22.3	-11.1	.....	-2.5	-68.9	1,307.2	1,117.5	82.3	1,204.8
November	-23.7	-20.3	.....	-1.9	-68.1	1,281.1	1,049.6	66.5	1,116.1
December	-26.0	-17.6	.....	+5	-43.1	1,218.0	952.3	82.1	1,034.4
1961	-202.0	-111.4	-19.3	-2.1	-384.3	1,218.0	952.3	82.1	1,034.4
1963:									
January	-24.1	-11.3	.....	+2	-37.1	1,180.9	866.6	103.3	969.8
February	-22.5	-6.7	.....	+2.6	-26.6	1,152.3	817.0	88.7	905.7
March	-21.3	-7.3	.....	-3.0	-31.6	1,116.7	736.9	65.5	872.4
April	-27.3	-12.4	.....	-1	-40.1	1,076.6	.....	.....	.....

¹ Includes purchases, lend-lease returns, net sales and transfers to Government agencies, sales to industry during 1959-61, variations in the amount of subsidiary coin and bullion held in the Treasurer's general account, and a residual discrepancy arising from the fact that the coinage and bullion exchanges are shown here on a mint accounting basis while the total change in silver stocks is shown on the more widely available Daily Statement basis.

² As shown in the Daily Statement. The total includes approximately 61,800,000 ounces held by certain agencies of the Federal Government.

³ Issued after June 30, 1973.

Source: Treasury Daily Statements, Circulation Statements, and unpublished material.

PRESENT POLICIES MUST BE ALTERED

A projection of these figures clearly demonstrates that the United States cannot continue its profligate use of so precious a metal for coinage when suitable substitute materials are now available for this purpose. From studies made by the Department of the Interior, as well as by the silver-

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producing industry itself, it is evident that new sources of silver could not be developed quickly enough, if at all, to meet the long-range needs of the free world for silver for industrial uses and also make possible the continued coinage of 0.900 fine silver coins by the United States at present levels of coin production.

STEPS ALREADY TAKEN

Most free world countries have already eliminated silver from their coinage. Those which continue to mint silver coins include in their coinage system only one or two such coins of varying degrees of fineness. The impending crisis in silver supply was becoming evident when the Committee on Banking and Currency in 1963 initiated action on legislation to repeal the Silver Purchase Act, and to authorize the issuance of \$1 and \$2 Federal Reserve notes as eventual replacements for silver certificates in the currency supply. This action freed hundreds of millions of ounces of silver for coinage, and made possible the dramatic expansion of mint production in the past year.

STUDIES MADE

In the meantime, the Bureau of the Mint entered into a contract with the Battelle Memorial Institute, of Columbus, Ohio, to make a study of silver supplies and of materials which could be used as alternates or replacements for the 90-percent silver coinage of the United States. The institute studied a wide variety of metals and alloys considered possible candidates for replacement of silver or to be used in combination with silver in coinage.

These materials were evaluated on the bases of availability and price; public acceptability; physical, chemical, and mechanical properties; effect on coin-operated devices; effect on mint operations; and counterfeiting, illegal duplication, and slugging potential. Among the metals and alloys considered and evaluated were aluminum, bismuth, cadmium, cobalt, chromium, columbium, copper, gold, hafnium, indium, iridium, iron, lead, manganese, mercury, molybdenum, magnesium, nickel, osmium, palladium, platinum, rhenium, rhodium, ruthenium, silver, tantalum, titanium, tungsten, uranium, vanadium, zinc, and zirconium.

Each of these materials, either by itself or in combination with other metals, was found to present problems of varying degree of seriousness as a substitute for silver. The best solution put forward by the Battelle Memorial Institute was a "clad" or sandwichlike combination consisting of a core of copper and an outer layer of cupronickel. The institute added, however, that if production of such a coin was not feasible "for unforeseen reasons" the 75 copper-25 nickel alloy used in the 5-cent coin was recommended. It added:

If the retention of silver because of tradition and prestige does not compromise any of the other objectives, it is recommended that either of two options be chosen. One is to use silver in the 50-cent piece only, by making a multilayer composite consisting of 80 silver-20 copper on the outside, and a low silver-copper alloy in the core. The other option is to spread the silver evenly throughout all subsidiary denominations by making a composite consisting of

COINAGE ACT OF 1965

the 40 silver-50 copper-5 nickel-5 zinc alloy on a silver-bearing copper alloy core. It is further recommended that the silver-containing coins, if adopted, be changed to the 75 copper-25 nickel on a copper core on July 1, 1975, or at such time as the Treasury stock of silver reaches a predetermined minimum.

The final report of the Battelle Memorial Institute was made to the Treasury on February 12, 1965, but was not made public until released by President Johnson in sending his silver coinage message to Congress on June 3. The Treasury Department used the Battelle report to supplement its own studies into the feasibility and desirability of changes in our coinage and the policy problems inherent in such a change.

CONCLUSIONS AND RECOMMENDATIONS OF TREASURY STAFF STUDY

The comprehensive Treasury report released by the President on June 3, "A Treasury Staff Study of Silver and Coinage," reached the following conclusions and recommendations:

1. Cupronickel is the best permanent material for a new subsidiary coinage, ignoring the vending machine problem. A close second choice would be nickel silver for 10-, 25-, and 50-cent pieces.

2. Either cupronickel or nickel silver coins would require "factory" adjustment of sophisticated vending machine rejectors, entailing significant costs and transitional inconvenience. This may not be adjudged intolerable, in view of their advantages in other respects. However, since extensive experiments confirm that cupronickel (and probably nickel silver) clad on a copper core operates successfully in unaltered vending machine rejectors, preferable options are available. A clad coin can be used during a transition period, or permanently.

3. Information on the wear properties of clad coins is altogether encouraging, and they undoubtedly meet all the requirements for permanent use in the coinage. If desired, they could, with equal facility, serve as a transitional coin while further study and research on the adaptation of vending machines was being conducted. An overriding requirement with clad coins is the production feasibility of the strip and the assurance of an adequate supply for processing in the mint.

4. Because of a number of unresolved questions, the Inco coin comes into the picture only if an assured supply of clad strip cannot be obtained. In any event, the Inco coin would have to have demonstrated conclusively that it would work vending machines with minimal adjustments, that it could be struck successfully in large volume on existing mint equipment, and that adequate supplies of strip or annealed blanks would be available.

5. Subsidiary silver coinage of reduced content, such as silver-copper alloys clad on a low-content silver-copper core, suffers both from difficult transitional problems and incomplete assurance that the subsidiary coinage would not be imperiled again within a fairly short period of time. The danger of a complete breakdown dur-

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ing the transition period cannot be ruled out, and the use of silver throughout the subsidiary coinage should not be viewed as an eligible option. If any silver is to be retained in the subsidiary coinage system, it should be limited to the silver dollar and to a clad 50-cent piece of 400 fineness. In any event, the retention of the monetary value of the silver dollar at its present fineness is absolutely essential to a successful transition.

6. During the transition to a new coinage system, it will be obligatory to hold the market price of silver at its current level in order to protect the existing coinage. Since this will remove the incentive to melt the existing coinage, controls over melting would probably not serve any useful purpose. Effective controls on the hoarding of coin appear impractical. Controls on the export of silver coin and bullion may serve a useful purpose during the transition period. There is something to be said for having standby authority to invoke controls. A prompt transition to base-alloy coinage would make the actual use of controls unnecessary.

7. New coins should be placed in circulation through normal channels. Every effort should be made as soon as possible to prepare for extremely high rates of production of the new coins. This should include an interim expansion in the production of 5-cent pieces (which would provide substitutes for silver coin and subsequently release mint capacity for the new coins) and arrangements for additional temporary production space. If this were to be outside of existing mint facilities, it should remain under mint control.

TRANSITION TO THE NEW COINAGE

It is of critical importance to the public and to the economy that there be a smooth transition from our present coinage system to the new system over a period of time with there being available at all times an adequate supply of coins. To this end, it is important that there be no incentive for the withdrawal from circulation of the existing subsidiary silver coins nor of the new ones.

USE OF STANDBY AUTHORITY DOUBTED

The standby authority granted in section 105 of the bill to the Secretary of the Treasury to prohibit, curtail, or regulate the exportation, melting, or treating of coins could be used by the Secretary whenever in his judgment it became necessary to do so in order to protect the coinage. In the judgment of the Secretary of the Treasury it is doubtful that this authority will have to be invoked. However, if due to unforeseen happenings the exporting or melting of coins for their silver content should begin to constitute a serious problem, the Secretary of the Treasury by invoking the authority granted to him by this legislation would be able to impose such restrictions as might be necessary to stop these practices. Violations of regulations issued by the Secretary of the Treasury under this authority would be punishable by fines of up to \$10,000 or imprisonment for not more than 5 years, or both. In addition, any violation of the Secretary's regulations would render the coins or metal involved subject to forfeiture to the United States.

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MINT MARKS ELIMINATED

In order to prevent the withdrawal of the new coins from circulation on a large scale for collecting purposes, the proposed legislation eliminates the mint mark from the new coins and also provides for dating of the coins in such manner that collector requirements will be held to a minimum, at least at first. The Secretary of the Treasury has assured your committee that none of the new coins will be placed in circulation until there is a sufficient quantity of such coins to assure that they will not be diverted from circulation as novelties. The fact that the new coins will closely resemble existing silver coins is likely to discourage their withdrawal also.

TEMPORARY SPECIAL PROCUREMENT AUTHORITY

The bill contains a number of provisions designed to facilitate the rapid expansion of production of the new coins so that there can be no doubt of the ability of the Government to supply to the economy all the coins necessary. Under section 103, the Secretary of the Treasury is granted for a period of 5 years authority to enter into procurement contracts upon such terms and conditions as he may deem appropriate and in the public interest, and without regard to other provisions of law governing procurement of public contracts. He may use this authority to acquire equipment, manufacturing facilities, patents, patent rights, technical knowledge and assistance, metallic strip, and other materials necessary to produce rapidly the new coins.

ADDITIONAL MINT AUTHORITY

In order to make available the necessary funds for the acquisition of the materials needed and for the establishment of the necessary additional mint facilities, the Secretary of the Treasury would be authorized to use the coinage metal fund for the purchase of metal for coinage, and there would be authorized to be appropriated an additional \$15 million to be used for the establishment of additional mint facilities. In connection with the proposed use of the U. S. assay office in San Francisco for coinage there would be granted continuing authority for this office to refine gold and silver.

COMMITTEE CONSIDERATION

The committee conducted hearings on this legislation on June 4, 7, and 8. It heard the Secretary of the Treasury, Assistant Secretary of the Treasury, the Director of the Mint, and their chief aids on coinage issues and problems. The Secretary appeared on two separate occasions and made himself available for extensive questioning, orally and in writing, by all of the members of the committee. Other witnesses who were heard testified on behalf of the silver-producing interests, on the one hand, and of the industries which use very substantial quantities of silver, on the other.

There was a consensus on the need for a change in our coinage laws to discontinue the production of 900 fine silver coins. The major controversy in the hearings revolved around the issue of the degree of silver to be used in the new coins—whether there should be none, as urged by the

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representatives of the consuming industries; whether the only silver used in coinage should be for a silver-clad half dollar containing 40-percent silver, as proposed by the Treasury and the President; or whether the dime, quarter, and half dollar should all contain a silver cladding, as urged by the representatives of the silver mining industry. Aside from this controversy, the bill as presented reflects general acceptance of the necessity to carry out the recommendations of the President to change our coinage "to meet new and growing needs."

The hearings of the Committee on Banking and Currency and the technical data submitted to the committee establish beyond doubt that the new coins proposed in the legislation will cause no disruption to the vending machine industry or to any other industry dependent upon adequate supplies of U. S. coinage.

EXPLANATION OF AMENDMENTS TO EXISTING LAW

Section 201

Section 3558 of the Revised Statutes (31 U.S.C. 283) as now in effect provides that the business of the U. S. assay office at San Francisco shall be in all respects similar to that of the assay office at New York, except that no gold or silver shall be refined. The bill would repeal that exception, and would also permit temporary coinage operations at San Francisco until the Secretary of the Treasury determines that the mints are adequate for the production of coins.

Section 202

The act of August 20, 1963, provided for the expansion of the facilities of the Bureau of the Mint. Section 4 of that act authorized the appropriation of \$30 million for that purpose, and section 202 of the bill would raise the authorization to \$45 million.

Section 203

Section 3 of the act of December 18, 1942 (31 U.S.C. 317c), confers on the Secretary of the Treasury authority to melt down worn and uncurrent minor coin and to use the resulting metal for coinage or to sell it. Minor coins are nickels and pennies. The bill would make this authority applicable to all coin of the United States.

Section 9 of the act of March 14, 1900 (31 U.S.C. 320), requires the re-coinage of all worn and uncurrent halves, quarters, and dimes. The bill repeals this section.

Section 204

The dates and other inscriptions to appear on coins are now governed by section 3517 of the Revised Statutes (31 U.S.C. 324), the act of July 11, 1955 (31 U.S.C. 324a), and the act of September 3, 1964 (31 U.S.C. 324 note). The bill consolidates the provisions of all three of these sections, insofar as they pertain to coins, into section 3517 of the Revised Statutes. The introduced bill would make permanent law the authority of the Secretary under the act of September 3, 1964, to continue using the same date while coins are in short supply, and authorizes him to use that authority in any future emergency which may occur. The committee amendments to this part of the introduced bill require that all coins made from the traditional coin silver be inscribed with the year 1964, and that the

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newly authorized coins be inscribed with 1965 or subsequent years. The committee amendment would also prohibit the use of mint marks except to the extent that they were already in use at the Denver Mint on the date of enactment.

Section 205

Section 3526 of the Revised Statutes (31 U.S.C. 335) authorizes the maintenance of the bullion fund. The bill amends this section to permit purchases of newly mined domestic silver pursuant to section 104 of the bill to be made from the bullion fund.

Section 206

Section 3528 of the Revised Statutes authorizes the creation of the minor coinage metal fund. The bill redesignates this as the coinage metal fund, and authorizes its use for the purchase of metal for any coins. The bill also removes the ceiling on the amount of this fund, as it has never served any useful purpose and, if retained, it would render existing mint accounting procedures unworkable in dealing with the expected volume of the new coinage.

This section of the Revised Statutes considerably antedates existing general law governing procurement and public contracts, and, as now in effect, contains coinage metal procurement provisions that are no longer needed to protect the interests of the Government. These provisions are repealed by the bill, so that when the Secretary's temporary authority under section 103(b) of the bill expires, procurement of metal for coinage will be governed by the same provisions of law that control Government procurement generally.

Section 207

This section repeals obsolete fixed wastage limitations for various mint operations prescribed under section 3542 of the Revised Statutes (31 U.S.C. 355) and directs that limitations be administratively established, thus permitting periodic adjustment in the light of experience and technological developments.

Section 208

This section repeals section 3550 of the Revised Statutes (31 U.S.C. 366), which requires annual destruction of obverse working dies at the mints.

Section 209

This section amends section 2 of the act of June 4, 1963 (31 U.S.C. 405a-1). The amendment establishes an express statutory reference for the monetary value of silver and permits the Secretary of the Treasury to sell silver at prices not less than that figure (\$1.292929292 per fine troy ounce). The practical effect of existing law is the same except that the minimum price provision does not apply in the case of sales to other departments of the Government.

Section 210

Section 102, in title 1 of the bill, makes all coins and currencies of the United States legal tender. Section 210 of the bill therefore repeals the last sentence of section 43(b) (1) of the act of May 12, 1933 (31 U.S.C. 462), which is to the same effect, in order to avoid raising any possible

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implication that section 102 of the bill is anything more than a restatement of existing law.

Section 211

Section 485 of title 18 of the United States Code makes it a felony to counterfeit silver coins. Section 211 of the bill amends it to cover coins of any denomination in excess of 5 cents, thus covering coins of the same denominations as existing law, but describing them in terms which make their composition irrelevant.

ADDITIONAL VIEWS OF REPRESENTATIVE COMPTON I. WHITE, JR. QUARTERS AND DIMES

One week and one day ago the Congress was informed of the long-awaited results of the Treasury staff study of silver and coinage. For years Members of Congress had recommended a comprehensive study of our silver and coinage situation, most of whom urged a reduction in the silver content of our coins. Increasing industrial uses, impeded production due to ceiling prices and dwindling Treasury stocks, indicated years ago that we must make a reduction in the grains and grams of silver in our coins. Various bills were introduced in both Houses of Congress, but we were told to wait for the results of the Treasury's study of the problem. We waited for years, and then we were asked to act within a matter of days. This committee has acted, but not entirely wisely. Unlike Gaul, I would like to divide these views into two parts: one dealing with the committee's departure from the President's request for reduced silver content half dollars, the other with the provision for base metal quarters and dimes.

HALF DOLLARS

ADMINISTRATION'S POSITION

The President's recommendation for a 400 fine silver 50-cent piece was reversed by the committee. The testimony of the Secretary of Treasury demonstrated the need for continuing the 173-year tradition of maintaining silver in our coins. Chairman Patman's bill provided for keeping a coin of intrinsic value in our monetary system. The committee amendment contradicting the advice of this Nation's leaders was ill advised, and not well considered. The action was due, I think, to three things: (a) An inaccurate estimate of our silver supplies; (b) a disbelief by some in the need for attractive coins of intrinsic value; and (c) the excessive greed of the silver consumers to obtain every last ounce of Treasury silver at the falsely low price of \$1.29 per ounce. In order to refute these motivations, it is sufficient to study the testimony of the administration's witnesses, which is based on the lengthy study conducted by the U. S. Department of Treasury.

SUFFICIENT SILVER

It is evident from the figures supplied by the Treasury Department that the United States owns ample silver to meet the needs of the reduced silver content 50-cent pieces. In order to mint the number needed for this Nation's commerce, Secretary Fowler estimated that only 15 million ounces

COINAGE ACT OF 1965

of silver per year would be required. That is merely 5 percent of the projected silver consumption for coinage this year. At this rate of production, the Secretary stated we could indefinitely mint silver halves; in other words, supply and demand for silver are not so drastically out of alignment, even with a ceiling price on the metal, that this rate of consumption would have any significant effect on the total future of silver. It is important to note that no flowback of the present 90 percent silver coins is needed to indefinitely maintain this production of 40 percent silver half dollars.

ANTIHOARDING PROTECTION

The best argument advanced by the Treasury for the need of continuing silver in the half dollar is the protection it provides against the hoarding of our circulating coin. Assistant Secretary of the Treasury Wallace accurately pointed out that one type of hoarding, which he colorfully termed "grandfather-type hoarding" would be lessened by the continuance of silver in the 50-cent piece. The reasoning behind this is that our citizens would not want to set aside our present coins because of their silver content if we have newly minted silver coins coming out continually. The sentiment that we would have to set aside the "old coins" for our grandchildren to admire, would not exist, because we could obtain similar coins in everyday commerce.

PRESIDENT KENNEDY'S IMAGE

Some witnesses expressed the opinion that silver 50-cent pieces would not circulate because they bear the image of our late President, John F. Kennedy. There are two reasons why this is not a valid conclusion. If another design were to be selected for the 50-cent piece, it would doubly become a collector's item, due to the design change and the new content. An even greater incentive would be created to hoard the millions of Kennedy halves already minted.

The second reason for the invalidity of the argument for increased hoarding of silver 50-cent pieces of the present design is that it makes no difference what metal is used. We all know that many of the Kennedy halves are held by our citizens, and citizens of other nations, because of their love for the assassinated President. The motive is the image, not the material upon which it is imprinted. If the late President's profile were placed on the easily distinguishable cupronickel sandwich coin, the incentive to hold it from the streams of commerce would be increased because of the novelty. Further, I do not think we should accept false arguments of expediency to place our beloved late President's image on what has been termed "the hamburger coin."

JOINT COMMISSION

In final argument for the President's and Chairman Patman's proposal for the continuance of silver in the half-dollar coins, I cite the safeguard that is built into this legislation. A Joint Commission on Coinage is established. One of the Commission's duties will be "to study the standards for our coins." If it is proven that the President, the Secretary of the Treasury, and Chairman of the House Banking and Currency Committee are wrong in advocating the continuance of silver in the 50-cent piece, the

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Commission may quickly bring this to our attention and we can correct the error some say they have made.

The views expressed above are shared, I believe, by many members of the House Banking and Currency Committee. Due to the inconvenience created by having this report filed within a day of the committee's action, and on a weekend, it has not been possible to seek their concurrence on this part of the "additional views." I am confident, however, that a majority of my colleagues would join me in this part, had the opportunity been timely available.

QUARTERS AND DIMES

HAMBURGER SANDWICHES

~~The committee followed the course suggested by the Treasury staff study with regard to quarters and dimes, namely, their complete debasement.~~ The sole reason for eliminating silver entirely from these two subsidiary coins is the fear that supply of the metal will never meet the demand for it. The pessimism is based on panic, born of the tardy realization that a Government-controlled price for silver has placed a strain on our Treasury stocks of the precious metal. While freely admitting the superiority of silver coins, the Secretary of the Treasury has asked us to give him authority to make red-edged "hamburger sandwiches" for dimes and quarters.

When asked whether he thought the proposed cupronickel clad coins could circulate side by side with the present silver coins, we obtained answers to the effect that he "intended for them to do so." The intention of the Secretary or of this committee will not make the dull and odd-looking cheap substitutes circulate side by side with our present coins of high silver content. The dimes and quarters authorized by H.R. 8926 could doubly be called "flat money," in that their value and their ability to circulate is to result from a governmental edict. The doubt about the latter quality was evident from the shamefaced manner in which the proposed coins were presented to the committee for inspection. The covert display of the copper and nickel, dimes, and quarters was so comical that one member expressed his analogical distrust of "red lights at the meat counter and green lights at the vegetable counter."

TREASURY'S ASSUMPTION

Our respected officials were placed in the ridiculous position described above by their conviction that this Nation can no longer afford silver in two of its three subsidiary coins. The frightening result of price management for silver on supply and demand came home to the Treasury "too much and too late." There is an overconviction about the need to reduce the silver content of our coins. It must be pointed out that most of the Treasury staff study was predicated on the conclusion that a reduction of silver content could not technically go below 50 percent. Working within that framework throughout most of the study, it looked doubtful that we could afford that much silver in our coins. When, however, the cladding process was brought to the attention of the Treasury, it was evident that a 40-percent-silver coin would not only look identical to the present coins,

More of Vietnam War

COINAGE ACT OF 1963

but it would perform just as well. Almost as a footnote, the Treasury staff study included table 2-A on page 70. Even with allowances for the omissions in this table, which I will outline below, it is evident that enough silver is within the reach of the Treasury to insure a smooth transition to reduced silver content dimes, quarters, and halves. Not only would ample silver be left over after the changeover for a strategic stockpile, but the Treasury could adequately supply industrial users of silver throughout that period.

SILVER SUPPLY

The omissions in table 2-A on page 70 of the Treasury staff study are prejudicial to the case for reduced silver content coins. On the supply side of the picture, the table fails to reflect increased production of silver during the transition period. The House Committee on Interior and Insular Affairs held hearings this week to gather corrective data for those figures, which will be available at the time H.R. 3926 comes to the floor of the House. No allowance is made for industrial recovery of silver, which has been estimated at more than 35 million ounces per year. Scrap silver from discarded jewelry and old coin is in excess of 30 million ounces per year, but those figures are not apparent in table 2-A. Not one ounce coming into the market from dehoarding of coin and bullion is counted on the supply side for the estimates in the table. Experts estimate this figure to be in excess of a hundred million ounces.

SILVER DEMAND

On the demand side of table 2-A, the estimates are more than generous. The explanation of the table notes that the 45 million silver dollars are in the Treasury figures. We all know that this will not be the case this year, or if an amendment to this bill prevails, will not be the case throughout the transition period. Also on the demand side, the Treasury staff study bases its estimates for withdrawals of Treasury silver on the redemption rate of silver certificates during 1964, the year of highest withdrawals. Much of the silver withdrawn in 1964 was for speculative purposes, not for legitimate industrial use.

CONCLUSION

In summary, ample silver exists for its retention in our subsidiary coins. More important, it is very likely that introduction of the dimes and quarters authorized by this bill will drive existing coins into hoarding. A horribly chaotic condition will result in the marketplace if this is the case. In order to provide an immediate remedy to such a result, I think we would be wise to place language in this bill which would give the Secretary of the Treasury discretionary authority to mint reduced silver content coins. He would not be required to exercise this authority unless it were proven necessary by the disappearance of our 90-percent-silver coins. The executive branch would be saved the embarrassment of coming again to Capitol Hill to admit its mistaken guess about coins and silver.

OFFICE OF THE WHITE HOUSE PRESS SECRETARY

THE WHITE HOUSE

REMARKS OF THE PRESIDENT

AT THE
SIGNING CEREMONY

OF THE
SILVER COINAGE ACT
(In The Rose Garden)

Bill
Coinage
Lyndon B. Johnson

(11:21 AM EDT)

~~Distinguished members of Congress, ladies and gentlemen:~~

~~We gather here today for a very rare and historic occasion in our Nation's history.~~

~~Before I make some observations that I have made not of here, I want to say to the Congress again, as I do almost daily these days, in the words of the Navy: "Well done."~~

~~When I have signed this bill before us, we will have made the first fundamental change in our coinage in 173 years. The Coinage Act of 1965 supersedes the Act of 1792. And that Act had the title: "An Act, Establishing a Mint and Regulating the Coinage of the United States."~~

~~Since that time our coinage of dimes, and quarters, and half dollars, and dollars have contained 90 percent silver. Today, except for the silver dollar, we are establishing a new coinage to take its place beside the old.~~

~~My Secretary of the Treasury, Joe Fowler, is a little stingy about making samples, but I have some here. Joe made sure that I wouldn't put them in my pocket by sending them over here in plastic.~~

~~Actually, no new coins can be minted until this bill is signed. So these strikes, as they are called, are coins that we will never use. One on the side is our first First Lady, Martha Washington. On the other, a replica of Mount Vernon.~~

~~The new dimes and the new quarters will contain no silver. They will be cupronickel, with faces of the same alloy used in our five cent piece that is bonded to a core of pure copper. They will show a copper edge.~~

~~Our new half dollar will continue our silver tradition. Eighty percent silver on the outside and 19 percent silver inside. It will be nearly indistinguishable in appearance from our present half dollars.~~

~~All these new coins will be the same size and will bear the same designs as do their present counterparts. And they will fit all the parking meters and ALL the coin machines and will have the same monetary value as the present ones.~~

~~Now, all of you know these changes are necessary for a very simple reason -- silver is a scarce material. Our uses of silver are growing as~~

our population and our economy grows. The hard fact is that silver consumption is more than double new silver production each year. So, in the face of this world-wide shortage of silver, and our rapidly growing need for coins, the only really prudent course was to reduce our dependence upon silver for making our coins.

If we had not done so, we would have risked chronic coin shortages in the very near future.

There is no change in the penny and the nickel. There is no change in the silver dollar, although we have no present plans for silver dollar production.

Some have asked whether silver coins will disappear. The answer is very definitely -- No.

Our present silver coins won't disappear and they won't even become rarities. We estimate that there are now 12 billion -- I repeat, more than 12 billion silver dimes and quarters and half dollars that are now outstanding. We will make another billion before we halt production. And they will be used side-by-side with our new coins.

Since the life of a silver coin is about 25 years, we expect our traditional silver coins to be with us in large numbers for a long, long time.

If anybody has any idea of hoarding our silver coins, let me say this. Treasury has a lot of silver on hand, and it can be, and it will be used to keep the price of silver in line with its value in our present silver coin. There will be no profit in holding them out of circulation for the value of their silver content.

The new coins are not going to have a scarcity value either. The mint is geared to get into production quickly and to do it on a massive scale. We can expect to produce not less than 3 1/2 billions of the new coins in the next year, and, if necessary, twice that amount in the following twelve months.

So, we have come here this morning to this, the first House of the land, this beautiful Rose Garden, to congratulate all of these men and women that make up our fine Congress, who made this legislation possible -- the committees of both Houses, the leadership in both Houses, both parties, and Secretary Fowler and all of his associates in the Treasury.

~~I commend the new coins to the National banks and businesses, and to the public. I think it will serve us well.~~

~~Now, I think it is time to make the first change in our coinage system since the 18th century. To those members of Congress, who are here on this very historic occasion, I want to assure you that in making this change from the 18th century, we have no idea of returning to it.~~

We are going to keep our eyes on the stars and our feet on the ground.

END

26
document
section

WASHINGTON, D.C.

TYPE SAFFR 1 S U
I P E D

10¢



25¢



50¢



NEW U.S. COINS

FACT SHEET



WHAT ARE THE NEW DIMES AND QUARTERS MADE OF?

- * The new dime and quarter are three layered coins. They are the country's first non-silver coins above 5 cents value, made necessary by a world silver shortage. The outer faces of both are 75 percent copper and 25 percent nickel -- the same alloy used for the 5¢ piece. The cupronickel faces of the new dime and quarter are bonded to a core of pure copper, giving them a new look in United States coinage: coins with a distinctive copper colored edge. This construction makes them compatible in all uses, including vending machines, with the silver coinage.

WHAT IS THE NEW HALF DOLLAR LIKE?

- * The new half dollar is also a three layered coin. But it is the silver standard bearer of the new coinage. Its outer faces are an alloy of 80 percent silver and 20 percent copper. The inner core is 21 percent silver and 79 percent copper. The 80 percent silver content of the faces of the new half dollar make it almost indistinguishable from the traditional 90 percent silver 50 cent piece. The new half dollar has an overall 40 percent silver content.

DO THE NEW COINS HAVE DIFFERENT DESIGNS?

- * No. The new dime, quarter, and half dollar have the same designs as the old ones. All new coins -- the dime, quarter, and half dollar -- are dated 1965 and will continue to be dated 1965 until all shortages disappear.

WHY DID THE UNITED STATES GREATLY REDUCE THE USE OF SILVER IN COINS?

- * Primarily because there is a world shortage of silver. The artistic and industrial demand for silver, to say nothing of the use of silver in coinage, far exceeds the amount of silver being mined.
- * Another important reason is the ever-increasing demand for coins by an expanding American population.
- * The silver for United States coins has come for many years from the Treasury's silver stock. But to provide more and more Americans with more and more coins requires more and more silver. In recent years, demand for coins has grown so fast that, at current rates of coin production, the Treasury's silver supply would last only another three years.

- * To avoid coin shortages, it therefore became necessary to reduce our dependence upon silver in our coinage.

COULDN'T NEW SUPPLIES OF SILVER BE INCREASED?

- * Extensive study of this question indicated that it was not practical to hope for increased mining of silver in anything like the huge amounts needed to continue a silver coinage.

WHAT WILL BECOME OF OUR SILVER COINAGE?

- * Production of our traditional 90 per cent silver coins continued while the new coins were introduced, building the circulated supply of silver coins to some 13 billion pieces. The silver coins are to circulate side-by-side with the new coins for the life of the coins, usually about 25 years.

ARE THE NEW COINS LEGAL TENDER?

- * Yes, they are full legal tender, just as valuable, as money, as the silver coins.

ARE SILVER DOLLARS NOW BEING MINTED?

- * No, silver dollars are not being minted and there are no present plans for minting them. But the silver dollar remains as a part of the United States coinage, unchanged since the founding of the nation, as a 90 percent silver coin.

HOW MANY NEW 25¢ COINS ARE NOW IN CIRCULATION?

- * The first of the three new coins -- dime, quarter and half dollar -- authorized by the Coinage Act of 1965 to go into use was the new quarter. During the week that began Monday, November 1, 1965, the 36 Federal Reserve Banks and branch banks throughout the country scheduled distribution of 230 million of the new, non-silver 25¢ pieces to commercial banks for public use. The Mint's plans called for further additions to supplies of the new coin at the rate of a quarter of a billion pieces a month. This high rate of production -- as many quarters every three months as ever before produced in a year -- will be kept up until a sufficient stock exists to satisfy all requirements for quarters.

WHAT ABOUT THE NEW 10¢ AND 50¢ PIECES?

- * Production of the new dime and half dollar was scheduled to commence in late 1965 to permit the build-up of stocks large enough for introduction of these coins to public use in the first half of 1966.

WILL THE NEW COINS LAST AS LONG AS THE OLD SILVER ONES?

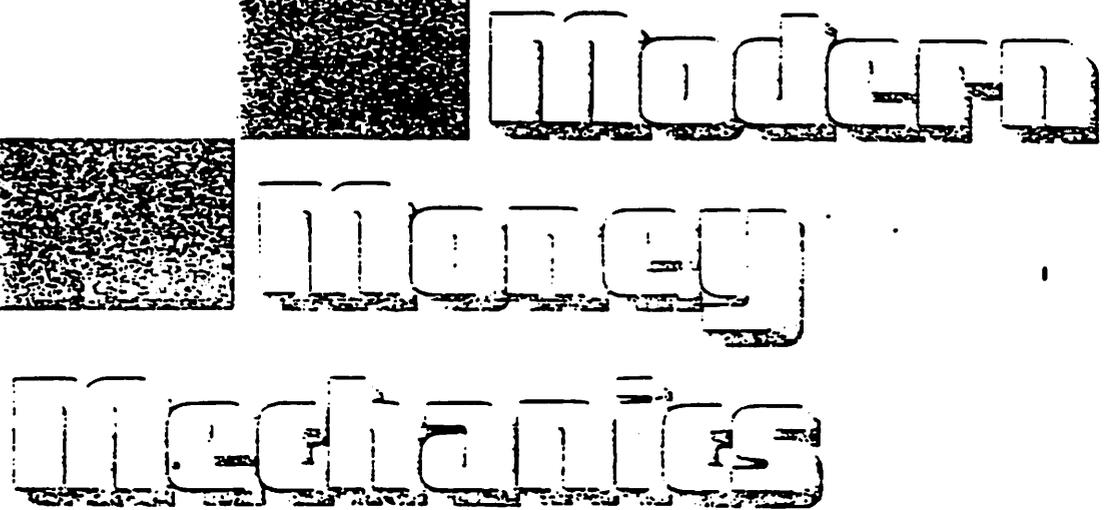
- * Yes, perhaps even longer. This is indicated by extensive wear tests made on new coins before they were adopted.

HAVE OTHER COUNTRIES ALSO ADOPTED NON-SILVER COINS?

- * Yes. Most countries have long since ended or drastically reduced the use of silver in their coinage.

WILL THE NEW COINS OPERATE IN VENDING MACHINES?

- * The new coins were engineered to duplicate exactly the electrical properties of existing silver coins -- that is why they are three-layered coins. Therefore, they will function in all coin vending machines, even in those with sensing devices set to accept only coins with the electrical properties of almost pure silver.



**Modern
Money
Mechanics**

**a workbook on
deposits
currency
and
bank reserves**

FEDERAL RESERVE BANK OF CHICAGO

Modern Money Mechanics

to the Federal
reserve banks & also
to all their public.
make this

The purpose of this booklet is to describe the mechanical process of money creation in a "fractional reserve" banking system. The approach is to illustrate the changes in bank balance sheets that occur when bank deposits change as a result of monetary action by the Federal Reserve System—the central bank of the United States. The relationships shown represent potentials based on simplifying assumptions. They should not be interpreted to imply a close and predictable relationship between a specific central bank transaction and the quantity of money.

The introductory pages contain a brief general description of the characteristics of money and how the U.S. money system works. The illustrations in the following section describe two processes—how bank deposits expand or contract in response to changes in the amount of reserves supplied by the central bank, and how those reserves are affected by both Federal Reserve actions and other factors. A final section deals with some of the elements that modify, at least in the short run, the simple theoretical relationship between bank reserves and deposit money.

~~Money is such a routine part of everyday living that its existence and acceptance are ordinarily taken for granted. A user may sense that money must come into being either automatically as a result of economic activity or as an outgrowth of some government operation. But just how this happens all too often remains a mystery.~~

What is money?

If money is viewed simply as a tool used to facilitate transactions, only those media that are readily accepted in exchange for goods, services, and other assets need to be considered. Many things—from stones to cigarettes—have served this monetary function through the ages. Today, in the United States, money used in transactions is mainly of three kinds—currency (paper money and coins in the pockets and purses of the public), demand deposits (non-interest bearing checking accounts in commercial banks) and other checkable deposits at all depository institutions, including commercial and mutual savings banks, savings and loan associations, and credit unions. Travelers checks are also included in the definition of transactions money. Since \$1 in currency and \$1 in checkable deposits are freely convertible into each other and both can be used directly for expenditures, they are money in equal degree. However, only the cash and balances held by the nonbank public are counted in the money supply. Deposits of the U.S. Treasury and vault cash in depository institutions are excluded.

This transactions concept of money is the one designated as M1 in the Federal Reserve money stock statistics. Broader concepts of money (M2 and M3) include certain financial assets, such as savings and time deposits and shares of money market mutual funds, which are relatively liquid but which are believed to represent principally investments to their holders rather than media of exchange. While transactions balances can easily be shifted into these other liquid assets, the money-creation process takes place principally through transactions accounts. In the remainder of this booklet "money" means M1.

The distribution between the components of money depends largely on the preferences of the public. When a depositor "cashes" a check, he reduces the amount of deposits and increases the amount of currency in circulation. Conversely, when more currency is in circulation than is needed, some is returned to the banks in exchange for deposits.

While currency is used for a great variety of small transactions, most of the dollar amount of money payments in our economy are made by check or by wire transfer between deposit accounts. Moreover, currency is a relatively small part of the money stock. More than 70 percent, or \$310 billion, of the \$440 billion total money stock at the end of 1981 was in the form of transactions deposits, of which roughly \$235 billion were demand and \$75 billion were other checkable deposits.

What makes money valuable?

In the United States neither paper currency nor deposits have value as commodities. Intrinsically, a dollar bill is just a piece of paper. Deposits are merely book entries. ~~Neither have some intrinsic value, nor do they generally exceed their face amount.~~

What, then, makes these instruments—checks, paper money, and coins—acceptable at face value in payment of all debts and for other monetary uses? ~~Mainly, it is the confidence people have that they will be able to exchange such money for other financial assets and goods~~ and services whenever they choose to do so. This is partly a matter of law; currency has been designated "legal tender" by the government—that is, it must be accepted by creditors in payment of money debts, and paper currency is a liability of the government. Transactions deposits are liabilities of the depository institutions, which stand ready to convert such deposits into currency or transfer their ownership at the request of depositors. Confidence in these forms of money also seems to be tied in some way to the fact that assets exist on the books of the government (or central bank) and the depository institutions equal to the amount of money outstanding, even though most of these assets themselves are no more than pieces of paper (such as customers' promises to repay depository institutions), and it is well understood that money is not redeemable in them.

But the real source of money's value is neither its commodity content nor what people think stands behind it. Commodities or services are more or less valuable because there are more or less of them relative to the amounts people want. Money, like anything else, derives its value from its *scarcity* in relation to its usefulness. Money's usefulness is its unique ability to command other goods and services and to permit a holder to be constantly ready to do so. How much is demanded depends on three factors—the total volume of transactions in the economy at any given time, the payments habits of the society, and the amount of money that individuals and businesses want to keep on hand to take care of unexpected or future transactions.

Control of the *quantity* of money is essential if its value is to be kept stable. Money's real value can be measured only in terms of what it will buy. Therefore, its value varies inversely with the general level of prices. Assuming a constant rate of use, if the volume of money grows more rapidly than the rate at which the output of real goods and services increases, prices will

rise. This will happen because there will be more money than there will be goods to spend it on at prevailing prices. The increase in prices would reduce the value of money even though the monetary unit were "backed" by and redeemable in the soundest assets imaginable. But if, on the other hand, growth in the supply of money does not keep pace with the economy's current production, prices will fall, manpower, factories, and other production facilities will not be fully employed, or both.

Just how large the stock of money needs to be in order to handle the transactions of the economy without exerting undue influence on the price level depends on how intensively money is being used. Every transactions deposit balance and every dollar bill is a part of somebody's spendable funds at any given time, ready to move to other owners as transactions take place. Some holders spend money quickly after they get it, making these dollars available for other uses. Others, however, hold dollars for longer periods. Obviously, when some dollars remain idle, a larger total is needed to accomplish any given volume of transactions.

Who creates money?

~~Changes in the quantity of money may originate with actions of the Federal Reserve System (the central bank), depository institutions (principally the commercial banks), or the public, but the main control rests with the central bank.~~

~~The actual process of money creation takes place in the banks. As notes and other checkable liabilities of banks are money. These liabilities are customers' accounts. They increase when the customers deposit currency and checks and when the proceeds of loans made by the banks are credited to borrowers' accounts.~~

~~In the absence of legal reserve requirements, banks can build up deposits by increasing loans and investments so long as they keep enough currency on hand to redeem whatever amounts the holders of deposits want to convert into currency. This unique attribute of the banking business was discovered by~~

Under the Depository Institutions Deregulation and Monetary Control Act of 1980, all depository institutions are permitted to offer interest-bearing transactions accounts, and these transactions accounts and also nonpersonal time deposits at all such institutions are subject to the reserve requirements set by the Federal Reserve. Thus all such institutions have the potential for creating money. In order to describe this process as simply as possible, however, henceforth in this booklet "banks" should be understood to encompass all depository institutions.

eral centuries ago. At one time, bankers were merely middlemen. They made a profit by accepting gold and coins brought to them for safekeeping and lending them to borrowers. But they soon found that the receipts they issued to depositors were being used as a means of payment. These receipts were acceptable as money since whoever held them could go to the banker and exchange them for metallic money.

Then bankers discovered that they could make loans more easily by giving borrowers their promises to pay (bank notes). These notes began to circulate as money. More notes could be issued than the gold and coin on hand because only a portion of the notes outstanding would be presented for payment at any one time. Enough metallic money had to be kept on hand, of course, to redeem whatever volume of notes was presented for payment.

Transactions deposits are the modern counterpart of bank notes. It was a small step from printing notes to making book entries to the credit of borrowers which the borrowers, in turn, could "spend" by writing checks, thereby "printing" their own money.

What limits the amount of money banks can create?

If deposit money can be created so easily, what is to prevent banks from making too much—more than sufficient to keep the nation's productive resources fully employed without price inflation? Like its predecessor, the modern bank must keep available, to make payment on demand, a considerable amount of currency and funds on deposit with the central bank. The bank must be prepared to convert deposit money into currency for those depositors who request currency. It must make remittance on checks written by depositors and presented for payment by other banks (settle adverse clearings). Finally, it must maintain cash and/or balances at its Federal Reserve Bank (legal reserves) equal to a prescribed percentage of its deposits.

The public's demand for currency varies greatly, but generally follows a seasonal pattern that is quite predictable. The effects on bank funds of these variations in the amount of currency held by the public are usually offset by the central bank, which replaces the reserves absorbed by currency withdrawals from banks. (Just how this is done will be explained later.) For all banks taken together, there is no net drain of funds through clearings. A check drawn on one bank

normally will be deposited to the credit of another account, if not in the same bank, then in some other bank.

These operating needs of individual banks, therefore, are of relatively minor importance as a restraint on aggregate deposit expansion in the banking system. Such expansion cannot continue, however, beyond the point where the amount of reserves that all banks have is just sufficient to satisfy legal requirements under our "fractional reserve" system. For example, if reserves of 20 percent were required, deposits could expand only until they were five times as large as reserves. Ten million dollars of reserves would support \$50 million of deposits. The lower the percentage requirement, the greater the deposit expansion that can be supported by each additional reserve dollar. Thus, the legal reserve ratio together with the dollar amount of bank reserves are the factors that set the upper limit to money creation.

What are bank reserves?

Currency held in bank vaults may be counted as legal reserves. More than half of bank reserves, however, are in the form of deposits (reserve balances) at the Federal Reserve Banks. Both are equally acceptable in satisfaction of reserve requirements. A bank can always obtain reserve balances by sending currency to its Reserve Bank and can obtain currency by drawing on its reserve balance. Because either can be used to support a much larger volume of deposit liabilities of banks, currency and reserve balances together are often referred to as "high-powered money" or "the monetary base." Reserve balances and vault cash in banks are not counted as part of the money stock held by the public.

For individual banks reserve balances also serve as clearing accounts. Banks may increase their reserve balances by depositing checks as well as currency. Or they may draw down these balances by writing checks on them or by authorizing a debit to them in payment for currency or customers' checks.

Although reserve accounts are used as working balances, each bank must maintain, on the average for the relevant reserve-maintenance period, deposit balances at the Reserve Bank and vault cash which together are equal to its required reserves, as determined by the amount of its deposits in the reserve calculation period.

Where do bank reserves come from?

Increases or decreases in bank reserves can result from a number of factors discussed later in this booklet. From the standpoint of money creation, however, the essential point is that the reserves of banks are, for the most part, liabilities of the Federal Reserve Banks, and net changes in them are largely determined by actions of the Federal Reserve System. Thus, the Federal Reserve, through its ability to vary both the total volume of reserves and the required ratio of reserves to deposit liabilities, influences banks' decisions with respect to their assets and deposits. One of the major responsibilities of the Federal Reserve System is to provide the total amount of reserves consistent with the monetary needs of the economy at reasonably stable prices. Such actions take into consideration, of course, any changes in the pace at which money is being used and changes in the public's demands for cash balances.

The reader should be mindful that deposits and reserves tend to expand simultaneously and that the Federal Reserve's control often is exerted through the marketplace as individual banks find it either cheaper or more expensive to obtain their required reserves, depending on the willingness of the "Fed" to support the current rate of credit and deposit expansion.

While an individual bank can obtain reserves by bidding them away from other banks, this cannot be done by the banking system as a whole. Except for reserves borrowed from the discount window, as is

shown later, the supply of reserves in the banking system is controlled by the Federal Reserve.

Moreover, a given increase in bank reserves is not necessarily accompanied by an expansion in money equal to the theoretical potential based on the required ratio of reserves to deposits. What happens to the quantity of money will vary, depending upon the reactions of the banks and the public. A number of slippages may occur. What amount of reserves will be drained into the public's currency holdings? To what extent will the increase in the reserve base remain unused as excess reserves? How much will be absorbed by time deposits or other liabilities not defined as money but against which banks must also hold reserves? How sensitive are the banks to policy actions of the central bank? The significance of these questions will be discussed later in this booklet. The answers indicate why changes in the money supply may be different than expected or may respond to policy action only after considerable time has elapsed.

In the succeeding pages the effects of various transactions on the quantity of money are described and illustrated. The basic working tool employed is the "T" account, which provides a simple means of tracing, step by step, the effects of these transactions on both the asset and liability sides of bank balance sheets. Changes in asset items are entered on the left half of the "T" and changes in liabilities on the right half. For any one transaction, of course, there must be at least two entries in order to maintain the equality of assets and liabilities.

Copies of this workbook are available from:

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Federal Reserve Bank of Chicago
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Chicago, Illinois 60690

This publication was prepared
by the F.R.B. of Chicago
in May 1961

REVISED
MAY 1968
SEPTEMBER 1971
JUNE 1975
OCTOBER 1982
CENTRAL BANK OF THE U.S.A.



FEDERAL RESERVE BANK OF CHICAGO

CHAPTER 17—COINS AND CURRENCY

331. Mutilation, diminution, and falsification of coins.
332. Debasement of coins; alteration of official scales, or embezzlement of metals.
333. Mutilation of national bank obligations.
334. Issuance of Federal Reserve or national bank notes.
335. Circulation of obligations of expired corporations.
336. Issuance of circulating obligations of less than \$1.
337. Coins as security for loans.

AMENDMENTS

1965—Pub. L. 89-81, title II, § 212(b), July 23, 1965, 79 Stat. 257, added item 337.

§ 331. Mutilation, diminution, and falsification of coins

Whoever fraudulently alters, defaces, mutilates, impairs, diminishes, falsifies, scales, or lightens any of the coins coined at the mints of the United States, or any foreign coins which are by law made current or are in actual use or circulation as money within the United States; or

Whoever fraudulently possesses, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or brings into the United States, any such coin, knowing the same to be altered, defaced, mutilated, impaired, diminished, falsified, scaled, or lightened—

Shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 700; July 16, 1951, ch. 226, § 1, 65 Stat. 121.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 279 (Mar. 4, 1909, ch. 321, § 165, 35 Stat. 1119).

Mandatory punishment provision was rephrased in the alternative.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Changes were also made in phraseology.

AMENDMENTS

1951—Act July 16, 1951, made section applicable to minor coins (5-cent and 1-cent pieces), and to fraudulent alteration of coins.

CANAL ZONE

Applicability of section to Canal Zone, see section 14 of this title.

CROSS REFERENCES

Forfeiture of counterfeit paraphernalia, see section 492 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 14, 492 of this title.

§ 332. Debasement of coins; alteration of official scales, or embezzlement of metals

If any of the gold or silver coins struck or coined at any of the mints of the United States shall be debased, or made worse as to the proportion of fine gold or fine silver therein contained, or shall be of less weight or value than

the same ought to be, pursuant to law, or if any of the scales or weights used at any of the mints or assay offices of the United States shall be defaced, altered, increased, or diminished through the fault or connivance of any officer or person employed at the said mints or assay offices, with a fraudulent intent; or if any such officer or person shall embezzle any of the metals at any time committed to his charge for the purpose of being coined, or any of the coins struck or coined at the said mints, or any medals, coins, or other moneys of said mints or assay offices at any time committed to his charge, or of which he may have assumed the charge, every such officer or person who commits any of the said offenses shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

(June 25, 1948, ch. 645, 62 Stat. 700.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 280 (Mar. 4, 1909, ch. 321, § 166, 35 Stat. 1120).

Mandatory punishment provision was rephrased in the alternative.

CROSS REFERENCES

Forfeiture of counterfeit paraphernalia, see section 492 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 492 of this title.

§ 333. Mutilation of national bank obligations

Whoever mutilates, cuts, defaces, disfigures, or perforates, or unites or cements together, or does any other thing to any bank bill, draft, note, or other evidence of debt issued by any national banking association, or Federal Reserve bank, or the Federal Reserve System, with intent to render such bank bill, draft, note, or other evidence of debt unfit to be issued, shall be fined not more than \$100 or imprisoned not more than six months, or both.

(June 25, 1948, ch. 645, 62 Stat. 700.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 291 (Mar. 4, 1909, ch. 321, § 174, 35 Stat. 1122).

Words "or Federal Reserve bank, or the Federal Reserve System" were inserted because the paper of such banks has almost supplanted national bank currency.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor changes in phraseology were made.

CROSS REFERENCES

Forfeiture of counterfeit paraphernalia, see section 492 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 492 of this title.

§ 334. Issuance of Federal Reserve or national bank notes

Whoever, being a Federal Reserve Agent, or an agent or employee of such Federal Reserve Agent, or of the Board of Governors of the Federal Reserve System, issues or puts in circulation any Federal Reserve notes, without com-

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13 L.Ed. (13 Howard) 257
(1848)

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reside in Nottingham. The bill of exchange was not dated at any particular place, and the acceptors reside in Baltimore. The defendant was not engaged in trade, but was a physician residing in the country, and it does not appear that he was in the practice of visiting Alexandria, or of having any business transactions there. And the proof is, that Travers, of whom the holder inquired, from the nature of the trade in which he had been many years engaged—first to Nottingham and afterwards to Baltimore—was as likely as any other person in Alexandria to give the information which the plaintiffs were seeking to obtain; if not more so. The answer he received was direct and positive, both as to the knowledge of Travers and the residence of the indorser, and he had a right to rely upon it. And although Travers was mistaken, and the notice was not sent to the nearest or usual postoffice of the defendant, yet the plaintiffs used all the diligence which the law requires, and had sufficient reason to believe that the notice would be received. The liability of the indorser was therefore fixed. The case of *Harris v. Robinson*, 4 Howard, 345, is conclusive on this point.

The second objection taken in the argument has not been so directly settled by judicial decision on the point, but is, we think, equally clear upon established principles.

We have already said, that the liability of the indorser was fixed by the notice sent to Nottingham. The plaintiffs had acquired a right of action against him by this notice, and might have brought their suit the next day. Could that right be divested by the information which was subsequently given to them? We think not, and that all of the cases in relation to this subject imply the contrary. The books are full of cases where mistakes of this kind have been committed, and suits afterwards brought when the residence of the party was discovered. Yet it does not seem to have been supposed in any of them that a second notice was necessary, nor are we aware that such a point has ever been raised. Yet if a notice thus given, after diligent inquiry, is not equivalent to actual notice, knowledge subsequently obtained would be a defense to the action, even if the holder had brought suit before he learned what was the nearest or usual postoffice of the defendant.

The case of *Firth v. Thrush*, 8 Barn. & Cress. 397, which was much relied on in the argument, depended upon different principles. In that case, the holder knew that notice had not been given to the indorser. He had been engaged in making inquiries for his residence, without being able to obtain any information upon which he might have acted. And the question there was not whether a second notice should be given, but whether due diligence was used in sending the first.

The rule contended for by the defendant would produce much uncertainty and difficulty in transactions of this kind. For, if a second notice must be given, is it to be required in all cases where there has been an error in the information as to the defendant's postoffice? Certainly the practice of the courts has been otherwise. And if it is not to be required in all cases, it would be impossible to fix any certain limits as to time or circumstances. The

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subsequent information might come to him casually, when his mind was occupied with other engagements; he might not confide in it as much as in that which he had before received; it might come to him in a few days, or months, might lapse before he obtained it. The rule would be loose and uncertain in its application, and constantly lead to litigation, where the residence of the indorser was unknown, or an error committed as to his usual postoffice. It would also be contrary, the court thinks, to the usages of commerce, and to the uniform practice in courts of justice. In the case of *Harris v. Robinson*, before referred to, no second notice was given, nor did the court intimate that any was necessary.

The law does not require actual notice. It requires reasonable diligence only, and reasonable efforts, made in good faith, to give it. And if sufficient inquiries have been made, and information received upon which the holder has a right to rely, a mistake as to the nearest postoffice or usual postoffice does not deprive him of his remedy. He has done all that the law requires; and the notice thus sent fixes the liability of the indorser as effectually as if he had actually received it. This we think is the true rule, and the only one that can give certainty and security in transactions in commercial paper.

We shall therefore certify, that reasonable diligence was used by the plaintiffs to give the defendant notice of the dishonor of the bill.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and on the point or question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court, that, upon the facts in this case, due diligence had been used by the plaintiffs, the holders of the bill, to give the defendant, the indorser thereof, notice of the dishonor of said bill. Whereupon, it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

THE UNITED STATES, Plaintiffs, (vs) v. PETER MARIGOLD.

U. S. statute for punishment for bringing from foreign country counterfeit coin, made similar to U. S. coins, constitutional.

On the 3d of March, 1825, Congress passed an act (4 Stat. at Large, 121), providing for the punishment of persons who shall bring into the United States, with intent to pass any false, forged, or counterfeited coin; and also for the punishment of persons who shall pass, utter, publish, or sell any such false, forged, or counterfeited coin. Congress had the constitutional power to pass this law. Under the power to regulate commerce, Congress can exclude, either partially or wholly, any subject falling within the legitimate sphere of

commercial regulation; and under the power to coin money and regulate the value thereof. Congress can protect the creature and object of that power.

The doctrines asserted by this court in the case of Fox v. The State of Ohio, 3 Howard, 433, are not inconsistent with that now maintained.

THIS case came up from the Circuit Court of the United States for the Northern District of New York, upon a certificate of division in opinion between the judges thereof.

The record in the case is so very short that the whole of it may be inserted.

"United States of America
Northern District of New York, ss.

"At a Circuit Court of the United States, begun and held at Albany, for the Northern District of New York, in the Second Circuit, on the third Tuesday of October, in the year of our Lord, 1848, and in the seventy-third year of American Independence.

"Present, the Honorable Samuel Nelson and Alfred Conkling, Esquires.

"The United States of America v. Peter Mari- gold.

"State of the Pleadings.

"This is an indictment against the defendant, charging him, under the twentieth section of the Act of Congress entitled 'An Act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes,' approved March 3, 1825,

"1st. With having brought into the United States, from a foreign place, with intent to pass, utter, publish, and sell as true, certain false, forged, and counterfeit coins, made, forged, and counterfeited in the resemblance and similitude of certain gold and silver coins of the United States, coined at the mint, he knowing the same to be false, forged, and counterfeit, and intending thereby to defraud divers persons unknown.

"2d. With having uttered, published, and passed such counterfeit coins, with intent to defraud, etc.

361"] To this indictment the defendant demurs, and George W. Clinton, attorney of the United States for the said district, who prosecutes in this behalf, joins in demurrer.

"This cause coming on to be argued at this term, the following questions occurred:

"1st. Whether Congress, under and by the Constitution, had power and authority to enact so much of the said twentieth section of the said act as relates to bringing into the United States counterfeit coins.

2d. Whether Congress, under and by virtue of the Constitution, had power to enact so much of the said twentieth section as relates to uttering, publishing, passing, and selling of the counterfeit coins therein specified.

"On which said several questions the opinions of the judges were opposed.

"Whereupon, on motion of the said attorney, prosecuting for the United States in this behalf, that the points on which the disagreement has happened may, during the term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court, to be finally decided, it is ordered that the foregoing state of the pleadings and statement of the points upon which the

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disagreement has happened, which is made under the direction of the judges, be certified, according to the request of the attorney, prosecuting as aforesaid, and the law in that case made and provided."

The case came up to this court upon this certificate.

The clauses in the Constitution of the United States and the Act of Congress were the following:

By the fifth and sixth clauses of the eighth section of the first article of the Constitution, it is declared that Congress shall have power, among other things, "to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures;" to provide for the punishment of counterfeiting the securities and current coin of the United States." 1 Statutes at Large, 14.

By the twentieth section of the Crimes Act of 3d March, 1825, 4 Statutes at Large, 121, it is enacted, "That if any person or persons shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting, any coin in the resemblance or similitude of the gold or silver coin which has been, or hereafter may be, coined at the mint of the United States, or in the resemblance or similitude of any foreign gold or silver coin which by law now is, or hereafter may be made, current in the United States; or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the United States from any foreign place with intent to pass, utter, publish, or sell, as true, any such false, forged, or counterfeited coin, knowing the same to be false, forged, or counterfeited, with intent to defraud any body politic or corporate, or any other person or persons whatsoever; every person so offending shall be deemed guilty of felony, and shall on conviction thereof be punished by fine not exceeding five thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten days, according to the aggravation of the offense."

The case was argued by Mr. Johnson (Attorney General) for the United States, and Mr. Seward for the defendant.

Mr. Johnson contended that both questions should be answered in the affirmative.

1. Because, under the fifth clause of the eighth section of the first article of the Constitution, the power to coin money, regulate the value thereof, and of foreign coin, includes the power in question.

2. Because, if it does not, it is included in the power to provide for the punishment of counterfeiting the securities and current coins of the United States, in the succeeding clause of the same section.

3. Because, if the question was at any time a doubtful one, it is to be considered as settled by legislative and judicial precedents, as well upon these provisions as, with reference to this question, upon analogous provisions in the Constitution. 3 Story on Constitution, sec. 1119; Rawle, ch. 9, p. 103; The Federalist, No. 42; Act 21st April, 1806, 2 Statutes at Large, 404; McCulloch v. State of Maryland, 4 Wheat. 401, 409, 416-419, 421.

Mr. Seward contended that the whole ques- Howard 9.

tion had been adjudicated in the case of Fox v. The State of Ohio, 5 Howard, 435.

The State of Ohio had enacted a law, "that, if any person shall counterfeit any of the coins of gold, silver, or copper currently passing in this State, or shall alter or put off counterfeit coin or coins, knowing them to be such," etc., 29 Ohio Stat. 136, quoted 5 Howard, 432. Malinda Fox was convicted of passing, with fraudulent intent, a base and counterfeit coin, in the similitude of a good and legal silver dollar. 563.] She brought a writ of error to this court, on the ground of the unconstitutionality of the Ohio Statute. The judgment was affirmed, and so the Ohio statute was sustained.

This decision is conclusive that the portions of the law of Congress of 1825 now under consideration are unconstitutional. But this argument requires the following conditions to be established:

1. That the offense prohibited by this portion of the act of Congress, and the offense forbidden by the Ohio statute, be identical.

2. That the constitutionality of the Ohio law appears to have been sustained upon the ground, not of a concurrent jurisdiction of the offense in the State and national governments, but on the ground of an exclusive jurisdiction residing in the State alone.

3. That the principle thus decided was necessarily involved in that case, and therefore the authority in that case is not obiter, but res adjudicata.

That the coin in the Ohio case was legalized coin was assumed by the whole court, including Judge McLean. Daniel's Opinion, 5 Howard, 432; McLean's Opinion, 5 Howard, 436.

I. The offenses were identical under the two acts. In the Ohio statute, it was not the "making, the forging, or the counterfeiting, or the aiding in making, forging, or counterfeiting the coin;" it was the "putting off counterfeit coin or coins, knowing them to be such." Putting off in the one case, and passing in the other, are identical. Importing, or bringing in from other places, with intent to pass, is of the same character, as opposed to making, forging or counterfeiting. And this is the test, as established by the Supreme Court. Fox v. Ohio, 5 Howard, 433.

And there is yet another index in the test. It is the party to be directly affected by the fraud; in the one case, the government; in the other, individuals. And the Act of Congress of 1825 includes this very intent to defraud individuals, not the government.

II. The constitutionality of the Ohio law appears to have been sustained upon the ground, not of a concurrent jurisdiction of the offense in the State and national governments, but on the ground of an exclusive jurisdiction in the State.

Nothing could be more direct or explicit than the language of the court (5 Howard, 433): "We think it manifest that the language of the Constitution, by its proper signification, is limited to the facts, or to the faculty in Congress of coining and of stamping the standard of value upon what the government [561] creates or shall adopt, and of punishing the offense of producing a false representation of what may have been so created or adopted. The impotence of passing a false coin

creates, produces, or alters nothing; it leaves the legal coin as it was," etc.

III. The question was directly involved in that case. Judge Daniel so held it. So did Judge McLean (5 Howard, 437): "And these powers must be incomplete, and in a great degree inoperative, unless Congress can exercise the power to punish the passing of counterfeit coin."

But it was indispensably involved in that case. The court could only obtain jurisdiction of the Ohio case on the ground that the Ohio law conflicted with the constitutional sovereignty of the United States. That conflict was the exact, the controlling question. If a question at all what were the boundaries of the respective jurisdictions, it was not incidental, but material, essential. If you could now say that the jurisdictions are concurrent, you could equally say that the State had no jurisdiction at all. The whole course of reasoning, of logic, must be changed.

What is obiter? Judge McLean's reasoning is conclusive, that the power must be exclusive in the States; since he shows that where it resides it must be exclusive. 5 Howard, 438, 439.

The views thus submitted are sustained by the opinion of Conkling, Judge of the District Court of the United States for the Northern District of New York, in the case of The United States v. ———, Law Reporter, June, 1840, p. 60. And they are opposed by Brockenbrough, District Judge for the Western District of Virginia, in the case of Campbell v. United States, Law Reporter, Vol. X, p. 429. But the learned judge only shows, that, as the precise questions had not been decided by the Supreme Court in a case where the indictment was for passing counterfeit coin, he felt himself at liberty to sustain indictments found under the Act of 1825. The Act of 1825 must be assumed to have been known to the Supreme Court when they decided the case of Fox v. Ohio.

The argument derived by Judge Brockenbrough from the analogy to the provision concerning the postoffice is untenable; because in that case the Constitution did not define the power of Congress, but left a full discretion; whereas, in the case of coin, the Constitution defines the power of punishing counterfeiting, and limits it to the making of the spurious coin.

The British statutes define two classes of offenses in regard to coin—the making and the passing; and the terms of the Constitution adopt the former only.

"This distinction was recognized in [565] the case of Fox v. Ohio. And Judge Brockenbrough admits it. And he concedes that the power to punish the passing is not derived from any amplification of the term "counterfeiting" in the Constitution. Law Reporter, Vol. X, p. 464. But the judge maintains that it is an implied power.

But the court forgets that the Constitution found all the States in possession of jurisdiction over private frauds; and it is to be inferred that it was thought that jurisdiction might best be left there. The question now is, not whether it was wisely left there, but whether it was left there. The Judge Brockenbrough erred in assuming that the denial of

jurisdiction to Congress in the case of Fox v. Ohio was obiter. On the contrary, the court expressly deny it, and argue upon the opposite assumption as one conceived, not in fact, but only for argument's sake.

The provision is wise as it is now settled. Congress is to furnish a uniform currency for all the States, and is to punish the crime of forging it. But the multiplied ramifications of crime require that the courts of the several States should have power to punish frauds in commerce and traffic, as well when coin is the instrument as in other cases. The machinery of State police and penal jurisprudence is better adapted and more effective.

Mr. Justice Daniel delivered the opinion of the court:

This is a certificate of division of opinion from the Northern District of New York.

The case is clearly and succinctly stated in the following abstract from the record:

"At a Circuit Court of the United States, begun and held at Albany, for the Northern District of New York, in the Second Circuit, on the third Tuesday of October, in the year of our Lord, 1849, and in the seventy-third year of American Independence.

"Present, the Honorable Samuel Nelson and Alfred Conkling, Esquires.

"The United States of America v. Peter Mari-gold.

"State of the Pleadings.

"This is an indictment against the defendant, charging him, under the twentieth section of the Act of Congress entitled 'An Act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes,' approved March 3, 1825.

"1st. With having brought into the United States, from a foreign place, with intent to pass, utter, publish, and sell as true, certain false, forged, and counterfeit coins, made, forged, and counterfeited in the resemblance and similitude of certain gold and silver coins of the United States, coined at the mint, he knowing the same to be false, forged, and counterfeit, and intending thereby to defraud divers persons unknown.

"2. With having uttered, published, and passed such counterfeit coins, with intent to defraud, &c.

"To this indictment the defendant demurs, and George W. Clinton, attorney of the United States for the said district, who prosecutes in this behalf, joins in demurrer.

"This cause coming on to be argued at this term, the following questions occurred:

"First. Whether Congress, under and by the Constitution, had power and authority to enact so much of the said twentieth section of the said act as relates to bringing into the United States counterfeit coins.

"Second. Whether Congress, under and by virtue of the Constitution, had power to enact so much of the said twentieth section as relates to uttering, publishing, passing, and selling of the counterfeit coins therein specified.

"On which said several questions, the opinions of the judges were opposed.

"Whereupon, on motion of the said attorney, prosecuting for the United States in this

behalf, that the points on which the disagreement has happened may, during the term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court, to be finally decided, it is ordered, that the foregoing state of the pleadings, and statement of the points upon which the disagreement has happened, which is made under the direction of the judges, be certified, according to the request of the attorney, prosecuting as aforesaid, and the law in that case made and provided."

The inquiry first propounded upon this record points, obviously, to the answer which concedes to Congress the power here drawn in question. Congress are, by the Constitution, vested with the power to regulate commerce with foreign nations; and however, at periods of high excitement, an application of the terms "to regulate commerce" such as would embrace absolute prohibitions may have been questioned, yet, since the passage of the embargo and non-intercourse laws, and the repeated judicial sanctions those statutes have received, it can scarcely, at this age, be open to doubt, that every subject falling within the legitimate sphere of commercial regulation may [1857] be partially or wholly included, when either measure shall be deemed of the safety or of the important interests of the entire nation. Such inclusion cannot be limited to particular classes or descriptions of commercial subjects; it may embrace manufactures, bullion, coin, or any other thing. The power once conceded, it may operate on any and every subject of commerce to which the legislative discretion may apply it.

But the twentieth section of the Act of Congress of March 3d, 1825, or rather those provisions of that section brought to the view of this court by the second question certified, are not properly referable to commercial regulations, merely as such; nor to considerations of ordinary commercial advantage. They appertain rather to the execution of an important trust invested by the Constitution, and to the obligation to fulfill that trust on the part of the government, namely, the trust and the duty of creating and maintaining a uniform and pure metallic standard of value throughout the Union. The power of coining money and of regulating its value was delegated to Congress by the Constitution for the very purpose, as assigned by the framers of that instrument, of creating and preserving the uniformity and purity of such a standard of value; and on account of the impossibility which was foreseen of otherwise preventing the inequalities and the confusion necessarily incident to different views of policy, which in different communities would be brought to bear on this subject. The power to coin money being thus given to Congress, founded on public necessity, it must carry with it the correlative power of protecting the creature and object of that power. It cannot be imputed to wise and practical statesmen, nor is it consistent with common sense, that they should have vested this high and exclusive authority, and with a view to objects pertaining of the magnitude of the authority itself, only to be rendered immediately vain and useless, as must have been the case had the government been left disabled and impotent.

to the only means of securing the objects in contemplation.

If the medium which the government was authorized to create and establish could immediately be expelled, and substituted by one it had neither created, estimated, nor authorized, — one possessing no intrinsic value — then the power conferred by the Constitution would be useless, wholly fruitless of every end it was designed to accomplish. Whatever functions Congress are, by the Constitution, authorized to perform, they are, when the public good requires it, bound to perform; and on this principle, having emitted a circulating medium, a '\$08' standard of value 'indispensable for the purposes of the community, and for the action of the government itself, they are equally authorized and bound to prevent its debasement and expulsion, and the destruction of the general confidence and convenience, by the issue and substitution of a spurious coin in lieu of the constitutional currency. We admit that the clause of the Constitution authorizing Congress to provide for the punishment of counterfeiting the securities and current coin of the United States does not embrace within its language the offense of uttering or circulating spurious or counterfeited coin (the term "counterfeit," both by its etymology and common intendment, signifying the fabrication of a false image or representation); nor do we think it necessary or regular to seek the foundation of the offense of circulating spurious coin, or for the origin of the right to punish that offense, either in the section of the statute before quoted, or in this clause of the Constitution. We have both the offense, and the authority to punish it, in the power given by the Constitution to coin money, and to the correspondent and necessary power and obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation. What we hold is a sound maxim that no powers should be conceded to the federal government which cannot be regularly and legitimately found in the charter of its creation, we acknowledge equally the obligation to withhold from it no power or attribute which, by the same charter, has been declared necessary to the execution of expressly granted powers, and to the fulfillment of clear and well-defined duties.

It has been argued, that the doctrines ruled in the case of Fox v. The State of Ohio are in conflict with the positions just stated in the case before us. We can perceive no such conflict, and think that any supposition of the kind must flow from a misapprehension of one or of both of these cases. The case of Fox v. The State of Ohio involved no question whatsoever as to the powers of the federal government to coin money and regulate its value; nor as to the power of that government to punish the offense of importing or circulating spurious coin; nor as to its power to punish for counterfeiting the current coin of the United States. That case was simply a prosecution for a private cheat practiced by one citizen of Ohio upon another, within the jurisdiction of the State, by means of a base coin in the similitude of a dollar — an offense denounced by the law of Ohio as obnoxious to punishment by confinement in the State Penitentiary. And the question, and

the only one, brought up for the examination of this court was, whether this private cheat could be punished by the State authorities, on account of 'the immediate instrument' ['569 of its perpetration having been a base coin, in the similitude of a dollar of the coinage of the United States.

The ground of the argument of this court in that case was to show, that the right of the State to punish that cheat had not been taken from her by the express terms, nor by any necessary implication, of the Constitution. It claimed for the State neither the power to coin money nor to regulate the value of coin; but simply that of protecting her citizens against frauds committed upon them within her jurisdiction, and, indeed, as a means auxiliary thereto, of relying upon the true standard of the coin as established and regulated under the authority of Congress. In illustration of the existence of the right just mentioned in the State, and in order merely to show that it had not been taken from her, it was said that the punishment of such a cheat did not fall within the express language of those clauses of the Constitution which gave to Congress the right of coining money and of regulating its value, or of providing for the punishment of counterfeiting the current coin. It was also said by this court, that the fact of passing or putting off a base coin did not fall within the language of those clauses of the Constitution, for this fact fabricated, altered, or changed nothing, but left the coins, whether genuine or spurious, precisely as before. But this court have nowhere said, that an offense cannot be committed against the coin or currency of the United States, or against that constitutional power which is exclusively authorized for public uses to create that currency, and which for the same public uses and necessities is authorized and bound to preserve it; nor have they said, that the debasement of the coin would not be as effectually accomplished by introducing and throwing into circulation a currency which was spurious and simulated, as it would be by actually making counterfeits — fabricating coin of inferior or base metal. On the contrary, we think that within of these proceedings would be equally in contravention of the right and of the obligation appertaining to the government, to coin money, and to protect and preserve it at the regulated or standard rate of value.

With the view of avoiding conflict between the State and federal jurisdictions, this court in the case of Fox v. The State of Ohio have taken care to point out, that the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We think this distinction sound, as we hold 'to' ['570 be the entire doctrines laid down in the case above mentioned, and regard them as being in no wise in conflict with the conclusions adopted in the present case.

We therefore order it to be certified to the Circuit Court of the United States for the Northern District of New York, in answer to the questions propounded by that court:

1st. That Congress had power and authority,

under the Constitution, to enact so much of the twentieth section of the Act of March 3, 1825, entitled "An Act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," as relates to bringing into the United States counterfeit coins.

2d. That Congress, under and by virtue of the Constitution, had power to enact so much of the said twentieth section as relates to the uttering, publishing, passing, and selling of the counterfeit coin therein specified.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of New York, and on the points or questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court, 1st. That Congress had power and authority, under the Constitution, to enact so much of the twentieth section of the Act of 3d March, 1825, entitled "An Act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," as relates to bringing into the United States counterfeit coins; and 2d. That Congress, under and by virtue of the Constitution, had power to enact so much of the said twentieth section as relates to uttering, publishing, passing, and selling of the counterfeit coins therein specified. Whereupon, it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

371.] *JOSEPH FORSYTHE, Plaintiff in Error,

v.

THE UNITED STATES.

Appeal or writ of error—conviction by territorial courts of Florida after Florida was admitted as State, is invalid.

The Judiciary Act of 1789 made no provision for the revision, by this court, of judgments of the circuit or district courts in criminal cases; and the Act of 1802 (2 Stat. at Large, 156) only embraced cases in which the opinions of the judges were opposed in criminal cases. There is, therefore, no general law giving appellate jurisdiction to this court in such cases.

But the Act of Congress passed on the 22d of February, 1817 (Sess. Laws, 1817, chap. 17), providing that certain cases might be brought up from the territorial courts of Florida to this court, included all cases, whether of civil or criminal jurisdiction.

Under this act, this court can revise a judgment of the Superior Court of the District of West Florida in a criminal case, which originated in October, 1815, and was transferred to the District Court of the United States for the Northern District of Florida.

Proceeding, therefore, to revise the judgment, this court decides that the jurisdiction of the territorial courts, of which the Superior Court was one, ceased on the creation of the territory into a state, on the 3d of March, 1845. The proceedings before the court in which the indictment was found were, consequently, coram non iudice, and void.

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THIS case was brought up by a writ of error from the District Court of the United States for the Northern District of Florida.

The facts in the case are sufficiently set forth in the opinion of the court.

Mr. Justice Nelson delivered the opinion of the court:

This is a motion by the Attorney General, on behalf of the United States, to dismiss the writ of error for want of jurisdiction, it having been taken out in a criminal case to bring up a judgment on an indictment for cutting timber upon government lands.

The indictment was returned by the grand jury, at the October Term, 1845, of the Superior Court of the District of West Florida, in the late Territory of Florida, in the County of Escambia, and was founded upon the Act of Congress passed March 2, 1825, entitled "An Act to provide for the punishment of offenses committed in cutting, destroying, or removing the oak and other timber or trees reserved for naval purposes."

The prisoner was arrested by a bench warrant issued upon the indictment on the 5th of November, 1845; but was taken out of the custody of the marshal by virtue of a writ of habeas corpus issued from the Circuit Court of the State of Florida, at the November Term, 1846, of that court, and discharged from the arrest.

He was afterwards arrested on an alias bench warrant, issued by the District Court of the United States for the Northern District of the State of Florida, on the 7th of February, 1848; and at the March term thereafter of the court, was arraigned, and pleaded not guilty.

Previous to the trial, a motion was made on behalf of the prisoner to quash the indictment, on the ground—

1. That it was found in the late Superior Court of the District of West Florida by a grand jury impaneled at the October Term, 1845, of said court, it being after the admission of the Territory of Florida into the Union as a State, and therefore that neither the court nor the grand jury thereof had jurisdiction over the offense, or authority to find the indictment.

2. That the Act of Congress of March 2, 1825, under which the indictment was found, prohibited the cutting of timber only on land reserved for the use of the navy of the United States, and on none other.

This motion was denied, and the case ordered for trial.

The jury found the prisoner guilty, and assessed the value of the timber cut by him at sixty-one dollars. And thereupon the court pronounced judgment, that he be imprisoned for one day, and pay a fine of two hundred and fifty dollars, and the costs of the prosecution, which were taxed at \$299.27.

The proceedings before us have been brought up on a writ of error to this judgment; and the question is, whether there is any act of Congress conferring authority upon this court to review them in this form, or in any other.

The Judiciary Act of 1789 (1 Stat. at Large, 73) made no provision for the revision of judgments of the circuit or district courts in criminal cases; and as the cases in which the appellate jurisdiction of this court can be exercised depend upon the regulation of Congress,

Howard 9.

CHAPTER 17—COINS AND CURRENCY

331. Mutilation, diminution, and falsification of coins.
332. Debasement of coins; alteration of official scales, or embezzlement of metals.
333. Mutilation of national bank obligations.
334. Issuance of Federal Reserve or national bank notes.
335. Circulation of obligations of expired corporations.
336. Issuance of circulating obligations of less than \$1.
337. Coins as security for loans.

AMENDMENTS

1965—Pub. L. 89-31, title II, § 212(b), July 23, 1965, 79 Stat. 257, added item 337.

§ 331. Mutilation, diminution and falsification of coins

Whoever fraudulently alters, defaces, mutilates, impairs, diminishes, falsifies, scales, or lightens any of the coins coined at the mints of the United States, or any foreign coins which are by law made current or are in actual use or circulation as money within the United States:

Whoever fraudulently possesses, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or brings into the United States, any such coin, knowing the same to be altered, defaced, mutilated, impaired, diminished, falsified, scaled, or lightened.

Shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 700; July 16, 1951, ch. 226, § 1, 65 Stat. 121.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 279 (Mar. 4, 1909, ch. 321, § 165, 35 Stat. 1119).

Mandatory punishment provision was rephrased in the alternative.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Changes were also made in phraseology.

AMENDMENTS

1951—Act July 16, 1951, made section applicable to minor coins (5-cent and 1-cent pieces), and to fraudulent alteration of coins.

CANAL ZONE

Applicability of section to Canal Zone, see section 14 of this title.

CROSS REFERENCES

Forfeiture of counterfeit paraphernalia, see section 492 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 14, 492 of this title.

§ 332. Debasement of coins; alteration of official scales, or embezzlement of metals

If any of the gold or silver coins struck or coined at any of the mints of the United States shall be debased, or made worse as to the proportion of fine gold or fine silver therein contained, or shall be of less weight or value than

the same ought to be, pursuant to law, or if any of the scales or weights used at any of the mints or assay offices of the United States shall be defaced, altered, increased, or diminished through the fault or connivance of any officer or person employed at the said mints or assay offices, with a fraudulent intent; or if any such officer or person shall embezzle any of the metals at any time committed to his charge for the purpose of being coined, or any of the coins struck or coined at the said mints, or any medals, coins, or other moneys of said mints or assay offices at any time committed to his charge, or of which he may have assumed the charge, every such officer or person who commits any of the said offenses shall be fined not more than \$10,000 or imprisoned not more than ten years or both, *as amended by Act. of 1948*

(June 25, 1948, ch. 645, 62 Stat. 700.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 280 (Mar. 4, 1909, ch. 321, § 166, 35 Stat. 1120).

Mandatory punishment provision was rephrased in the alternative.

CROSS REFERENCES

Forfeiture of counterfeit paraphernalia, see section 492 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 492 of this title.

§ 333. Mutilation of national bank obligations

Whoever mutilates, cuts, defaces, disfigures, or perforates, or unites or cements together, or does any other thing to any bank bill, draft, note, or other evidence of debt issued by any national banking association, or Federal Reserve bank, or the Federal Reserve System, with intent to render such bank bill, draft, note, or other evidence of debt unfit to be re-issued, shall be fined not more than \$100 or imprisoned not more than six months, or both.

(June 25, 1948, ch. 645, 62 Stat. 700.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 291 (Mar. 4, 1909, ch. 321, § 176, 35 Stat. 1122).

Words "or Federal Reserve bank, or the Federal Reserve System" were inserted because the paper of such banks has almost supplanted national bank currency.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Minor changes in phraseology were made.

CROSS REFERENCES

Forfeiture of counterfeit paraphernalia, see section 492 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 492 of this title.

§ 334. Issuance of Federal Reserve or national bank notes

Whoever, being a Federal Reserve Agent, or an agent or employee of such Federal Reserve Agent, or of the Board of Governors of the Federal Reserve System, issues or puts in circulation any Federal Reserve notes, without com-

plying with or in violation of the provisions of law regulating the issuance and circulation of such Federal Reserve notes; or

Whoever, being an officer acting under the provisions of chapter 2 of Title 12, countersigns or delivers to any national banking association, or to any other company or person, any circulating notes contemplated by that chapter except in strict accordance with its provisions—

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 700.)

HISTORICAL AND REVISION NOTES

Based on sections 581 and 592 of title 12, U.S.C., 1940 ed., Banks and Banking (R.S. §§ 5187, 5209; Sept. 26, 1918, ch. 177, § 7, 40 Stat. 972; Aug. 23, 1935, ch. 614, § 316, 49 Stat. 712).

This section consolidates section 581 and part of section 592 of title 12, U.S.C., 1940 ed., Banks and Banking.

The punishment provision was drawn from said section 592 as being the latest expression of congressional intent, in preference to the provision of said section 581 which authorized a fine "not more than double the amount so countersigned and delivered and imprisonment not more than 15 years".

The words "shall be guilty of a misdemeanor" were omitted as unnecessary in view of definition of misdemeanor in section 1 of this title.

Likewise the words "upon conviction in any district court of the United States" were omitted as unnecessary since punishment can follow only after conviction.

(See reviser's note under section 656 of this title for statement of reasons for dividing said section 592 into three revised sections, with consequent changes in phraseology, style, and arrangement.)

CROSS REFERENCES

Offense punishable by imprisonment for term exceeding one year declared a felony, see section 1 of this title.

State banks becoming members of Federal reserve system, application to, see section 324 of Title 12, Banks and Banking.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 12 sections 209, 324.

§ 335. Circulation of obligations of expired corporations

Whoever, being a director, officer, or agent of a corporation created by Act of Congress, the charter of which has expired, or trustee thereof, or an agent of such trustee, or a person having in his possession or under his control the property of such corporation for the purpose of paying or redeeming its notes and obligations, knowingly issues, reissues, or utters as money, or in any other way knowingly puts in circulation any bill, note, check, draft, or other security purporting to have been made by any such corporation, or by any officer thereof, or purporting to have been made under authority derived therefrom, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 700.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 289 (Mar. 4, 1909, ch. 321, § 174, 35 Stat. 1122).

The reference to persons aiding was omitted as unnecessary, since such persons are made principals by section 2 of this title.

The last sentence excepting bona fide holders in due course was omitted as surplusage.

Other changes in phraseology also were made.

CROSS REFERENCES

Forfeiture of counterfeit paraphernalia, see section 492 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 492 of this title.

§ 336. Issuance of circulating obligations of less than \$1

Whoever makes, issues, circulates, or pays out any note, check, memorandum, token, or other obligation for a less sum than \$1, intended to circulate as money or to be received or used in lieu of lawful money of the United States, shall be fined not more than \$500 or imprisoned not more than six months, or both.

(June 25, 1948, ch. 645, 62 Stat. 701.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 293 (Mar. 4, 1909, ch. 321, § 178, 35 Stat. 1122).

Numerous suggestions, of which that of Mr. E. M. Mallon, of Arlington, Va., is typical, recommend that this section be omitted as obsolete or revised to except commercial obligations. However, since the decisions make it plain that only obligations intended to circulate as money are within the provisions of this section and that commercial checks of less than \$1 are not affected, there seems no reason so to rewrite the section. (See *U.S. v. Monongahela Bridge Co.*, Fed. Cas. No. 13,796; *Stettinius v. U.S.*, Fed. Cas. No. 13,387.)

Minor changes were made in phraseology.

CROSS REFERENCES

Forfeiture of counterfeit paraphernalia, see section 492 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 492 of this title.

§ 337. Coins on security for loans

Whoever lends or borrows money or credit upon the security of such coins of the United States as the Secretary of the Treasury may from time to time designate by proclamation published in the Federal Register, during any period designated in such a proclamation, shall be fined not more than \$10,000 or imprisoned not more than one year, or both.

(Added Pub. L. 89-81, title II, § 212(a), July 23, 1965, 79 Stat. 257.)

EFFECTIVE DATE

Section 212(c) of Pub. L. 89-81 provided that: "The amendments made by this section (adding this section) shall apply only with respect to loans made, renewed, or increased on or after the 31st day after the date of enactment of this Act (July 23, 1965)."

§ 611. Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

(June 25, 1948, ch. 645, 62 Stat. 725.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 82, 87, 100, 101 (Mar. 4, 1909, ch. 321, §§ 35, 36, 47, 48, 35 Stat. 1095, 1096-1098; Oct. 23, 1918, ch. 194, 40 Stat. 1015; June 18, 1934, ch. 587, 48 Stat. 996; Apr. 4, 1938, ch. 69, 52 Stat. 197; Nov. 22, 1943, ch. 302, 57 Stat. 591.)

Section consolidates sections 82, 87, 100, and 101 of title 18, U.S.C., 1940 ed. Changes necessary to effect the consolidation were made. Words "or shall willfully injure or commit any depredation against" were taken from said section 82 so as to confine it to embezzlement or theft.

The quoted language, rephrased in the present tense, appears in section 1361 of this title.

Words "in a jail" which followed "imprisonment" and preceded "for not more than one year" in said section 82, were omitted. (See reviser's note under section 1 of this title.)

Language relating to receiving stolen property is from said section 101.

Words "or aid in concealing" were omitted as unnecessary in view of definitive section 2 of this title. Procedural language at end of said section 101 "and such person may be tried either before or after the conviction of the principal offender" was transferred to and rephrased in section 3435 of this title.

Words "or any corporation in which the United States of America is a stockholder" in said section 82 were omitted as unnecessary in view of definition of "agency" in section 6 of this title.

The provisions for fine of not more than \$1,000 or imprisonment of not more than 1 year for an offense involving \$100 or less and for fine of not more than \$10,000 or imprisonment of not more than 10 years, or both, for an offense involving a greater amount were written into this section as more in conformity with the later congressional policy expressed in sections 82 and 87 of title 18, U.S.C., 1940 ed., than the non-graduated penalties of sections 100 and 101 of said title 18.

Since the purchasing power of the dollar is less than it was when \$50 was the figure which determined whether larceny was petit larceny or grand larceny, the sum \$100 was substituted as more consistent with modern values.

The meaning of "value" in the last paragraph of the revised section is written to conform with that provided in section 2311 of this title by inserting the words "face, par, or".

This section incorporates the recommendation of Paul W. Hyatt, president, board of commissioners of the Idaho State Bar Association, that sections 82 and

100 of title 18, U.S.C., 1940 ed., be combined and simplified.

Also, with respect to section 101 of title 18, U.S.C., 1940 ed., this section meets the suggestion of P. F. Herrick, United States attorney for Puerto Rico, that the punishment provision of said section be amended to make the offense a misdemeanor where the amount involved is \$50 or less.

Changes were made in phraseology.

CROSS REFERENCES

Concealment, removal or destruction of records, see section 2071 of this title.

Court records or process, theft of, see section 1506 of this title.

Mail matter or postal service equipment, embezzlement or theft, see section 1702 et seq. of this title.

Misappropriation of postal funds, see section 1711 of this title.

Receiver triable before or after principal, see section 3435 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 12 section 1457; title 22 section 3622; title 40 section 491.

§ 642. Tools and materials for counterfeiting purposes

Whoever, without authority from the United States, secretes within, or embezzles, or takes, and carries away from any building, room, office, apartment, vault, safe, or other place where the same is kept, used, employed, placed, lodged, or deposited by authority of the United States, any tool, implement, or thing used or fitted to be used in stamping or printing, or in making some other tool or implement used or fitted to be used in stamping or printing any kind or description of bond, bill, note, certificate, coupon, postage stamp, revenue stamp, fractional currency note, or other paper, instrument, obligation, device, or document, authorized by law to be printed, stamped, sealed, prepared, issued, uttered, or put in circulation on behalf of the United States; or

Whoever, without such authority, so secretes, embezzles, or takes and carries away any paper, parchment, or other material prepared and intended to be used in the making of any such papers, instruments, obligations, devices, or documents; or

Whoever, without such authority, so secretes, embezzles, or takes and carries away any paper, parchment, or other material printed or stamped, in whole or part, and intended to be prepared, issued, or put in circulation on behalf of the United States as one of such papers, instruments, or obligations, or printed or stamped, in whole or part, in the similitude of any such paper, instrument, or obligation, whether intended to issue or put the same in circulation or not—

Shall be fined not more than \$5,000 or imprisoned not more than ten years, or both.

(June 25, 1948, ch. 645, 62 Stat. 725.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 269 (Mar. 4, 1909, ch. 321, § 155, 35 Stat. 1117).

Words "bed piece, bed-plate, roll, plate, die, seal, type, or other" were omitted as covered by "tool, implement, or thing."

Minor changes in phraseology were made.

CROSS REFERENCES

Forfeiture of counterfeit paraphernalia, see section 492 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 492 of this title; title 12 section 1457.

§ 613. Accounting generally for public money.

Whoever, being an officer, employee or agent of the United States or of any department or agency thereof, having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render his accounts for the same as provided by law is guilty of embezzlement, and shall be fined in a sum equal to the amount of the money embezzled or imprisoned not more than ten years, or both; but if the amount embezzled does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(June 25, 1948, ch. 645, 62 Stat. 726.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 176 (Mar. 4, 1909, ch. 321, § 90, 35 Stat. 1105).

Word "employee" was inserted to avoid ambiguity as to scope of section.

Words "or of any department or agency thereof" were added after the words "United States". (See definitions of the terms "department" and "agency" in section 6 of this title.)

Mandatory punishment provisions phrased in alternative.

The smaller punishment for an offense involving \$100 or less was added. (See reviser's notes under sections 641 and 645 of this title.)

CROSS REFERENCES

Persons to whom section applicable, see section 649 of this title.

Refusal to pay as evidence of embezzlement, see section 3487 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 649 of this title; title 5 section 3374.

§ 644. Banker receiving unauthorized deposit of public money

Whoever, not being an authorized depository of public moneys, knowingly receives from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or uses, transfers, converts, appropriates, or applies any portion of the public money for any purpose not prescribed by law is guilty of embezzlement and shall be fined not more than the amount so embezzled or imprisoned not more than ten years, or both; but if the amount embezzled does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(June 25, 1948, ch. 645, 62 Stat. 726.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 182 (Mar. 4, 1909, ch. 321, § 96, 35 Stat. 1106).

The smaller punishment for an offense involving \$100 or less was added. (See reviser's notes under sections 641 and 645 of this title.)

Changes were made in phraseology.

CROSS REFERENCES

Depositaries of public moneys and financial agents of Government, see section 90 of Title 12, Banks and Banking.

§ 645. Court officers generally.

Whoever, being a United States marshal, clerk, receiver, referee, trustee, or other officer of a United States court, or any deputy, assistant, or employee of any such officer, retains or converts to his own use or to the use of another or after demand by the party entitled thereto, unlawfully retains any money coming into his hands by virtue of his official relation, position or employment, is guilty of embezzlement and shall, where the offense is not otherwise punishable by enactment of Congress, be fined not more than double the value of the money so embezzled or imprisoned not more than ten years, or both; but if the amount embezzled does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

It shall not be a defense that the accused person had any interest in such moneys or fund.

(June 25, 1948, ch. 645, 62 Stat. 726.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 186 (May 29, 1920, ch. 212, 41 Stat. 630).

The smaller punishment for an offense involving \$100 or less was inserted to conform to section 641 of this title which represents a later expression of congressional intent.

Minor changes were made in phraseology.

CROSS REFERENCES

Embezzlement by bankruptcy court officer, see section 153 of this title.

Refusal to pay as evidence of embezzlement, see section 3487 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 22 section 3622.

§ 646. Court officers depositing registry moneys

Whoever, being a clerk or other officer of a court of the United States, fails to deposit promptly any money belonging in the registry of the court, or paid into court or received by the officers thereof, with the Treasurer or a designated depository of the United States, in the name and to the credit of such court, or retains or converts to his own use or to the use of another any such money, is guilty of embezzlement and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both; but if the amount embezzled does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

This section shall not prevent the delivery of any such money upon security, according to

Words "or any department or agency thereof," were inserted after "United States" so as to eliminate any possible ambiguity as to scope of section. (See definitive section 6 of this title.)

The smaller punishment for an offense involving \$100 or less was added. (See reviser's note under sections 641, 645 of this title.)

Minor changes were made in phraseology.

CROSS REFERENCES

Persons to whom section applicable, see section 649 of this title.

Property and fiscal officers, see section 708 of Title 32, National Guard.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 649 of this title.

§ 655. ~~Whoever, being an officer or employee of the United States, converting~~

Whoever, being an officer or employee of the United States or of any department or agency thereof, embezzles or wrongfully converts to his own use the money or property of another which comes into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or employee, shall be fined not more than the value of the money and property thus embezzled or converted, or imprisoned not more than ten years, or both; but if the sum embezzled is \$100 or less, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(June 25, 1948, ch. 645, 62 Stat. 728.)

~~REVISION NOTES~~

Based on title 18, U.S.C., 1940 ed., § 183 (Mar. 4, 1909, ch. 321, § 97, 35 Stat. 1106).

The phrase "Whoever being an officer or agent of the United States or of any department or agency thereof," was substituted for the words "Any officer connected with, or employed in the Internal Revenue Service of the United States . . ." And any officer of the United States, or any assistant of such officer," in order to clarify scope of section. (See definitive section 6 and reviser's note thereunder.)

The embezzlement of Government money or property is adequately covered by section 641 of this title.

The smaller punishment for an offense involving \$100 or less was added. (See reviser's notes under sections 641 and 645 of this title.)

Minor changes were made in phraseology.

CROSS REFERENCES

Postmaster or employee embezzling mail matter, see section 1709 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 5 section 3374; title 12 section 1457.

§ 655. Theft by bank examiner

Whoever, being a bank examiner or assistant examiner, steals, or unlawfully takes, or unlawfully conceals any money, note, draft, bond, or security or any other property of value in the possession of any bank or banking institution which is a member of the Federal Reserve System or which is insured by the Federal Deposit Insurance Corporation, or from any safe deposit box in or adjacent to the premises of such bank, shall be fined not more than \$5,000 or imprisoned not more than five years, or

both; but if the amount taken or concealed does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and shall be disqualified from holding office as a national bank examiner or Federal Deposit Insurance Corporation examiner.

This section shall apply to all public examiners and assistant examiners who examine member banks of the Federal Reserve System or banks the deposits of which are insured by the Federal Deposit Insurance Corporation, whether appointed by the Comptroller of the Currency, by the Board of Governors of the Federal Reserve System, by a Federal Reserve Agent, by a Federal Reserve bank, or by the Federal Deposit Insurance Corporation, or appointed or elected under the laws of any State; but shall not apply to private examiners or assistant examiners employed only by a clearing-house association or by the directors of a bank.

(June 25, 1948, ch. 645, 62 Stat. 728.)

HISTORICAL AND REVISION NOTES

Based on section 593 of title 12, U.S.C., 1940 ed., Banks and Banking (Dec. 23, 1913, ch. 6, § 22, 38 Stat. 272; Sept. 26, 1918, ch. 177, § 5, 40 Stat. 970; Feb. 25, 1927, ch. 191, § 15, 44 Stat. 1232; Aug. 23, 1935, ch. 614, § 328(a), 49 Stat. 715).

Other provisions of section 593 of title 12, U.S.C., 1940 ed., Banks and Banking, are incorporated in sections 217 and 218 of this title.

The words "and shall upon conviction thereof" were omitted as unnecessary, since punishment cannot be imposed until a conviction is secured.

The phrase "bank or banking institution which is a member of the Federal Reserve System or which is insured by the Federal Deposit Insurance Corporation" was substituted for "member bank or insured bank" to avoid the use of a definitive section based on sections 221a, 264(e)(8), and 588a of title 12, U.S.C., 1940 ed., Banks and Banking. Words "banks the deposits of which are insured by the Federal Deposit Insurance Corporation" were substituted for "insured banks" in second paragraph, for the same reason.

Punishment provision harmonized with that of section 656 of this title. (See also, reviser's notes under sections 641 and 645 of this title.)

Changes in phraseology were also made.

CROSS REFERENCES

Civil liability of officers or directors of member banks of the Federal Reserve System, for violating or permitting violation of this section, see section 503 of Title 12, Banks and Banking.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 12 sections 503, 1457.

§ 656. Theft, embezzlement, or misapplication by bank officer or employee

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys,

- 1012. Department of Housing and Urban Development transactions.
- 1013. Farm loan bonds and credit bank debentures.
- 1014. Loan and credit applications generally; renewals and discounts; crop insurance.
- 1015. Naturalization, citizenship or alien registry.
- 1016. Acknowledgment of appearance or oath.
- 1017. Government seals wrongfully used and instruments wrongfully sealed.
- 1018. Official certificates or writings.
- 1019. Certificates by consular officers.
- 1020. Highway projects.
- 1021. Title records.
- 1022. Delivery of certificate, voucher, receipt for military or naval property.
- 1023. Insufficient delivery of money or property for military or naval service.
- 1024. Purchase or receipt of military, naval, or veterans' facilities property.
- 1025. False pretenses on high seas and other waters.
- 1026. Compromise, adjustment, or cancellation of farm indebtedness.
- 1027. False statements and concealment of facts in relation to documents required by the Employee Retirement Income Security Act of 1974.
- 1028. Fraud and related activity in connection with identification documents.

AMENDMENTS

1982—Pub. L. 97-398, § 3, Dec. 31, 1982, 96 Stat. 2010, added item 1028.

1974—Pub. L. 93-406, title I, § 111(a)(2)(B)(iii), Sept. 2, 1974, 88 Stat. 952, substituted "Employee Retirement Income Security Act of 1974" for "Welfare and Pension Plans Disclosure Act" in item 1027.

1967—Pub. L. 90-19, § 24(e)(1), (2), May 25, 1967, 81 Stat. 28, included "Department of Housing and Urban Development" in item 1010 and substituted the same for "Public Housing Administration" in item 1012, respectively.

1962—Pub. L. 87-420, § 17(d), Mar. 20, 1962, 76 Stat. 42, added item 1027.

1951—Act Oct. 31, 1951, ch. 655, § 25, 65 Stat. 720, substituted, in item 1012, "Public Housing Administration" for "United States Housing Authority".

1949—Act May 24, 1949, ch. 139, §§ 18, 19, 63 Stat. 92, corrected spelling of "1016. Acknowledgment etc.," and substituted "officers" for "offices" in "1019. Certificates by consular officers."

CROSS REFERENCES

Alien registration, fraud and false statements, see section 1306 of Title 8, Aliens and Nationality.

Carriers' reports to Interstate Commerce Commission, false entries, see section 11909 of Title 49, Transportation.

China Trade, false or fraudulent statements prohibited, see section 158 of Title 15, Commerce and Trade.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 7 section 12a; title 15 sections 78o, 80b-3; title 29 section 1031.

~~§ 1001. Statements or entries generally.~~

~~Whoever in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry,~~

~~shall be fined not more than \$10,000 or imprisoned not more than five years, or both.~~
(June 25, 1948, ch. 645, 62 Stat. 749.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 80 (Mar. 4, 1909, ch. 321, § 35, 35 Stat. 1095; Oct. 23, 1918, ch. 194, 40 Stat. 1015; June 18, 1934, ch. 587, 48 Stat. 996; Apr. 4, 1938, ch. 69, 52 Stat. 197).

Section 80 of title 18, U.S.C., 1940 ed., was divided into two parts.

The provision relating to false claims was incorporated in section 287 of this title.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in section 2 of this title.

Words "or any corporation in which the United States of America is a stockholder" in said section 80 were omitted as unnecessary in view of definition of "agency" in section 6 of this title.

In addition to minor changes of phraseology, the maximum term of imprisonment was changed from 10 to 5 years to be consistent with comparable sections. (See reviser's note under section 287 of this title.)

SHORT TITLE OF 1982 AMENDMENT

Section 1 of Pub. L. 97-398 provided: "That this Act (enacting sections 1028 and 1738 of this title and amending section 3001 of Title 39, Postal Service) may be cited as the 'False Identification Crime Control Act of 1982.'"

CANAL ZONE

Applicability of section to Canal Zone, see section 14 of this title.

CROSS REFERENCES

Conspiracy to defraud Government in regard to false claims, see section 286 of this title.

Conspiracy to defraud United States, see section 371 of this title.

Education, section as applicable to National Defense Education Program, see section 581 of Title 20, Education.

False claims for pensions, see section 289 of this title.

False claims for postal losses, see section 288 of this title.

False entry or certificate by revenue officer or agent, see section 7214 of Title 26, Internal Revenue Code.

Falsification of postal returns to increase compensation, see section 1712 of this title.

Fraudulent claims, generally, see section 287 of this title.

National Science Foundation scholarships or fellowships, applicability of section to loyalty affidavits, see section 1874 of Title 42, The Public Health and Welfare.

Passports, false statements in application, see section 1542 of this title.

Patent declaration in lieu of oath; warning in document of punishment for willful false statements and the like under this section, see section 25 of Title 35, Patents.

Public buildings, section as applicable to statements by contractors, see section 276c of Title 40, Public Buildings, Property, and Works.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 14 of this title; title 7 section 136h; title 12 section 1457; title 15 section 3413; title 19 section 2515; title 20 section 581; title 22 sections 1623, 3622; title 35 section 25; title 40 section 276c; title 42 sections 1874, 2000b-3, 2000c-6, 3428, 3795a; title 43 sections 1212, 1812.

HISTORICAL AND REVISION NOTES

Based on subsections (a), paragraphs (1), (16), (17), (19), (32), (b), (d), and (f) of section 746 of title 8, U.S.C., 1940 ed., Aliens and Nationality (Oct. 14, 1940, ch. 876, § 346(a), para. (1), (16), (17), (19), (32), (b), (d), and (f), 45 Stat. 1163, 1165, 1167).

Section consolidates, with minor changes, subsection (a), paragraphs (1), (16), (17), (19), (32), and subsections (b), (d), and (f), of section 746 of title 8, U.S.C., 1940 ed., Aliens and Nationality.

Such changes of arrangement and phraseology were made as were appropriate and necessary.

CROSS REFERENCES

Immigration and Nationality, see section 1101 et seq. of Title 8, Aliens and Nationality.

§ 1016. Acknowledgment of appearance or oath

Whoever, being an officer authorized to administer oaths or to take and certify acknowledgments, knowingly makes any false acknowledgment, certificate, or statement concerning the appearance before him or the taking of an oath or affirmation by any person with respect to any proposal, contract, bond, undertaking, or other matter submitted to, made with, or taken on behalf of the United States or any department or agency thereof, concerning which an oath or affirmation is required by law or lawful regulation, or with respect to the financial standing of any principal, surety, or other party to any such proposal, contract, bond, undertaking, or other instrument, shall be fined not more than \$2,000 or imprisoned not more than two years, or both.

(June 25, 1948, ch. 645, 62 Stat. 753.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 75 (Mar. 4, 1909, ch. 321, § 31, 35 Stat. 1094).

Words "or of any department or agency thereof" were inserted after "United States" so as to remove any ambiguity as to scope of section. (See definitions of "department" and "agency" in section 6 of this title.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 12 section 1457.

§ 1017. Government seals wrongfully used and instruments wrongfully sealed

Whoever fraudulently or wrongfully affixes or impresses the seal of any department or agency of the United States, to or upon any certificate, instrument, commission, document, or paper or with knowledge of its fraudulent character, with wrongful or fraudulent intent, uses, buys, procures, sells, or transfers to another any such certificate, instrument, commission, document, or paper, to which or upon which said seal has been so fraudulently affixed or impressed, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 753.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 130 (June 15, 1917, ch. 30, title X, § 1, 40 Stat. 227).

To clarify scope of section and in view of definition of department or agency in section 6 of this title,

words "department or agency" were substituted for "executive department, or of any bureau, commission, or office".

Slight verbal changes were also made.

CANAL ZONE

Applicability of section to Canal Zone, see section 14 of this title.

CROSS REFERENCES

Jurisdiction of offenses under this section, see section 3241 of this title.

Letters, writings, etc., in violation of this section as nonmailable, see section 1717 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 14, 1717 of this title; title 12 section 1457.

§ 1018. Official certificates or writings

Whoever, being a public officer or other person authorized by any law of the United States to make or give a certificate or other writing, knowingly makes and delivers as true such a certificate or writing, containing any statement which he knows to be false, in a case where the punishment thereof is not elsewhere expressly provided by law, shall be fined not more than \$500 or imprisoned not more than one year, or both.

(June 25, 1948, ch. 645, 62 Stat. 753.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 195 (Mar. 4, 1909, ch. 321, § 106, 35 Stat. 1107).

Minor changes were made in phraseology.

CROSS REFERENCES

False certificate by revenue officer or agent, see section 7214 of Title 26, Internal Revenue Code.

§ 1019. Certificates by consular officers

Whoever, being a consul, or vice consul, or other person employed in the consular service of the United States, knowingly certifies falsely to any invoice, or other paper, to which his certificate is authorized or required by law, shall be fined not more than \$10,000 or imprisoned not more than three years, or both.

(June 25, 1948, ch. 645, 62 Stat. 753.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 127 (Mar. 4, 1909, ch. 321, § 70, 35 Stat. 1101).

Mandatory punishment provision was rephrased in the alternative.

Changes were made in phraseology.

CROSS REFERENCES

Certification of invoices and related matters, see sections 1481, 1482 of Title 19, Customs Duties, and section 1180 et seq. of Title 22, Foreign Relations and Intercourse.

§ 1020. Highway projects

Whoever, being an officer, agent, or employee of the United States, or of any State or Territory, or whoever, whether a person, association, firm, or corporation, knowingly makes any false statement, false representation, or false report as to the character, quality, quantity, or cost of

engages, cooperates, or participates with any armed force or with an armed force invades any portion of this state commits insurrection.

(2) Insurrection is a class 4 felony.

Source: R & RE. L. 71, p. 479, § 1; C.R.S. 1963, § 40-11-102.

Am. Jur.2d. Sec 45 Am. Jur.2d. Insur-
rection. § § 1, 3.

C.J.S. Sec 46 C.J.S., Insurrection and Sedi-
tion. § § 1-4.

PART 2

ANARCHY - SEDITION

18-11-201. Advocating overthrow of government. (1) Every person who, in this state, either orally or by writing, printing, exhibiting, or circulating written or printed words or pictures, or otherwise, shall advocate, teach, incite, propose, aid, abet, encourage, or advise resistance by physical force to, or the destruction or overthrow by physical force of, constituted government in general, or of the government or laws of the United States, or of this state, under circumstances constituting a clear and present danger that violent action will result therefrom, commits sedition.

(2) Sedition is a class 4 felony.

Source: R & RE. L. 71, p. 479, § 1; C.R.S. 1963, § 40-11-201.

Am. Jur.2d. Sec 70 Am. Jur.2d. Sedition,
Subversive Activities, and Treason. § 6-4.

C.J.S. Sec 46 C.J.S., Insurrection and Sedi-
tion. § 1.

18-11-202. Inciting destruction of life or property. Every person who, in this state, either orally or by writing, printing, exhibiting, or circulating written or printed words or pictures, shall advocate, teach, incite, propose, aid, abet, encourage, or advise the unlawful injury or destruction of private or public property by the use of physical force, violence, or bodily injury, or the unlawful injury by the use of physical force or violence of any person, or the unlawful taking of human life, as a policy or course of conduct, under circumstances constituting a clear and present danger that violent action will result therefrom, commits a class 5 felony.

Source: R & RE. L. 71, p. 479, § 1; C.R.S. 1963, § 40-11-202; L. 81, p. 981, § 7.

18-11-203 Membership in anarchistic and seditious associations.
(1) Any association, organization, society, or corporation, one of whose purposes or professed purposes is to bring about any governmental, social, industrial, or economic change in this state or in the United States by the use of sabotage, terrorism, physical force, violence, or bodily injury, or which teaches, advocates, advises, or defends the use of sabotage, terrorism, physical force, violence, or bodily injury to person or property, or threats of such injury, to accomplish such change, and which shall, by any such means,

prosecute or pursue such purpose or professed purpose is declared to be anarchistic and seditious in character and to be an unlawful association.

(2) Any person who, in this state, shall act or profess to act as an officer of any such unlawful association, or shall speak, write, or publish as a representative or professed representative of any such unlawful association, or, knowing the purpose, teachings, and doctrine of such association, shall become or continue to be a member thereof or contribute dues, money, or other things of value to it or to anyone for it commits a class 4 felony.

Source: R & RE, L. 71, p. 480, § 1; C.R.S. 1963, § 40-11-203; L. 81, p. 981, § 8.

Am. Jur.2d. See 70 Am. Jur.2d, Seditious Subversive Activities, and Treason, § 61.

C.J.S. See 46 C.J.S., Insurrection and Sedition, § 2.

18-11-204. Mutilation - contempt of flag - penalty. (1) It is unlawful for any person to mutilate, deface, defile, trample upon, burn, cut, or tear any flag in public:

- (a) With intent to cast contempt or ridicule upon the flag; or
- (b) With intent to outrage the sensibilities of persons liable to observe or discover the action or its results; or
- (c) With intent to cause a breach of the peace or incitement to riot; or
- (d) Under such circumstances that it may cause a breach of the peace or incitement to riot.

(2) "Flag", as used in this section, means any flag, ensign, banner, standard, colors, or replica or representation thereof which is an official or commonly recognized symbol of the United States of America or the state of Colorado.

(3) Any person violating the provisions of this section commits a class 3 misdemeanor.

Source: R & RE, L. 71, p. 480, § 1; C.R.S. 1963, § 40-11-204.

C.J.S. See 36A C.J.S., Flags, § 1, 2.

Law review. For note, "Comment: Constitutional Law — Symbolic Speech — Colorado Flag Desecration Statute", see 45 *Ann. L.* 451 (1971).

Subsection (1)(a) unconstitutional. Provision of this section making it unlawful to mutilate, deface, and defile a flag of the United States with intent to cast contempt thereupon is unconstitutional upon its face because the interests it seeks to promote are contrary to the fundamental values protected by the first amendment. *People v. Vaughan*, 183 Colo. 40, 514 P.2d 1318 (1973).

Statute was not designed to proscribe mutilating or misusing flag per se. *People v. Vaughan*, 183 Colo. 40, 514 P.2d 1318 (1973).

Specific intent required. A violation of this section occurs only when the surrounding cir-

cumstances manifest the exercise of the intellect in such a manner that inferences may be drawn therefrom that the acts or conduct were done with the specific intent of casting contempt on the flag. There is no violation of this section where the proscribed acts are the result of thoughtlessness, inadvertence, accident, or the like. *People v. Vaughan*, 183 Colo. 40, 514 P.2d 1318 (1973).

Symbolic speech protected. Conduct, which consisted of wearing a pair of blue jeans on the seat of which a portion of the American flag had been sewn, manifested an expressive intent and a communicative content such as to be considered "symbolic speech" and consequently was protected "speech" under the first amendment. *People v. Vaughan*, 183 Colo. 40, 514 P.2d 1318 (1973).

18-11-205. Unlawful to display flag - exceptions. (1) Any person who displays any flag other than the flag of the United States of America or the

TREATY

BRETTON WOODS AGREEMENT.
(1944)

INTERNATIONAL ORGANIZATIONS

UNITED STATES CODES, TITLE 22



DEPARTMENT OF THE TREASURY
WASHINGTON

OCT 26 1933

Dear Mr. Stafford:

This is in response to your letter of September 7 to the Treasurer of the United States. In that letter, you demanded redemption of Federal Reserve notes with silver eagle dollars.

You may be interested in the following information:

Beginning in 1792, statutes of the United States specified a formal gold content of the dollar (1 Stat. 246); at that time the dollar had a formal silver content as well (1 Stat. 246). This is not to say that the dollar was always backed by specie, however. Beginning in 1861 the Federal Government issued United States notes which were not redeemable in gold or silver. Under the Gold Resumption Act the United States notes became redeemable in gold in 1879. By the late 1800's United States notes, United States coin, Treasury notes of 1890, and silver certificates (redeemable in gold or silver at the option of the Treasury), issued by the government all circulated as money. (Private bank notes also circulated as money.) Beginning in 1900 the Gold Standard Act made it the duty of the Secretary of the Treasury to maintain all forms of money issued by the United States at parity with gold (Section 1, 31 Stat. 45 (formerly 31 U.S.C. 314)). This was done by exchanging gold for each type of money and vice versa at a fixed ratio. This Act officially replaced bimetallicism with the gold standard. However, as a practical matter the Nation had been on a gold standard since 1879, because the Treasury had chosen to redeem silver certificates in gold.

By Section 43(b)(2) of the Act of May 12, 1933 (48 Stat. 52), the President was authorized to change the gold content of the dollar within certain limits, but the parity provision was not changed in substance. By Proclamation No. 2072 dated January 31, 1934 (48 Stat. 1730), President Roosevelt exercised his powers under the 1933 statute, as amended by Section 12 of the Gold Reserve Act of 1934 (48 Stat. 342), to change the gold content of the dollar from 25.8 grains of gold 9/10ths fine, corresponding to a price of \$20.67 per ounce, to 15 5/21 grains, 9/10ths fine, corresponding to the price of \$35 per ounce. The President's authority to change the gold content of the dollar expired on June 30, 1943 (55 Stat. 396) after which time only Congress, by statute, could establish the value of the dollar in terms of gold. The definition of the dollar in terms of gold at \$35 per fine troy ounce was retained until 1972. However, during this period it is important to note the changing monetary role of gold with respect to U.S. currency.

The United States officially abandoned the domestic gold standard in 1933-1934. Pursuant to authority provided in the Emergency Banking Relief Act of March 9, 1933, gold held by private persons in the United States was required to be surrendered to the Government (48 Stat. 2, 12 U.S.C. 248 (a)). The Gold Reserve Act of 1934 prohibited private ownership of gold and provided for the

termination of gold coinage and for the withdrawal from circulation and melting down of existing gold coins. All acts and parts of acts inconsistent with the Gold Reserve Act of 1934, including Section 1, 31 Stat. 45, were repealed by Section 17, 48 Stat. 344. Redemption of any currency of the United States in gold was, and remains, prohibited (48 Stat. 340, 31 U.S.C. 5119), except to the extent that it is authorized in regulations promulgated by the Secretary of the Treasury, with the approval of the President. No such regulations have been promulgated.

*Public Law
93-110
states this
is not
lawful*

These actions effectively removed the domestic monetary system's direct link with gold. However, the provisions in the Federal Reserve Act of 1913 for a 35 percent gold certificate reserve against required deposits by banks with the Federal Reserve, and a 40 percent reserve against Federal Reserve notes in circulation, remained in force. By an Act of June 12, 1945, both reserve requirements were reduced to 25 percent (59 Stat. 237). By Public Law 89-3 of March 3, 1965 (79 Stat. 5) the gold certificate reserve against Federal Reserve deposits was eliminated entirely; Public Law 90-269 of March 18, 1968 (82 Stat. 50), removed entirely the gold reserve requirement against Federal Reserve notes in circulation in order to make available additional amounts of gold for international monetary transactions.

The Coinage Act of 1965 discontinued silver coinage (79 Stat. 254, 31 U.S.C. 5112). After a one year grace period, redemption of silver certificates in silver was discontinued as of June 24, 1968 pursuant to the Act of June 24, 1967 (81 Stat. 77).

In the Olympic Commemorative Coin Act, Public Law No. 97-220, Congress authorized the issuing in 1983 and 1984 of a total of not more than 50 million silver dollars and not more than 2 million \$10 gold coins to help raise funds for the 1984 Olympics. Both types of coins will be legal tender at their face value; however, as the value of the silver content and the purchase prices of these coins will far exceed their face value, it is unlikely that any of these coins will be used in ordinary transactions.

In Title I of the Statue of Liberty - Ellis Island Commemorative Coin Act, Public Law 99-61, Congress authorized the issuance, beginning in October 1985 and ending in December 1986, of not more than 500,000 five dollar coins, not more than 10 million one dollar coins, and not more than twenty-five million half dollar coins to commemorate the centennial of the Statue of Liberty. These coins are legal tender at their face value. Title II of the Act authorizes the issuance at the earlier of September 1986 or the date on which all gold coins authorized under Title I have been sold, of silver Liberty Coins in quantities sufficient to meet public demand. These silver coins will be legal tender at face value. It is unlikely that either the gold or silver coins will be used in ordinary transactions since their purchase price will far exceed face value.

The Gold Bullion Coin Act of 1985 authorizes the issuance, in quantities sufficient to meet public demand, of gold coins in fifty, twenty-five, ten, and five-dollar denominations. No coins may be issued before October 1, 1986. These coins will be legal tender at their face value. However, it is unlikely that they will be used in ordinary transactions because their purchase price will far exceed face value.

Bicentennial of Constitution Coins Act (P.L. 99-582, October 29, 1986) authorized the issuance of not more than one million five dollar gold coins and ten million one dollar silver coins to commemorate the Bicentennial of the United States Constitution. Coins were initially issued beginning January 1, 1987, and the legislation provided that no coins should be minted after June 30, 1988. These coins are legal tender at their face value. It is unlikely that either coin will be used in ordinary transactions since their purchase price will far exceed their face value. The price of each coin included a fixed surcharge which is required to be used to reduce the national debt.

In the 1988 Olympic Commemorative Coin Act (P.L. 100-141, October 28, 1987), Congress authorized the Secretary of the Treasury to issue not more than one million five dollar gold coins and ten million one silver dollar coins to help raise funds to train United States Olympic athletes. Both types of coins are legal tender at their face value. It is unlikely that either the gold or silver coins will be used in ordinary transactions since their purchase price will far exceed their face value.

In the Bicentennial of the United States Congress Commemorative Coin Act (P.L. 100-673, November 17, 1988, as amended by P.L. 100-696, November 18, 1988), Congress authorized the minting and issuance of not more than one million five dollar gold coins, three million one dollar silver coins, and four million half dollar clad coins to commemorate the Bicentennial of the United States Congress. These coins are legal tender at their face value, and it is unlikely that any of the coins would be used in ordinary transactions because their purchase price will far exceed their face value. The sales price of the coins include a fixed surcharge which is required to be deposited into the Capitol Preservation Fund. This fund is to be utilized by the United States Capitol Preservation Commission to improve and preserve the artistic and architectural integrity of the United States Capitol.

The Dwight David Eisenhower Commemorative Coin Act of 1988 (P.L. 100-467, October 3, 1988) directed the Secretary of the Treasury to mint and issue not more than four million one dollar silver coins to commemorate the one hundredth anniversary of the birth of President Eisenhower. The coins will be legal tender at their face value, and it is unlikely that either coin will be used in ordinary transactions since their purchase price will far exceed their face value. The U.S. Mint may begin selling the coins on

January 1, 1990, and may not mint any additional coins after December 31, 1990. The sales price will include a fixed surcharge which will be used for the purpose of reducing the national deficit.

During the 1700's and into the 1800's most nations made international settlements in both gold and silver, but by the late 1800's gold had largely replaced silver. The international gold standard broke down during the 1930's, but a system of fixed exchange rates defined in gold was re-established after World War II.

~~In 1945,~~ the Bretton Woods Agreements Act (59 Stat. 512, 22 U.S.C. 286 et. seq.) was enacted, which provided for U.S. membership in the International Monetary Fund (IMF). Under the Articles of Agreement of the IMF, each member of the IMF was required to establish a par value for its currency, expressed in terms of gold, and to take appropriate measures to permit within its territories exchange transactions between its own currency and those of other IMF members only within prescribed margins of the par value for its currency of \$35 per fine troy ounce, and as authorized by the IMF-prescribed margins; for the official settlement of international transactions.

On March 31, 1972, Public Law 92-268 (86 Stat. 116), the Par Value Modification Act, was enacted, by which Congress established a new par value for the dollar equal to one thirty-eighth of a fine troy ounce of gold. On September 21, 1973, Public Law 93-110 (87 Stat. 353), the Par Value Modification Act was amended by changing the par value of the dollar to equal "0.828948 Special Drawing Right or, the equivalent in terms of gold, of forty-two and two-ninths dollars per fine troy ounce of gold". Definition of the dollar in terms of gold was solely for the purpose of meeting U.S. obligations in the International Monetary Fund. The only domestic purpose for which the legal definition of the dollar in terms of gold continued to be relevant, was the issuance of gold certificates to Federal Reserve Banks pursuant to section 2(a) of the Gold Reserve Act of 1934 (31 U.S.C. 5117).

The par value of the dollar, established by Section 2 of the Par Value Modification Act, was repealed by Section 6 of Public Law 94-564 (90 Stat. 2660). Under Section 9 of that Act, the repeal became effective "upon entry into force of the amendments to the Articles of Agreement of the International Monetary Fund approved in resolution numbered 31-4 of the Board of Governors of the Fund", i.e., adoption by the IMF of the proposed Second Amendment to the Articles of Agreement of the IMF. Under the amended IMF Articles Agreement, which became effective April 1, 1978, the United States has no legal obligation to establish and maintain a par value for the dollar.

"Lawful money" means "legal tender." In 1913 the Senate Committee on Banking and Currency included the following explanation in its report on the bill which became the Federal Reserve

The terms "lawful money" and "legal tender" are different names for the same thing. The term "lawful money" originated in the act of February 25, 1862, authorizing the issue of United States notes. It was probably used in subsequent acts, because the term was comprehensive and, notwithstanding the fact that gold and silver coins were not then in circulation, it would necessarily embrace them, as well as legal-tender notes, whenever specie payments should be resumed. However, commonly the term "lawful money" has been applied to the United States notes. "Legal tender" is a quality given a circulating medium by Congress, and possessing this quality it becomes "lawful money."

Senate Report Number 133 Part 2, 63rd Congress, 1st Session, p.107 (1913). Section 16 of the Federal Reserve Act of 1913 (12 U.S.C. Section 411) provided for the issuance of Federal Reserve notes but did not make them legal tender. Instead, it made them redeemable in gold or "lawful money" (legal tender) at the Federal Reserve banks or in gold at the U.S. Treasury in Washington. However, in 1933 the United States went off the domestic gold standard. The Gold Reserve Act of 1934 amended Section 16, to provide that Federal Reserve notes are redeemable in "lawful money" only. Redemption of any currency of the United States in gold was, and remains, prohibited (31 U.S.C. 5119).

Federal Reserve notes are legal tender under 31 U.S.C. 5103, and are therefore "lawful money". United States notes have been discontinued (with the exception of the \$100 United States note), and Federal Reserve notes have become practically the only form of paper currency in circulation. Consequently, if a holder of Federal Reserve notes presents them for redemption in lawful money at the Treasury or at a Federal Reserve Bank, he is most likely to receive in exchange lawful money in the form of other Federal Reserve notes.

This being the case, the inscription "payable to bearer on demand in lawful money" was removed from Federal Reserve notes at the direction of the Secretary of the Treasury, beginning with the 1963 series, because it no longer had any significant meaning.

At the present time, Treasury does not have a facility for exchanging Federal Reserve notes for silver eagle dollars, and I am not aware of any obligation imposed by law for it to have such a facility.

I hope that this information is useful to you.

Sincerely,

Russell L. Munk

Russell L. Munk
Assistant General Counsel
(International Affairs)

Return to -

Mr. Van Stafford
15th Colorado Judicial District
P.O. Box 56
Campo, Colorado 81029

371891

10:40 AM
11-3-89
364 369
Shirley Ingle
3000 pd.

STATE OF COLORADO)
COUNTY OF BACA) -SS

I HEREBY CERTIFY THAT THE WITHIN AND FOREGOING IS A FULL, TRUE AND CORRECT COPY OF NO. 372891 AT BOOK 541 AT PAGE 364/369 OF THE RECORDS IN MY OFFICE.

WITNESS MY HAND AND OFFICIAL SEAL THIS 5th DAY OF Feb 1996

BACA COUNTY CLERK & RECORDER
Shirley Ingle
BY: *V. Dawell* DEPUTY



DEPARTMENT OF THE TREASURY
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20220

EXHIBIT O-8

FEB 18 1977

Dear Mr. [redacted]

This is to respond to your letter of November 23, 1976 in which you request a definition for the dollar as distinguished from a Federal Reserve note.

Federal Reserve notes are not dollars. Those notes are denominated in dollars, which are the unit of account of United States money. The Coinage Act of 1792 established the dollar as the basic unit of United States currency, by providing that "The money of account of the United States shall be expressed in dollars or units, dimes or tenths, cents, or hundredths .." 31 U.S.C. § 371.

The fact that Federal Reserve notes may not be converted into gold or silver does not render them worthless. Mr. Bernard of the Federal Reserve Board is quite correct in stating that the value of the dollar is its purchasing power. Professor Samuelson, in his text Economics, notes that the dollar, as our medium of exchange, is wanted not for its own sake, but for the things it will buy.

I trust this information responds to your inquiry.

Sincerely yours,

Russell L. Munk
Assistant General Counsel

Mr.
P.O. Box [redacted]

of the Corporation with respect to the execution of any instruments or documents affecting title to real estate or with respect to authorizing satisfactions of judgments are transferred to such Board. Any such instruments or documents executed by the Secretary or an Assistant Secretary to such Board on behalf of the Board shall be as effective as if the same had been executed by the Corporation prior to its dissolution. Subject to the approval of the Director of the Bureau of the Budget, such Board may transfer to any other department or agency of the United States, with the consent of such department or agency, all the powers and functions vested in such Board by this subsection (c). All liens held by the Corporation upon real or personal property on account of judgments rendered in its favor except judgments for mortgage debts which have been assigned by the Corporation, and all claims now held by the Corporation arising out of its mortgage or real estate operations, whether for rent or otherwise, are hereby released and discharged in full.

"(d) The authority to appropriate for any functions relating to the Corporation may continue to be exercised after its dissolution for the purpose of making appropriations to any department or agency carrying out the provisions of this section [this note]."

CROSS REFERENCE

Abolishment of Home Owners' Loan Corporation, 12 USCS § 1463 note.

§ 395. Federal Reserve banks as depositaries for Commodity Credit Corporation

The Federal Reserve banks are hereby authorized to act as depositaries, custodians, and fiscal agents for the Commodity Credit Corporation. (July 16, 1943, c. 241, § 3, 57 Stat. 566.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Transfer of functions:

Administration of program of Commodity Credit Corporation was transferred to Secretary of Agriculture by 1946 Reorg. Plan No. 3, § 501, eff. July 16, 1946, 11 Fed. Reg. 7877, 60 Stat. 1100. See 5 USCS § 903 note.

FEDERAL RESERVE NOTES

§ 411. Issuance to reserve banks; nature of obligation; redemption

Federal reserve notes, to be issued at the discretion of the Federal Reserve Board [Board of Governors of the Federal Reserve System] for the purpose of making advances to Federal reserve banks through the Federal reserve agents as hereinafter set forth and ~~for no other purpose~~, are hereby authorized. The said notes shall be obligations of the United States and shall be receivable by all national and member banks and Federal reserve

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Debt

banks and for all taxes, customs, and other public dues. They shall be redeemed in lawful money on demand at the Treasury Department of the United States, in the city of Washington, District of Columbia, or at any Federal reserve bank.

(Dec. 23, 1913, c. 6, § 16, ¶ 1, 38 Stat. 265; Jan. 30, 1934, c. 6, § 2(b)(1), 48 Stat. 337.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"Hereinafter set forth," referred to in this section, probably refers to § 17 et seq. of the Federal Reserve Act (Act Dec. 23, 1913). For distribution of such sections, see USCS Tables Volume and 12 USCS § 226 note.

Explanatory notes:

The bracketed words "Board of Governors of the Federal Reserve System" are inserted on authority of 12 USCS § 241 note.

This section is comprised of first para. of section 16 of Act Dec. 23, 1913. Paras. 2-4, 5 and 6, 7, 8-11, 13 and 14 of section 16, and paras. 15-18 of section 16, as added June 21, 1917, c. 32, § 8, 40 Stat. 238, are classified to 12 USCS §§ 412-414, 415, 416, 418-421, 360, 248(o) and 467, respectively. Para. 12 of section 16, formerly classified to 12 USCS § 422, was repealed by Act June 26, 1934, c. 756, § 1, 48 Stat. 1225.

Amendments:

1934. Act Jan. 30, 1934, substituted "lawful money" for "gold" in the last sentence of this section, and deleted "in gold or lawful money" which followed "or" in such sentence.

CROSS REFERENCES

Gold coinage discontinued, 31 USCS § 315b.

This section is referred to in 12 USCS §§ 348, 420, 421, 467; 31 USCS §§ 440, 442, 443, 444, 445, 446, 822b.

RESEARCH GUIDE

Am Jur:

10 Am Jur 2d, Banks § 321.

21 Am Jur 2d, Customs Duties § 101.

INTERPRETIVE NOTES AND DECISIONS

Federal reserve notes are legal tender in absence of objection thereto. *MacLeod v Hoover* (1925) 159 La 344, 105 So 305.

§ 412. Application for notes; collateral required

Any Federal Reserve bank may make application to the local Federal Reserve agent for such amount of the Federal Reserve notes hereinbefore

VICK vs. HOWARD

136 VA. 101, 116 S. E. 465
(1923)

"Bank Notes & Silver Certificates Not Tender"
(12 U.S.C. 411 - For No Other Purpose)

112 U.S.C. 111 - for no other purpose

"Bank Notes & Silver Certificates of the United States"

LEWIS VICK, Plff. in Err.,
v.

RICHARD HOWARD.

Virginia Supreme Court of Appeals — March 16, 1923.

(136 Va. 101, 116 S. E. 465.)

Tender — silver certificates and national bank notes.

~~1. National bank notes and United States silver certificates are not legal tender for the purchase price of real estate.~~

[See note on this question beginning on page 246.]

Appeal — immaterial error in instruction.

2. An instruction in an action for damages for breach of contract to convey real estate that gold certificates were not legal tender after they were made so by statute is immaterial error, where other money tendered to cover the purchase price was not legal tender.

Vendor and purchaser — right to demand legal tender for purchase price.

3. One who contracts to sell real estate for a specified number of dollars may demand legal tender in satisfaction of the purchase price and refuse to execute a deed until it is paid.

[See 21 R. C. L. 49; 27 R. C. L. 536.]

Words and phrases — "money."

4. The word "money," in its generic sense, is one of very comprehensive import, and includes any lawful circulating medium of exchange.

[See 18 R. C. L. 1266; 21 R. C. L. 40.]

Tender — power of Congress.

5. Congress has the power to declare what kind of money shall be legal tender for the payment of private obligations.

[See 18 R. C. L. 1271.]

Vendor and purchaser — waiver of right to legal tender.

6. The acceptance by one contract-

ing to sell real estate of current funds not legal tender for the down payment does not waive his right to insist on legal tender for the balance.

[See 21 R. C. L. 49.]

— effect of custom to accept current funds.

7. A custom to accept current funds in satisfaction of debts does not entitle one who has contracted to purchase real estate to pay the purchase price in such funds, which are not legal tender, against the protest of the vendor.

Tender — effect of statute governing payment into court.

8. A statute providing for payment of money into court does not affect the law with respect to a legal tender in payment of the purchase price of real estate.

Specific performance — tender after day — when sufficient.

9. One who, having contracted to convey real estate, refuses a tender of current money on the day of performance without previous notice that she would demand legal tender, may be required to perform in case a proper tender is made within a reasonable time afterwards.

[See 25 R. C. L. 321; 4 R. C. L. Supp. 1582. See also notes in 11 A.L.R. 811; 23 A.L.R. 630.]

ERROR to the Circuit Court for Southampton County (McLemore, J.) to review a judgment in favor of defendant in a proceeding by motion to recover damages for alleged breach of a contract for the sale of real estate.

Affirmed.

The facts are stated in the opinion of the court.

Messrs. Turnbull & Turnbull and James T. Gillette, for plaintiff in error:

When the balance of the purchase price of \$24,900 in current money was tendered to the defendant, Howard,

within the time prescribed by the contract between the parties, plaintiff was entitled to his deed, and defendant did not have the right to demand legal tender.

21 R. C. L. § 38; King v. King, 90

Va. 177, 17 S. E. 894; Lohman v. Crouch, 19 Gratt. 331; 30 Cyc. 1210; Cheney v. Libby, 134 U. S. 68, 33 L. ed. 818, 10 Sup. Ct. Rep. 498; Blount v. Lynch, 24 Ga. App. 217, 100 S. E. 644; Ansley v. Highpower, 120 Ga. 719, 48 S. E. 197; Barnes v. Morrison, 97 Va. 372, 34 S. E. 93; Clemmitt v. New York L. Ins. Co. 76 Va. 355; Matney v. Barnes, 116 Va. 713, 82 S. E. 801.

Defendant had waived his right to demand what the court termed, in the only instruction given, "legal tender." 40 Cyc. 270; 27 R. C. L. 912.

When a contract is made requiring the payment of money, tender of current funds is sufficient to discharge the payment, unless the contract, in express terms, requires legal tender as the medium of payment.

21 R. C. L. § 38; 30 Cyc. 1210; San Juan v. St. John's Gas Co. 195 U. S. 520, 49 L. ed. 304, 25 Sup. Ct. Rep. 108, 1 Ann. Cas. 796.

Messrs. James H. Corbitt and John N. Sebrell, Jr., for defendant in error:

Defendant had the right to require the payment of all the purchase price in legal tender, and to refuse to make a deed unless the money tendered was recognized by law as legal tender, and informing the jury what was legal tender.

30 Cyc. 1210, note; Miller v. Lacy, 33 Tex. 351; 21 R. C. L. 49; Burk, Pl. & Pr. 2d ed. p. 363; 2 Benjamin, Sales, 4th Am. ed. by Corbin, § 1066, note 11; Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287; Corbit v. Bank of Smyrna, 2 Harr. (Del.) 235, 30 Am. Dec. 635; 3 Elliott, Contr. § 1958; Lang v. Water, 47 Ala. 624; Larsen v. Breene, 12 Colo. 480, 21 Pac. 498; Martin v. Bott, 17 Ind. App. 444, 46 N. E. 151; Hallowell & A. Bank v. Howard, 13 Mass. 235; Grigby v. Oakes, 2 Bos. & P. 526, 126 Eng. Reprint, 1420; Bank of United States v. Bank of Georgia, 10 Wheat. 333, 6 L. ed. 334; Cheney v. Libby, 134 U. S. 68, 33 L. ed. 818, 10 Sup. Ct. Rep. 498; Decamp v. Feay, 5 Serg. & R. 323, 9 Am. Dec. 372.

Plaintiff cannot recover under any view of the case.

Stuart v. Pennis, 100 Va. 612, 42 S. E. 667; Thompson v. Guthrie, 9 Leigh, 101, 33 Am. Dec. 225.

Kelly, P., delivered the opinion of the court:

This is a proceeding by motion instituted by Levy Vick against Rich-

31 A.L.R.—16.

ard Howard to recover damages for²⁴¹ an alleged breach of a contract for the sale of real estate. There was a verdict and judgment below in favor of Howard, and Vick assigns error.

On the 8th day of May, 1920, these parties entered into a written contract, signed by each of them, which, so far as material to this controversy, was as follows: "Received of Levy Vick the sum of one hundred dollars in part payment of that certain lot or parcel of land known as the store and bank building, situated [here follows description], and that certain farm known as the 'Neal Place,' situated [here follows description], which I have this day sold the said Levy Vick for the sum of twenty-five thousand dollars (\$25,000), balance to be paid in ninety days from this date, the said property to be given possession of at the time of the payment for the property. . . . I, the said Levy Vick, have this day purchased the said property upon the terms and conditions as stated above."

The "terms and conditions" referred to in the contract are in no way material to this case.

On July 31, 1920, pursuant to an arrangement which had been previously agreed upon, Vick signed and delivered to the Beaton Realty Corporation the following memorandum: "I hereby assign the within contract to the Beaton Realty Corporation, of Boykins, Virginia, for the sum of fifty-five hundred dollars, to be paid when deed for said property is presented."

In our view of the case it is unnecessary to consider the legal effect of the last-mentioned paper. It is sufficient to say that the real consideration therefor was \$6,000, \$500 having already been paid to Vick by the corporation, and that the true arrangement between the parties was that the corporation was to take over the property at the price of \$31,000, and was ready and able to do so, thereby affording Vick the opportunity to make a profit of \$6,000 on his purchase from Howard. As will hereafter appear, nei-

r Vick nor the Beaton Realty Corporation got a deed for the property and this suit was brought for a sum of \$6,000, which Vick would not have realized if Howard had made a deed.

On the 26th day of July, 1920, Howard went away from his home, what fairly appears from the record to have been a vacation, going first to Virginia beach for a few days, then to Hampton, where he visited some relations, until the 6th of August. On the last-named day he returned to Newsoms, where he and Vick resided. There is no insistent contention by counsel for Vick that Howard went on this trip for the purpose of evading a tender of the balance of the purchase money, and in an effort to deprive Vick of the opportunity to comply with the contract. We do not find that this contention, even if material, is very well supported by the evidence. It is clear from the record that he was anxious to get out of the contract, but he was at home during much the greater part of the ninety days within which a final payment was to be made, and he returned to his home before the expiration of that period.

During Howard's absence, the Beaton Realty Corporation secured the means necessary to carry out its agreement with Vick, and the latter was anxious to locate Howard and pay the balance of the purchase money under the contract with him. When Howard returned to Newsoms on the morning of August 6th, the last day of the period fixed for the payment of the balance, an attorney representing Vick and the Beaton Realty Corporation offered him some money and a certified check, which he declined to accept. He was then asked to prepare a deed for the property, and was told in substance by the attorney and Mr. Beaton, president of the Realty Corporation, would come back in a short time with the whole amount in cash. This was shortly after noon, and a few minutes later in the evening the same

parties returned with the balance of the purchase price in currency, but a large part of the money they had consisted of national bank notes and other bills, which do not constitute legal tender within the requirements of the acts of Congress. A tender of this money was made to Howard, and he declined to accept it. According to the testimony for the plaintiff, Howard said at that time that he would not accept the money and give a deed, "because he had not been treated right and it was not legal tender," and also said, "It was too much of Arthur Woolford's (Bank of Suffolk) money." According to Howard's testimony, on the other hand, he told the parties making the tender that he had other reasons which he did not deem necessary to state, but added: "I have got one reason; it is not legal tender." In any view of the evidence, he based his refusal to accept the money on the specific ground that it was not a legal tender. Later on that day Howard was asked whether he would make a deed if they would "bring him the kind of money he wished," and he replied that he would answer when he saw the money.

The attorney representing Vick and the Beaton Realty Corporation made some further effort that evening to secure enough legal tender money to make up the whole amount of the balance due Howard, but did not succeed, and the day passed without any further tender having been made, and no tender in pais was at any time thereafter made to Howard.

Sometime later—just when does not appear—the Beaton Realty Corporation brought a suit against Howard for specific performance. While that suit was pending, to wit, on the 26th day of November, 1920, Howard wrote the Beaton Realty Corporation, referring to the suit, saying that he did not consider himself bound by the contract with Vick, but that he desired to avoid any disagreeable litigation, and that

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he would execute a deed for the property upon payment of the balance of the purchase price. To this letter the Beaton Realty Corporation replied on December 10, 1920, declining to take the property, and the suit was dismissed on the motion of the complainant.

After the conclusion of the evidence in the instant case, the plaintiff and defendant respectively asked for certain instructions, all of which were refused, except the following, which was given on behalf of the plaintiff:

"The court instructs the jury that Howard had a right to require the payment of all the purchase money in legal tender, and he had a right to refuse to make the deed unless all of the money tendered was recognized by law as a legal tender, and the court further instructs you that gold certificates are not a legal tender, silver certificates are not a legal tender, national bank notes are not a legal tender, in this case.

"The court further instructs you that if, therefore, the money tendered Howard consisted in part of gold certificates and national bank notes, such was not a legal tender, and Howard had the legal right to refuse to receive the same, and in such case the jury should find for the defendant."

If this instruction was correct, it was conclusive of the case, and any discussion of the other instructions is unnecessary.

The court was clearly right in telling the jury that national bank

Tender—silver certificates and national bank notes.

notes and silver certificates did not constitute legal tender. Gold certificates were made legal tender by the Act of Congress of December 24, 1919 (41 Stat. at L. 370, chap. 15, §§ 1 and 2, Comp. Stat. § 6577a, Fed. Stat. Anno. Supp. 1919, p. 242). See Burk, Pl. & Pr. 2d ed. p. 640, note 57. And the instruction as to such certificates was in error. This, however, is immaterial, because the

greater part of the money tendered consisted of national bank notes, and this error in the instruction, therefore, did not prejudice the defendant. If Howard was entitled to demand legal tender money, the full amount of such money was requisite. See Burk, Pl. & Pr. 2d ed. p. 363, note 2, and also page 640, note 57.

Apparent—immaterial error in instruction.

The sole question in the case is whether the defendant had the right to demand legal tender and to refuse to execute a deed unless such tender was made. We see

Vendor and purchaser—right to demand legal tender for purchase price.

no escape from an affirmative answer to this question. The contract was to pay so many "dollars," and this, according to the universal understanding and holding in the courts of Virginia and of the United States, means "lawful money of the United States;" that is to say, money which by the acts of Congress constitutes legal tender. *Omhundro v. Crump*, 18 Gratt. 705; *Lohman v. Crouch*, 19 Gratt. 331; *Hilb v. Peyton*, 22 Gratt. 551, 561; 1 Dan. Neg. Inst. 6th ed. § 87; *Bank of New York v. New York County*, 7 Wall. 26, 30, 19 L. ed. 60, 61; *Thorington v. Smith*, 8 Wall. 1, 12, 19 L. ed. 361, 364; *Cheney v. Libby*, 134 U. S. 68, 80, 33 L. ed. 818, 823, 10 Sup. Ct. Rep. 498. This being true, in the absence of waiver, express or implied, Howard's right to demand legal tender was perfectly clear. Burk, Pl. & Pr. 2d ed. 363, note 2; 21 R. C. L. p. 49, § 47; 3 Williston, Contr. § 1810; 3 Elliott, Contr. § 1958; 2 Benjamin, Sales, 4th Am. ed. by Corbin, § 1066, and note 11; *Hallowell & A. Bank v. Howard*, 13 Mass. 235; *Corbit v. Bank of Smyrna*, 2 Harr. (Del.) 235, 30 Am. Dec. 635; *Martin v. Bott*, 17 Ind. App. 444, 46 N. E. 151, 153; *Cheney v. Libby*, supra; *Legal Tender Cases*, 12 Wall. 457, 545, 549, 20 L. ed. 287, 310, 311; *Juilliard v. Greenman*, 110 U. S. 421, 23 L. ed. 204, 4 Sup. Ct. Rep. 122.

14
 National bank notes are generally regarded as money, and constitute a large part of the currency of the country. The word "money," in its generic sense, is one of every comprehensive import, and includes any lawful circulating medium of exchange. *Danville v. Sutherland*, 20 Cratt. 555, 583; *Dillard v. Dillard*, 97 Va. 434, 438, 34 S. E. 1; 18 R. C. L. 1268-1270, §§ 3, 4; *State v. Finnegean*, 127 Iowa, 286, 103 N. W. 155, 4 Ann. Cas. 628, note, 630; *Klauber v. Biggerstaff*, 7 Wis. 551, 3 N. W. 357, 32 Am. rep. 779; *Woodruff v. Mississippi*, 32 U. S. 291, 299, 40 L. ed. 973, 76, 16 Sup. Ct. Rep. 820. Some expressions used in these and similar authorities appear upon casual reading to place all kinds of current money upon a parity in every respect, but this is not their true meaning and effect. The authorities last cited, and the many others like them which we have examined, clearly recognize the distinction between money which is, and money which is not, legal tender. In other words, all legal tender is money, but not all money is legal tender. The confusion which is sometimes said to be found in the cases is more apparent than real; but where it does exist it is due, as said in *State v. Finnegean*, 127 Iowa, 286, 103 N. W. 155, 4 Ann. Cas. 628, to a "want of proper distinction between money which is current and money which is legal tender."

It may be conceded that under conditions prevailing in this country now, one kind of currency is as good as another, and that Howard could have been just as well off with the money which he was offered as with that which he demanded. But this does not affect the legal result. Congress has the power to declare, and has declared, what kind of money shall be legal tender for the payment of private obligations, and national bank notes are not such money. U. S. Comp. §§ 6571-6577; 41 Stat. at L.

words and phrases—
 money."

power—
 Congress.

370, chap. 15, Comp. Stat. § 6577a, Fed. Stat. Anno. Supp. 1919, p. 242; Legal Tender Cases, 12 Wall. 457, 545, 549, 20 L. ed. 287, 310, 311.

It is insisted that Howard waived his right to demand legal tender, but this position is not sustained by the evidence. The record does not show what kind of money he accepted in payment of the \$100 which was paid to him when the contract was made; but, if it be conceded that, as contended by the plaintiff, it consisted of current funds which did not constitute lawful money of the United States, still his acceptance thereof would not have been sufficient to operate as a waiver of his right to require legal tender of the balance. If the position here insisted upon by counsel for Vick could be sustained, then it would seem to follow that, if the original \$100 had been paid by check, Howard would have been bound to also accept a check for the balance, and this, of course, is not a sound conclusion. Even the acceptance of a number of previous checks or payments in current funds would not have constituted a waiver as to any unpaid balance. *Cheney v. Libby*, supra. Such a course of conduct might have been very material as to Vick's right to a reasonable time after expiration of the ninety days to secure legal tender and offer the same to Howard, but not as to Howard's right to refuse the money which was offered him on August 6th.

Vendor and purchaser—
 waiver of right to legal tender.

It seems clear, as we have already said, that Howard did not wish to comply with his contract, and had other reasons for declining to make the deed. These reasons are not disclosed, and may or may not have been such as a court of conscience would approve; but, whether good or not, they did not affect his right to require the plaintiff to comply with the law and to tender in discharge of the obligation lawful money of the United States. It is quite true that by common consent debts

are usually paid in any funds which ordinarily pass as money; but the contention of the plaintiff that this custom entitled him, over the protest of the defendant, to make the payment in this case in such funds, is not supported by authority.

In 1 Dan. Neg. Inst. 6th ed. § 87, the author says: "When the term 'dollars' is used in any security for money given in any of the United States, it is understood to mean dollars 'of legal money of the United States,' and extraneous evidence will not be permitted as a general rule to give it a different signification." See also the authorities cited, supra.

In Corbit v. Bank of Smyrna, 2 Harr. (Del.) 235, 30 Am. Dec. 635, it is said: "Bank notes constitute a large and convenient part of the currency of our country, and, by common consent, serve to a great extent all the purposes of coin. In themselves they are not money, for they are not a legal tender; and yet they are a good tender, *unless especially objected to as being notes merely*, and not money. Miller v. Race, 1 Burr. 457, 97 Eng. Reprint, 401; Bank of United States v. Bank of Georgia, 10 Wheat. 333, 6 L. ed. 334; Handy v. Dobbin, 12 Johns. 220; Wright v. Reed, 3 T. R. 554, 100 Eng. Reprint, 729. They subserve the purposes of money in the ordinary business of life, by the mutual consent (express or implied) of the parties to a contract, and not by the binding force of any common usage; *for the party to whom they may be tendered has an undoubted right to refuse accepting them as money.*" (Italics added.) See also 21 R. C. L. pp. 39, 40, § 36.

Nor is the case, as plaintiff contends, affected by § 6142 of the Code of Virginia, providing for payment of money into court, or by the following comment thereon in Burk, Pl. & Pr. 2d ed. pp. 364, 365:

Tender—effect of statute governing payment into court.

"In Virginia, while the common-

law doctrine of tender has not been specifically repealed or abolished, it has been practically superseded by statute. . . .

"These enactments apply to all personal actions, whether upon tort or contract, and if a tender, after maturity of a money demand, be made of the full amount (principal and interest to date of tender), and be arbitrarily refused, and the debtor keeps his tender good, and pays the money into court and files a plea under § 3296, it is not likely that any court or jury would require more."

The language here quoted has reference to the effect of tender after maturity, and not to the character of the tender. Whether a payment of money into court under the statute could, by timely action, be successfully challenged, if offered in the form of a check or bank notes, or other currency not constituting legal tender, is a question which we need not consider. It is certain that the statute in question was not designed to affect the law as it applies to the question of a legal tender in pais.

The action of Howard in refusing the money offered him on the 6th day of August was not necessarily fraught with the injustice and hardship which counsel for the defendant seem to think it entailed. Neither Vick nor the realty corporation necessarily lost the right to make legal tender the next day, or within a reasonable time, and to compel Howard to convey the property. As a matter of fact, neither of these parties, so far as the record shows, ever asked Howard for a deed or even made him any tender of money after the 6th of August, except in so far as such request and tender may have been embodied in the suit for specific performance, which was subsequently brought by the realty corporation. When that suit was brought, Howard offered to make a deed upon payment of the balance of the purchase money, and he would doubtless have been required to make it if he had declined; but the com-

plaintiff refused to accept his offer and had the suit dismissed.

The principles governing the legal and equitable rights of the parties in the instant case seem to us to have been properly announced and applied in the case of *Cheney v. Libby*, 134 U. S. 68, 79, 33 L. ed. 818, 523, 10 Sup. Ct. Rep. 498, wherein the court said: "Although the contract between Cheney and Libby called for payment in dollars, the latter might well have supposed, unless distinctly informed to the contrary, that the former would be willing to receive current funds, that is, such as are ordinarily received by men of business or by banks, and such funds were received in payment of all of Libby's notes falling due in 1880 to 1884, inclusive. While this course of business was not an absolute waiver by Cheney of his right to demand coin or legal tender paper in payment of notes subsequently falling due, such contract, during a period of several years, was calculated to produce the impression upon Libby's mind that current or bankable funds would be received in payment of any of his notes. And therefore, upon every principle of fair dealing, Cheney was bound to give reasonable notice of

his purpose, after 1884, to accept only such funds as, under the contract, strictly interpreted, he was entitled to demand. No such notice was given. On the contrary, the just inference from the testimony is that Cheney designed to throw Libby off his guard, and render it impossible for the latter, or for the bankers to whom he sent drafts to be used in paying his notes, to supply the requisite amount of coin or legal tender paper, on the very day the notes matured. . . ." (Italics added.)

It will be observed, of course, from the foregoing quotation, that the *Cheney Case* was, upon its facts, much stronger than this one for the enforcement of the contract. We are of opinion, however, that, if a legal tender had been made within a reasonable time after

*Specific performance—
tender after day—
when sufficient.*

the 6th of August, a court of equity would have required Howard to specifically perform the contract.

Upon the evidence before us, there was no view of the case under which the plaintiff was entitled to recover in a suit of this character. The judgment complained of is right, and must be affirmed.

ANNOTATION.

What money is legal tender.

- I. Introductory, 246.
- II. Coin money, 247.
- III. Paper money, 247.

I. Introductory.

As is pointed out in the reported case (*VICK v. HOWARD*, ante, 210), there is a clear distinction between "money" and "legal tender," not all money commonly current being legal tender. The states are expressly forbidden to coin money or make anything but gold and silver legal tender for the payment of debts. Const. Art. 1, §

10. If a state establishes a tender law it must be for coin the value of which is regulated by Congress. *Van Husan*

v. Kanouse (1865) 13 Mich. 312. See also *Thayer v. Hedges* (1864) 22 Ind. 301. The prohibition of the section cited took from the paper of state banks all coercive circulation, and left it to stand on the credit of the banks. *Veazie Bank v. Fenno* (1869) 8 Wall. (U. S.) 552, 19 L. ed. 489.

All money now in circulation in the United States is that issued by or under authority of the United States. Ignoring, therefore, questions arising out of currency now obsolete, the question, What money is legal tender, to which the present annotation is confined, is to be answered from the Federal enactments on the subject, which

are so clear as to leave little room for construction.

II. Coin money.

The gold coins of the United States, of standard weight and fineness, are legal tender in all payments at their face value. Act Feb. 12, 1873, Rev. Stat. § 3585, Comp. Stat. § 6572, 6 Fed. Stat. Anno. 2d ed. p. 297.

Silver coins of denominations smaller than \$1 are legal tender in all sums not exceeding \$10. Act June 9, 1879, Comp. Stat. § 6573, 6 Fed. Stat. Anno. 2d ed. p. 301.

The minor coins of the United States are legal tender for any amount not exceeding 25 cents in any one payment. Act Feb. 12, 1873, Rev. Stat. § 3587, Comp. Stat. § 6574, 6 Fed. Stat. Anno. 2d ed. p. 298.

Under the act last referred to, 5-cent pieces have been held to be "lawful current money." *Black v. State* (1904) 46 Tex. Crim. Rep. 107, 79 S. E. 311 (larceny).

A 5-cent piece is legal tender, though it is worn, defaced, and mutilated, if its weight is not appreciably diminished and its mint marks are plainly discernible. *Cincinnati Northern Traction Co. v. Rosnagle* (1911) 84 Ohio St. 310, 35 L.R.A. (N.S.) 1030, 95 N. E. 384, Ann. Cas. 1912C, 639. See to similar effect, as to worn or mutilated minor coins: *Mobile Street R. Co. v. Watters* (1902) 135 Ala. 227, 33 So. 42; *Chicago Union Traction Co. v. McClevey* (1906) 126 Ill. App. 21; *Ruth v. St. Louis Transit Co.* (1903) 98 Mo. App. 1, 71 S. W. 1055; *Jersey City & B. R. Co. v. Morgan* (1889) 52 N. J. L. 60, 18 Atl. 904, affirmed in (1890) 52 N. J. L. 558, 21 Atl. 783.

III. Paper money.

It has been authoritatively settled that Congress has the power to make paper money legal tender. *Legal Tender Cases* (1871) 12 Wall. (U. S.) 457, 20 L. ed. 287; *Legal Tender Cases* (1884) 110 U. S. 421, 28 L. ed. 204, 4 Sup. Ct. Rep. 122. In the latter case it was said: "We are irresistibly impelled to the conclusion that the impressing upon the Treasury notes of the United States the quality of being a legal tender in payment of private

debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and therefore, within the meaning of the instrument, 'necessary and proper for carrying into execution the powers vested by this Constitution in the government of the United States.'"

The Federal statutes provide that the following United States paper money shall be legal tender for private debts:

(1) United States notes, Act February 25, 1862, Rev. Stat. § 358 Comp. Stat. § 6575, 6 Fed. Stat. Anno. 2d ed. p. 299.

(2) Demand Treasury notes authorized by the Act of July 17, 1861, and the Act of February 12, 1862, Rev. Stat. § 3589, Comp. Stat. 6576, 6 Fed. Stat. Anno. 2d ed. p. 300.

(3) Interest-bearing Treasury note issued under the Acts of March 3, 1863, and June 30, 1864, Rev. Stat. 3590, Comp. Stat. § 6577, 6 Fed. Stat. Anno. 2d ed. p. 300.

(4) United States gold certificate Act December 24, 1919, Comp. Stat. § 6577a, Fed. Stat. Anno. Supp. 1919, p. 212.

Certain other paper currency is authorized by Congress, which is not made legal tender for all debts.

(1) National bank notes are legal tender for the payment of "taxes, excises, public lands, and all other dues to the United States except duties on imports, and also for all salaries and other debts and demands owing by the United States to individuals, corporations and associations within the United States, except interest on the public debt and in redemption of the national currency." Rev. Stat. § 518; Comp. Stat. § 9721, 6 Fed. Stat. Anno. 2d ed. p. 733. The foregoing provision as to debts owing by the United States was also enacted in Rev. Stat. § 3475, Comp. Stat. § 6331, 6 Fed. Stat. Anno. 2d ed. p. 636.

(2) Federal reserve notes are made "receivable by all national and member banks, and Federal reserve banks and for all taxes, customs, and other public dues." Act Dec. 23, 1913. § 1

Comp. Stat. § 9799, 6 Fed. Stat. Anno. 1 ed. p. 833.

In the reported case (*VICK v. HOWARD*, ante. 210) it is held that old certificates are legal tender under the Act of 1919, supra, and that national bank notes are not legal tender for private debts, because not declared by Congress. It is however, recognized in that case that national bank notes are a good tender, unless specifically objected to. So, in *Legal Tender Cases* (1884) 110 U. S. 51, 23 L. ed. 204, 4 Sup. Ct. Rep. 122, national bank notes were referred to

arguendo as "bills which under ordinary circumstances pass from hand to hand as money at their nominal value, and which, when so current, the law has always recognized as a good tender in payment of money debts, unless specifically objected to at the time of the tender."

In *North Hudson County R. Co. v. Anderson* (1897) 61 N. J. L. 248, 40 L.R.A. 410, 68 Am. St. Rep. 703, 39 Atl. 905, 4 Am. Neg. Rep. 317, a United States Treasury note from which a corner had been torn was held not to be legal tender. W. A. S.

JOSEPH K. STONE, Trustee in Bankruptcy of Guiseppe Gioffre, Appt.,
v.
SUPERIOR FIRE INSURANCE COMPANY.

Pennsylvania Supreme Court — January 7, 1924.

(278 Pa. 400, 123 Atl. 333.)

Bankruptcy — effect of payment of insurance to bankrupt.

1. In view of the provisions of the Bankruptcy Act of 1898, that the trustee shall be vested with the title of the bankrupt as of the date he was adjudged a bankrupt, an insurance company which, without notice of the proceedings, pays a loss to the bankrupt between the time of the voluntary petition and the adjudication, will not be required to pay again to the trustee because of the Amendment of 1910, that the trustee shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. |

[See note on this question beginning on page 254.]

Right of trustee — when fixed.

2. Under the provisions of the 1910 Amendment to the Bankruptcy Act, there was nothing in existence at the time of adjudication to which the trustee could take title, it is imma-

terial in what condition any property may have been at the time of the filing of the petition.

[See 3 R. C. L. 231; 1 R. C. L. Supp. 790; 4 R. C. L. Supp. 182.]

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Beaver County (Baldwin, P. J.) refusing to remove a compulsory writ in an action brought to recover an amount paid by defendant to the insured bankrupt less the sum paid the mortgagee. *Affirmed.*

The facts are stated in the opinion of the court.

Messrs. Roy M. Jamison and Joseph Stone for appellant.

Messrs. John M. Haverly and John McClure for appellee.

Justice Saffer, J., delivered the opinion of the court:

The question presented:

Where a fire insurance company, in settlement of a loss, has made payment to the insured, after the date of filing an involuntary bankruptcy petition against him, but before the adjudication, without knowledge of the petition, can the trustee, the in-

BRETTON WOODS AGREEMENTS ACT
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BRETTON WOODS AGREEMENTS ACT

P.L. 94-564, see page 90 Stat. 2650

House Report (Banking, Currency and Housing Committee)
No. 94-1284, June 21, 1976 [To accompany H.R. 13955]

Senate Report (Foreign Relations Committee) No. 94-1148,
Aug. 10, 1976 [To accompany H.R. 13955]

Senate Report (Banking, Housing and Urban Affairs Committee)
No. 94-1295, Sept. 27, 1976 [To accompany H.R. 13955]

Cong. Record Vol. 122 (1976)

DATES OF CONSIDERATION AND PASSAGE

House July 27, 1976.

Senate October 1, 1976

The Senate Reports are set out.

SENATE REPORT NO. 94-1148

[page 1]

The Committee on Foreign Relations, to which was referred the bill (H.R. 13955) to provide for amendment of the Bretton Woods Agreements Act and for other purposes, having considered the same, reports favorably thereon with amendment and recommends that the bill as amended do pass.

PURPOSE OF THE BILL

The purpose of the bill H.R. 13955 is threefold. First, the bill authorizes the U.S. Governor of the International Monetary Fund (IMF) to sign for the United States the amended Articles of Agreement of the Fund. The new amendment IMF Articles of Agreement are printed in House of Representatives document no. 94-447. (The corresponding pages of the old Articles of Agreement are printed on the opposing pages of the House document.) Second, the bill authorizes an increase in the United States quota to the IMF by 1,705 million Special Drawing Rights (SDR) or approximately \$2 billion with the SDR valued at 1 SDR = \$1.16 U.S. Third, H.R. 13955 amends three other acts of relevant financial legislation to reflect the changes in the amended IMF Articles of Agreement.

COST OF THE BILL

There are no budgetary implications in this bill. The expansion of the U.S. quota at the IMF is treated as an exchange of assets between

LEGISLATIVE HISTORY

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the Fund and the U.S. Government. Such an exchange must be authorized but not appropriated since there is no uncompensated expenditure of fiscal resources.

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HISTORICAL BACKGROUND

The international monetary system as it has been experienced over the last three decades in the creation of the Bretton Woods Conference in 1944. The conference agreement was authorized by the United States and the United Kingdom. The objective of the system was to provide financial stability in international markets. This was achieved by fixing exchange rates, by setting an official price for gold, by guaranteeing the conversion into gold of major currencies, and by forming the IMF to oversee the system and provide it with the credit facilities to stabilize the currencies of countries having balance of trade difficulties.

The dissolution of the monetary system created by the Bretton Woods Agreements can be traced to the early 1960s. The monetary system during this time period made a *de facto* transition from a "gold standard" to a dollar standard. The continuing annual balance of payments deficits of the United States, which were seen as a blessing in the 1950s when the new post-war monetary system was starved for liquidity, produced a dollar glut abroad by the early 1960s. There were more dollars abroad than the U.S. had gold. The U.S. commitment to redeem international dollars for gold became a physical impossibility. ~~The reality of dollar convertibility ended.~~ The strength of the dollar and the U.S. economy became the base for the system, as major trading countries were forced to hold their international monetary reserves in dollars.

Continuing U.S. balance of payments deficits through the 1960s meant the U.S. was providing more monetary paper for the real resources it bought from abroad. The dollar was overvalued in relation to other major currencies. The inflation generated by the Vietnam War expenditures further accelerated both the flow of dollars abroad and the overvaluation. However, during the 1960s, devaluation of the dollar was not politically acceptable in the United States nor desired abroad by our trading partners. A number of actions during the 1960s marked the U.S. efforts to help relieve pressures on the monetary system. The interest equalization tax (IET) and regulations on capital flows were instituted. Military offset agreements were negotiated. Agreements were made between the largest 10 countries on gold holdings, the price of gold and foreign dollar holdings. A system of currency swap arrangements between the major central banks came into being to help stem short-term speculative flows against major currencies. U.S. Export-Import Bank activities were expanded in the hopes of reducing the deficit and the domestic international sales corporation (DISC) authorized to further stimulate exports.

By the late 1960s, major pressures were building for change. The monetary system was not serving the objectives of major interest groups. The Europeans became sensitive to U.S. purchases of European firms with overvalued dollars. U.S. labor felt that jobs were being shipped abroad at the same time that imports were competing easily with domestic production because of the overvalued dollar. U.S. ex-

• Defacto Law
Texas v. White
74 U.S. 7 Wall 227

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porters were losing overseas markets and finding it difficult to compete with European firms in third country markets. Studies by the OECD (Organization for Economic Cooperation and Development)

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began to show that under a fixed exchange rate system, the U.S. had exported to Europe and the world its own inflation. The Europeans argued that the dollar had two functions, one as a domestic currency and one as an international currency. The United States was accused continually of opting for domestic political considerations rather than fulfilling its international responsibilities as a reserve currency country.

The system had been faltering for a decade, but the benchmark date of the collapse is put at August 15, 1971. On this day, President Nixon reversed U.S. international monetary policy by officially declaring the non-convertibility of the U.S. dollar into gold and unilaterally imposing a 10 percent surcharge on all imports. The latter act represented a 10 percent devaluation of the dollar. The August-15 declaration led to the Smithsonian Agreement of December, 1971, which realigned the exchange rates between the dollar and other major currencies in the world. As part of the agreement, the dollar was devalued by 8 percent in relation to gold, while such currencies as the Deutsche mark and the Japanese yen were appreciated substantially.

The Smithsonian Agreement was an attempt to hold together the monetary system under the Bretton Woods structure of fixed exchange rates and currencies denominated in gold at official prices. But economic pressures in the United States, in the face of continuing balance of payments deficits, forced the United States to unilaterally devalue again by 10 percent in January, 1973. This devaluation signaled the end of the Smithsonian Agreement and the demise of the fixed rate exchange of Bretton Woods. By March of 1973, all of the major trading nations, with few exceptions, were floating their currencies and allowing world exchange markets to set currency values. While sanctioned by the IMF, the float was in technical violation of the Bretton Woods Agreements and the Articles of the International Monetary Fund.

The 1973 float of currencies eventually ended IMF efforts to structure a new monetary system on the principle of fixed exchange rates. The focus of reform was redirected to structuring a new system reflecting the realities of the floating rates. During the summer of 1974, the Interim Committee of the IMF was formed to negotiate this change. The major industrialized countries are represented directly on the Committee, with other members of the IMF selecting representatives that each represent a group of countries. The representatives are of ministerial rank. The Interim Committee was set up with the basic idea that the finance ministers have the capacity to make the political decisions necessary to reach the compromises needed to form a consensus on the shape of a new international monetary system.

There were three major issues facing the Interim Committee when it began negotiations in September 1974. These three issues were: the future role of gold in the new monetary system, the changes in the IMF quota structure to reflect the changes in economic wealth in the

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world, and the structure of the exchange rate system in the new monetary system.

The basic political compromise on the issue of gold was reached between the French and Americans at the bilateral summit meeting in

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Martinique, December, 1974. President Ford met with President Giscard d'Estaing, with finance ministers William Simon and Jean-Pierre Fourcade present. The agreement, accepted by the Interim Committee in August, 1975, abolished an official price for gold, allowed each nation to value its gold reserves at market price if it so wished, and advocated the sale of IMF gold assets. It seemed to indicate substantial withdrawal by the French from their long-held position that gold should remain central to the monetary system. Yet it is argued by some that the agreement may allow gold actually to come back into the system in the future. The United States advocates that the Special Drawing Right (SDR) replace gold in the system. The U.S. also surfaced the proposal at Martinique that the IMF might sell a portion of its gold, the profits from the sale being placed in a fund to be used by less developed countries to help with special balance of payment problems. This proposal evolved into the idea of the new IMF Trust Fund.

The second question before the Interim Committee, that of changing quotas in the IMF, was approved on August 31, 1975, at the Committee's meeting in Washington, D.C. It was decided to expand the total quotas of the IMF by one-third. Almost all countries will increase their quotas by an absolute amount but a limited number of countries will increase their quotas by a larger percentage than others. This will result in a change in the relative percentage of national participation in the IMF. The most significant relative increase in participation was an expansion of the OPEC (oil-exporting) nations' percentage from 5 percent to 10 percent, with the U.S. and other OECD nations reducing their cumulative percentage by 5 percent.

On the third issue—exchange rates—the main differences were between the French position advocating fixed rates and the American position promoting floating rates. The issue was not resolved at the September, 1975, IMF/IBRD meeting, but a consensus was reached among the industrial countries that if the French and the Americans could solve their differences, the others would accept the compromise. Accordingly, the U.S. took advantage of the opportunity to work with the French to design the foundation of the new international monetary system. ~~The drafting was carried on in relative secrecy until the French-U.S. agreement surfaced at the November, 1975, economic summit conference at Rambouillet, France.~~ The other countries attending Rambouillet had no previous knowledge of the document, although they were cognizant of the French-American negotiating effort.

The negotiations began with both countries committed to the same objective, the reestablishment of stability in the international monetary system. It was the French belief that this stability could be imposed by the central governments. The Americans countered with the argument that the central governments did not have the resources

*Still under
Secrecy*

Sec. 5. Section 2304 of title 10 of the United States Code¹⁵ is amended by adding thereto the following subsection:

"(h) Except in a case where the Secretary of Defense determines that military requirements necessitate specification of container sizes, no contract for the carriage of Government property in other than Government-owned cargo containers shall require carriage of such property in cargo containers of any stated length, height, or width."

Approved March 16, 1968.

FEDERAL RESERVE NOTES, UNITED STATES NOTES,
TREASURY NOTES OF 1890—RESERVE
REQUIREMENTS

For Legislative History of Act, see p. 1760

PUBLIC LAW 90-269; 82 STAT. 50

[H. R. 14743]

~~An Act to eliminate the reserve requirements for Federal Reserve notes and
for United States notes and Treasury notes of 1890.~~

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

~~Section 1. Subsection (c) of section 11 of the Federal Reserve Act (12 U.S.C. 248(c))¹⁶ is amended by striking both provisos, and by striking the last sentence, in such subsection.~~

~~Sec. 2. The first sentence of section 15 of the Federal Reserve Act (12 U.S.C. 391)¹⁷ is amended by striking "and the funds provided in this Act for the redemption of Federal Reserve notes"~~

Sec. 3. That part of the third paragraph of section 16 of the Federal Reserve Act (12 U.S.C. 413) which precedes the last two sentences of such paragraph¹⁸ is amended to read: "Federal Reserve notes shall bear upon their faces a distinctive letter and serial number which shall be assigned by the Board of Governors of the Federal Reserve System to each Federal Reserve bank."

Sec. 4. (a) The first sentence of the fourth paragraph of section 16 of the Federal Reserve Act (12 U.S.C. 414)¹⁹ is repealed.

(b) The sentence which, prior to the repeal made by this section, was the second sentence of such paragraph is amended by inserting immediately after "The Board" the following: "of Governors of the Federal Reserve System".

Sec. 5. The sixth paragraph of section 16 of the Federal Reserve Act (12 U.S.C. 415)²⁰ is repealed.

Sec. 6. The fourth sentence of the paragraph which, prior to the amendments made by this Act, was the seventh paragraph of section 16 of the Federal Reserve Act (12 U.S.C. 416)²¹ is repealed.

15. 10 U.S.C.A. § 2304.
16. 12 U.S.C.A. § 248(c).
17. 12 U.S.C.A. § 391.
18. 12 U.S.C.A. § 413.

19. 12 U.S.C.A. § 414.
20. 12 U.S.C.A. § 415.
21. 12 U.S.C.A. § 416.

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Sec. 7. The paragraph which, prior to the amendments made by this Act, was the eighteenth paragraph of section 16 of the Federal Reserve Act (12 U.S.C. 467)²² is repealed.

Sec. 8. Section 6 of the Gold Reserve Act of 1934 (31 U.S.C. 408a)²³ is amended by striking in the second proviso the phrases "the reserve for United States notes and for Treasury notes of 1890, and" and ", and the reserve for Federal Reserve notes shall be maintained in gold certificates, or in credits payable in gold certificates maintained with the Treasurer of the United States under section 16 of the Federal Reserve Act, as heretofore and by this Act amended".

Sec. 9. There are hereby repealed the sentences of subsection (a) of section 43 of the Act of May 12, 1933 (48 Stat. 31, 52; 31 U.S.C. 821(a)), which read: "No suspension of reserve requirements of the Federal Reserve banks, under the terms of section 11(c) of the Federal Reserve Act necessitated by reason of operations under this section, shall require the imposition of the graduated tax upon any deficiency in reserves as provided in said section 11(c). Nor shall it require any automatic increase in the rates of interest or discount charged by any Federal Reserve bank, as otherwise specified in that section."²⁴

Sec. 10. Section 2 of the Act of July 14, 1890 (26 Stat. 289; 31 U.S.C. 408),²⁵ and section 2 of the Act of March 14, 1900 (31 Stat. 45),²⁶ are repealed.

Sec. 11. Section 7 of the Act of January 30, 1934 (48 Stat. 341, 31 U.S.C. 408b),²⁷ is amended by striking the phrase "and as a reserve for any United States notes and for Treasury notes of 1890" and also by striking the phrase "as a reserve for any United States notes and for Treasury notes of 1890, and".

Sec. 12. Section 14(c) of the Act of January 30, 1934 (48 Stat. 344, 31 U.S.C. 405b),²⁸ is amended by striking from the first sentence "except the gold fund held as a reserve for any United States notes and Treasury notes of 1890."

Approved March 18, 1968.

22. 12 U.S.C.A. | 467.
23. 31 U.S.C.A. | 408a.
24. 31 U.S.C.A. | 821(a).
25. 31 U.S.C.A. | 408.

26. 31 U.S.C.A. | 408.
27. 31 U.S.C.A. | 408b.
28. 31 U.S.C.A. | 405b.

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to stabilize the market without each economy reaching its own internal equilibrium. The French came to accept this position.

The actual document still remain classified as secret. However, U.S. Treasury Under Secretary for Monetary Affairs, Edwin Yeo, III, dis-
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cussed the contents of the document as follows before the Senate Foreign Relations Committee on June 22, 1976:

The understandings at Rambouillet came in two forms: one, an agreement between the French government and ourselves which dealt with our mutual perception of the shape of international monetary reform. In other words, we had a number of points on which we had been unable to agree, and the understanding dealt with those disagreements.

The second aspect of the understanding of Rambouillet involves, again between the French and ourselves, an agreement to collaborate-to (sic) consult between Treasuries and central banks regarding exchange rate developments—specifically an agreement to counter disorderly market conditions, which has been our policy for some time.

The other participants at Rambouillet associated themselves not with the understanding per se, but with the communique which came out of that understanding . . .

While it is publicly known that the agreement contained a working draft of the key compromise on a new Article IV of the IMF Articles of Agreement, the second aspect of the Rambouillet Agreement mentioned by Under Secretary Yeo has received minimal public attention. From his statement, it must be concluded that a process involving national treasuries and central banks has been put into place to oversee the management of the new monetary system. The Rambouillet Agreement, therefore, takes on a longer term significance than just a compromise on the issue of the structure of the exchange rate system.

The Rambouillet compromise on the structure of the exchange rate system formally was accepted by the other members of the IMF at the ~~Interim Committee meeting in January, 1976 in Kingston, Jamaica.~~ With this key decision made, it was possible for the Governors of the Fund to vote on resolutions expanding quotas and accepting the amendments to the Articles of Agreement. The amended agreements enter into force upon signature of three-fifths of the members having four-fifths of the weighted voting power.

The Secretary of the Treasury, as U.S. Governor of the Fund, cast a favorable vote on the quota resolution in March, 1976, and a favorable vote on the amendment resolution in April, 1976. These votes did not constitute acceptance by the United States of the resolutions. Under Section 5 of the Bretton Woods Agreements Act, Congressional authorization is necessary prior to U.S. acceptance of amendments to the Articles of Agreements or of the expansion of quotas. The necessary legislation was transmitted to the Congress and introduced on May 19, 1976, in the Senate as S. 3454 and on May 21, 1976 in the House as H.R. 13955.

COMMITTEE ACTION

The bill to amend the Bretton Woods Agreements, S. 3454, was introduced (by request) by Senator Sparkman on May 19, 1976. The

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Committee held two days of hearings on S. 3454. On June 22, 1976, the Committee heard Under Secretary of the Treasury Edwin H. Yeo III. Senator Sparkman also introduced into the record a letter in support

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of the bill on behalf of the Atlantic Council from former Secretary of the Treasury Henry Fowler. On June 29, 1976, the Committee invited a panel of three Brookings Institution economists to comment on the implications of S. 3454: Edward R. Fried, William Cline and Philip H. Trezise. The Committee also took testimony from Eugene A. Birnbaum, Vice President and Chief Economist of the First National Bank of Chicago and Patrick M. Borman from the Institute for Economic and Legal Analysis in New York City. The Committee held the record of the hearings open for two weeks for those parties who wished to submit statements for the record. Statements were received from Deputy Assistant Secretary of State for International Finance and Development Paul H. Becker and from Irving S. Friedman from Citibank of New York City.

On July 27, 1976, the House of Representatives passed H.R. 13955 by a vote of 289 yeas and 121 nays, and that bill was referred to the Committee on Foreign Relations on the following day. The Committee took H.R. 13955 under consideration on August 3, 1976. The staff reviewed for the Committee the House amendments. These amendments are identified in the section-by-section analysis of the bill. The Committee had no objection to the House amendments except for one technical point which was amended.

The technical amendment was made to Section 5 of the Bretton Woods Agreements Act. Section 5 specifies certain actions which neither the President nor any person or agency can take on behalf of the United States unless authorized by Congress. The House amended Section 5 by adding paragraph (g) which prohibits U.S. approval of the establishment of any additional trust fund at the IMF which would provide special benefits to a single member or group of members. This language limited the U.S. Governor from approving IMF management of national trusts without Congressional approval. Such services are authorized under Article V, Section 2(b) of the IMF Articles of Agreement. The Committee amended this amendment by inserting the phrase "whereby resources of the International Monetary Fund would be used." This phrase makes it clear that the amendment deals with IMF financial resources and not national or multinational resources being managed by the IMF on a contractual basis. The amendment has the approval of the Department of the Treasury.

The Committee further amended H.R. 13955 on a motion by Senator Charles Percy by inserting a new Section 4. Section 4 adds a new subsection (b) to section 14 of the Bretton Woods Agreements Act which would require the President, upon the request of a Congressional committee with proper jurisdiction, to transmit promptly to such committee any "appropriate" information furnished to any United States department or agency by any international financial institution or economic organization of which the United States is a member. The quoted word was an amendment to Senator Percy's amendment and carries special significance as later noted.

The Committee believes that this amendment will improve Congressional oversight with regard to United States participation in the

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international monetary system. More effective oversight is required by the change to floating exchange rates. In the past, under the system of par values or set rates, exchange management was carried out by

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means of controls over trade, financial flows, offset payments, and other activities requiring Congressional approval. The move to floating rates has eliminated many such oversight tools, however, while at the same time increasing the need for reliable information on how well the new system is functioning. Growing economic interdependence has added to that need.

The provision also strengthens Congressional oversight over United States foreign economic policy. The staffs and secretariats of the international economic institutions and organizations produce significant economic research on national economies and international economic issues which they distribute to their members. This information is available to the Executive Branch and it is the opinion of the Committee that it should be available to the appropriate legislative committees of Congress.

The provision should not create constitutional difficulties. It requires the transmittal only of "appropriate" information. It would not require the transmittal of confidential communications between departments or agencies of the Executive Branch. Rather, it relates to information furnished the Executive Branch by external sources. In this regard, it is roughly analogous, constitutionally, to the "Case Act", which requires the transmittal to the Congress of international agreements to which the United States is a party.

The Committee recognizes that there will be cases where the appropriate information involved may be sensitive. But it notes that such information is now disseminated to 20 directors of the IMF representing over 100 countries. Access to such information, most Committee members believe, is essential for the proper performance of legislative functions. Nothing in this provision is to be construed as limiting any Committee's subpoena power.

A portion of Senator Percy's proposal which would have imposed criminal penalties for unauthorized disclosure of sensitive information was dropped because of uncertainty regarding its effect on activities protected by the Speech or Debate Clause, Article I, Section 6, clause 1 of the Constitution. Such action was taken, however, without prejudice to consideration of a penalties provision on the Senate floor.

During its consideration of this amendment, the Committee heard the testimony of Mr. Sam Y. Cross, U.S. Executive Director of the IMF. Mr. Cross expressed concern over the amendment, especially the transfer of highly sensitive economic information to Congress.

Thereafter, the Committee by voice vote and without dissent on August 3 passed H.R. 13955 as amended and ordered it reported favorably to the Senate.

SECTION BY SECTION ANALYSIS OF H.R. 13955, AS AMENDED

H.R. 13955 passed the House of Representatives on July 27, 1976, and was referred to the Senate on July 28, 1976. The bill—which replaces S. 3454—as amended in the House and by the Committee on Foreign Relations, has ten sections. The first five sections of H.R.

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13955 amend the Bretton Woods Agreements Act, the next four sections amend other relevant legislation, and the last section deals with the date the amendment will become effective.

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The first section of H.R. 13955 amends the Bretton Woods Agreements Act by adding Sections 24, 25 and 26 to the Act. Section 24 is the key section. It authorizes the U.S. Governor of the International Monetary Fund, the Secretary of the Treasury, to accept the amendments to the Articles of Agreement of the Fund. These amendments to the Articles are contained in the IMF Board of Governors resolution 31-4. It is this document that contains the provisions that move the exchange rate system from a fixed rate system to a floating rate system, substantially reduce the role of gold in the international monetary system, expand the quotas of the Fund by 33.6 percent, establish a Trust Fund and more lenient access to the Fund's resources, and modernize the operations of the Fund to include authority to create a Fund Council. The Council would be composed of finance ministers and would replace the current Interim Committee.

Section 25 specifically authorizes the increase in the U.S. quota in the IMF. The increase is 1,705 million Special Drawing Rights (SDR) or approximately \$2 billion. The SDR value is based on an average daily value of 16 international currencies and fluctuates daily. Presently, the U.S. quota is SDR 6,700 or approximately \$8 billion. The U.S. quota expansion is less than the general one-third expansion of the Fund's resources, therefore the U.S. percentage in the Fund drops from 22.93 percent to 21.53 percent. Roughly every five years since 1958-59, the Fund's resources have been increased to keep in step with the growth of international monetary resources and trade. This one-third increase is the fourth expansion.

Section 26 was added on the floor of the House of Representatives. It instructs the U.S. Governor to the IMF to vote against the formation of the new IMF Council if the Council will not follow the practice of weighted voting. Weighted voting provisions of the Fund are stated in Article XII, Section 5. They apply to all organs of the Fund and all votes. The addition of Article 26 has the effect of expressing the sentiment of the Congress that weighted voting in the Council is desirable.

Section 2 of H.R. 13955 was inserted by House Committee action and amends Section 3 of the Bretton Woods Agreements Act. Section 3 deals with the "Appointment of Governors, Executive Directors, and Alternates." The amendment anticipates the formation of the IMF Council by stipulating that if the Council is formed, the U.S. Governor of the Fund will serve as Councilor and have the authority to designate an alternate and associates. The second part of the amendment prohibits the Councilor, his alternate or associates from receiving salary or other compensation from the U.S. Government. This is standard language for all U.S. legislation on international financial institutions. The U.S. Secretary of the Treasury receives no compensation for representing the United States. The other positions are paid by the institution. The provision prohibits double salary payments.

The third section is a House provision which amends Section 5 of the original Act. Section 5 prohibits specific acts of the Executive Branch without prior Congressional authorization. H.R. 13955 amends Section 5 by adding part (g). Part (g) will prohibit the U.S. Gov-

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error to vote for the establishment of any new trust funds at the IMF without the prior approval of the Congress. The amendment reflects House sentiment that the Trust Fund, with its concessional lending

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to specified poor members, is an economic aid mechanism and past U.S. Executive support for such a fund without the consent of Congress has been seen as a circumvention of Congressional authority. Similar concerns have been expressed in the U.S. Senate. The Committee on Foreign Relations amended the House amendment, inserting a technical phrase allowing the U.S. Governor to vote without Congressional authority on trust funds that might be managed by the IMF but would not include financial resources of the Fund. This initiative is explained fully in the section of this report titled Committee Action.

The Committee amended H.R. 13955 to insert a new Section 4 and consecutively renumbered House sections 4 through 9 to 5 through 10. Section 4 amends Section 14 of the Bretton Woods Agreements Act by designating the present language of Section 14 as paragraph "(a)" and adding a new paragraph lettered "(b)". The new paragraph provides legislative authority for the committees of Congress with legislative jurisdiction over international financial institutions or economic organizations to request from the President that he furnish any appropriate information provided by these institutions or organizations to any department or agency of the United States Government. The intent of the Committee in amending the legislation in this manner is explained in the section of this report entitled "Committee Action."

Section 5 of the bill, reflecting House Committee action, amends Section 17(a) of the Bretton Woods Agreements Act. The section deals with U.S. obligations under the 1962 General Agreements to Borrow. The amendment changes the IMF Article reference to the appropriate paragraph in the new IMF Articles. It also deletes the last sentence of 17(a) which stated that any loan must take into consideration the U.S. balance of payments and reserve position. This provision was logically consistent with a fixed exchange rate system where reserves were needed to defend the par value of the dollar. Under a floating rate system, the reserves play a much smaller role in the adjustment mechanism.

Section 6, dealing with amendments to the Special Drawing Rights Act, and Section 7, dealing with the par Value Modification Act, contain a series of technical amendments that change appropriate references from the old IMF Articles of Agreement to the new amended Articles, or delete language that is inconsistent with the new Articles.

~~Sections 8 and 9 reflect House amendments to the Gold Reserve Act of 1934. These are technical amendments, with the exception of the amendment of Section 10(a). Section 10(a) of the present Act authorizes the Secretary of the Treasury to use the resources of the Exchange Stabilization Fund (ESF) "for the purposes of stabilizing the exchange value of the dollar." The amendment deletes this language since under the amended IMF Articles of Agreement there is no obligation to stabilize the dollar at a par value. The new language directs the Secretary of the Treasury to use the ESF "as he may deem necessary to and consistent with the United States obligations in the International Monetary Fund."~~

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Section 10 of the bill states that the amendments made in Section 2, 3, 5, 6, 7, and 8 of the bill will become effective upon entry into force of the amendments to the IMF Articles of Agreement.

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IMPLICATIONS OF THE AMENDMENTS TO THE BRETTON WOODS AGREEMENTS ACT

The amended Bretton Woods Agreements Act authorizes the United States Governor of the IMF to accept the amended IMF Articles of Agreement and authorizes the expansion of the U.S. IMF quota. Authorizing these two actions will have a broad impact in five major areas of the international monetary system: the exchange rate system, the role of gold in the system, the expansion of IMF quotas, the expansion of access to IMF resources, and the formation of the IMF Council. In discussing these five areas, it is important to realize that the amendments of the IMF Articles and the expansion of quotas were negotiated as one package. The compromises which made this package a reality took place over a two-year period. They were achieved among the industrial nations, as well as between the industrial nations and the developing countries. The package is the result of both economic and political craftsmanship. It is the opinion of the Committee that the basic U.S. negotiating objectives were achieved and U.S. national interests protected.

Exchange Rate System

Of all the changes in the Fund, the agreement sanctioning the floating exchange rate system is the most significant. Moving to a floating exchange rate for international commerce means that private enterprises and not the central governments bear the risk of currency fluctuations. It also means that trade restrictions such as fixed tariff schedules are of less importance, since the exchange rate should compensate to a degree for these impediments. Variable tariffs and non-tariff barriers will remain as effective impediments to trade. It is also felt by some that floating rates will complicate domestic monetary policy because interest rate changes may affect international capital flows which, in turn, will affect exchange rate levels.

The negotiations on the exchange rate structure centered on how the system would be managed, not whether the system would be managed. A fixed rate system is managed by direct government involvement in the money markets, as well as by controlling certain items in the balance of payments that affect the demand and supply of a currency on foreign currency markets. A floating system is managed by individuals in the market responding to economic stimuli that influence decisions to buy or sell foreign currency. These incentives register themselves through price or interest rates. In the first case, the central government provides guidance to the market. In the second case, this guidance is provided by forces in the market which encourage or inhibit economic activity. Adjustment takes place in the exchange rate and the national economy rather than through government regulation of trade or capital flows. Governments enter the foreign exchange market only to stabilize the market in cases of erratic fluctuations.

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The exchange rate decision that is incorporated in the amendment to Article IV of the IMF charter is not a straightforward declaration. The article in fact allows for the simultaneous existence of numerous systems of exchange rates. It does not state that a floating system is

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authorized but implicitly states that the system presently in force is sanctioned. It also states that on the vote of 85 percent of the members' quotas, the IMF can return to a fixed exchange system. The agreement allows coordinated floats such as the European "snake", as well as tied floats where one currency is fixed to another that is floating. For example, Mexico could fix its currency to the dollar. Its exchange rate with the dollar would remain constant while its exchange rate with other major currencies would float as these currencies floated against the dollar. The wording very effectively allows all parties in the proceeding to save face. Its central importance for the U.S. position is that the present floating system is sanctioned and the U.S. has veto power over any move to adopt another system.

To help assure that governments do not secretly enter the foreign exchange market to influence the exchange rate of national currencies, the IMF members have accepted the following obligations. First, all nations commit themselves to foster domestic economic policies which assure reasonable price stability and which assure a monetary system reasonably free of erratic disruptions. Secondly, all nations pledge not to manipulate exchange rates other than short-term market action to stabilize market disruptions. The success of the effort will rely on the integrity of the countries involved to live by the spirit of the agreement.

The Role of Gold

The compromise on the future role of gold in the monetary system was reached, except for some decisions on beneficiaries of distributions, at the August 1975, IMF Interim Committee meeting. The decision was to remove gold from the international monetary system. It has long been reasoned that gold is not a good "numeraire" for the system. There are many long dissertations on this issue, but the basic argument is that the supply of gold is determined by factors outside the monetary system. Liquidity in relation to the needs of the system is critical for its stable operation. In the past, gold supply has not kept pace with the need for international liquidity. Furthermore, the use of gold as a central part of the system favors those nations with large reserves, mainly South Africa and the Soviet Union. Finally, there are competing uses for gold as a commodity, the demand for which influences the structure of the monetary system—an influence that is not seen as productive.

To remove gold from the international monetary system necessitated a decision on how to remove from the IMF its store of 150 million troy ounces which had been contributed to it by member countries as part of their quota obligations. The decision was to sell this gold. However, it was realized that any massive sale of gold would collapse the world gold market. The first two sections of the accord set up a procedure for the IMF to divest itself of one-third of its gold leaving two-thirds of the gold to be handled at some later date at the discretion of the IMF.

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The gold at the IMF is officially valued at SDR 35 or approximately \$42 per ounce. The present world price of gold is near \$120 per ounce. It was decided that in any distribution or sale of gold, the Fund would keep the figure of SDR 35 per ounce so that the IMF's assets

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would not be depleted. The benefits to members from the redistribution of IMF assets (described below) made the gold arrangement acceptable to promote a larger consensus.

The first part of the compromise is the restitution of one-sixth of the IMF gold holdings to IMF members on the basis of their quotas in the Fund. The main beneficiaries of the restitution are the developed countries who hold the major portion of the Fund's quotas. This restitution to the developed countries was seen as a quid pro quo to France which has opposed for a long time the removal of gold from the monetary system. The countries will pay the IMF the official price for the gold, \$42.00, in an exchange of assets. Should these countries wish to sell this gold on the open market, they would realize the profits.

The second part of the compromise deals with the sale on the world market of the second one-sixth of the IMF gold, the profits from this sale to benefit the less developed countries. Sales of this gold have already commenced and will continue over the next four years. The profits generated are to be placed in a Trust Fund which will provide concessional lending to less developed countries who need loans for balance of payments support. Although Treasury officials deny that a five-year grace period and five years to repay. Those countries with a loan program that will provide loans at one-half of one percent with a five-year grace period and five years to repay. Those countries with a per capita income of less than SDR 300 or approximately \$350 will be eligible to use the Trust Fund. The Trust Fund is to make about \$750 million available each year for the next four years. This figure will vary depending on the world market price of gold.

Another aspect of the sale of the second sixth of gold is referred to as the "direct access" question. A number of Fund members which consider themselves less developed countries do not wish the profits from the sale of their gold in the Fund given to other less developed countries (LDC). Of the 25,000 troy ounces to be sold, 7,000 or 28 percent is LDC gold. As part of the agreement on the second one-sixth sale, seven twenty-fifths of the profit will be given by quota share directly to the less developed countries as their share of the profits of the sale. Only eighteen twenty-fifths or 72 percent of the profit will go into the Trust Fund. This hidden restitution benefits the more wealthy LDCs who have larger quota shares.

The third aspect of the gold compromise deals with the role of gold within the structure of the international monetary system. The agreement eliminates the official price for gold and the obligation of central banks to use gold in transactions between central banks or between central banks and the Fund. To insure that no central bank moves to hoard gold sold on the open market, it is still illegal for a central bank to purchase gold at more than SDR 35 per ounce. Furthermore, the G-10 adopted a set of rules to minimize the possibility of any central bank not adhering to the agreement.

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While it is the expressed intent of the IMT to move gold out of the international monetary system, there are vast numbers of legal and psychological mechanisms still in evidence in the system that will

¹ Members of the G-10 are: Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, U.K., and U.S., with Switzerland as an associate member in attendance.

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perpetuate some role for gold. By ending the practice of having a percentage of IMF quotas paid in gold and eliminating gold transactions between the Fund and central banks, the Fund has taken direct action to eliminate gold from the system. However, as with most institutional acts, it is the concurrence and sincerity of the daily actions of members which will determine the success of the effort.

The Expansion of Quotas

The expansion of the IMF quotas was agreed upon at the annual IMF meeting in Washington in August, 1975. Quotas are the actual exchanges of monetary assets by member states with the IMF. These assets represent the capitalization of the Fund. The U.S. has a claim to its quota should the IMF ever be liquidated. These assets are "purchased" from the IMF by member states for short-term balance of payment needs. Present interest rates on these "purchases" are 4 to 6 percent with maturities of 3 to 5 years.

As a result of the agreement on expanded quotas, assets held by the IMF will increase by \$12 billion over the next two years. This represents an increase by one-third in the Fund's resources. The actual figures are denominated in SDRs: SDR 29.2 billion rising to SDR 39 billion. This change will be reflected in an increase in quotas of almost all members of the Fund. The U.S. quota will rise from SDR 6.7 billion to SDR 8.405 billion. However, on a relative basis, some countries will expend their percentage of the IMF's total assets more than others. The major shift will be an increase in the OPEC nation quotas from 5 percent of the Fund to 10 percent. The United States and the OECD countries will reduce their relative share to allow this expansion. The U.S. quota will be reduced from 22.93 to 21.53 percent.

This relative change in percentage of the total assets will shift national voting power in the Fund. Votes in the Fund are weighted in relation to quotas as a percentage of total assets. Each member receives 250 votes plus one vote for each 100,000 SDR of its quota. The drop in U.S. quota relative to the total assets will reduce the U.S. voting share from 20.75 percent to 19.96 percent.

By controlling 19.96 percent of the vote, the United States has veto power over the important decisions in the Fund. In the past, important decisions of the Fund required an 80 percent majority. In the amended Articles of Agreement, this percentage has been raised to 85 percent. This change will allow the United States a continuation of its veto power even if there are more relative shifts in the voting power among Fund members.

Expansion of Access to IMF Resources

As part of the broader compromise in the negotiation, it was agreed to temporarily expand each of the four available credit tranches from 25 percent to 36.25 percent of the quota. This expansion is designed to allow temporarily more access to the Fund's resources. With four

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expanded tranches, a country can now "purchase" 145 percent of its quota. This temporary expansion will be in effect until the new IMF quotas are ratified. The conditions on each succeeding credit tranche remains as they have been in the past. In a system that is already replete with liquidity this agreement adds some inflationary pressure to the total system. However, the \$3 billion of new liquidity created

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is only 1.5 percent of something more than \$200 billion plus in official international reserves held by Fund members.

The liberalization of the Compensatory Financing Facility (CFF) of the IMF is another measure designed to provide more access to the Fund's resources. This was agreed upon in December, 1974, and is already operational. The Facility is for the use of members "facing balance of payments difficulties arising from temporary shortfalls in export receipts resulting from circumstances beyond their control." The liberalization expands the use of the CFF from 25 percent of quota to 50 percent of quota in a 12-month period. The formula for calculating shortfalls was also changed in a manner that provides for larger sums to be made available. "Purchases" from the CFF carry the same interest rate and maturities as regular credit tranche "purchases", but do not affect the members' access to other facilities of the IMF. It is estimated that this liberalization will provide an extra \$1 billion for those qualifying.

The IMF Council

There are numerous technical changes in the amendments to the IMF Articles designed to improve the operation of the IMF. The only major institutional change included in the amendments is an enabling provision which would permit the Board of Governors, by an 85 percent majority vote, to create an IMF Council. The Council would be a new, permanent organ of the IMF composed of members of ministerial or equivalent rank. The Council is seen as a successor to the Interim Committee. It would provide the Fund with a deliberative forum whose members would have the political authority to make the decisions necessary to supervise and adopt the international monetary system to changing circumstances. The authority to make these decisions would be delegated by the Board of Governors.

Summary

In summary, the new quotas and the amended Articles of Agreement are a pragmatic reform of the Bretton Woods Agreement of 1944. The amendments, for the most part, sanction what already is being practiced. They authorized three major systemic reforms: a monetary adjustment process based on a floating exchange rate, the elimination of gold, and a one-third expansion in IMF quotas. They created for the less developed countries some \$3 to \$4 billion in new credits through liberalization of the Compensatory Financing Facility, the Trust Fund and a temporary expansion of drawing rights from the Fund.

The agreements do not guarantee a trouble-free system. Numerous problem areas still remain. There must be close oversight of the system to guarantee national obligations are being fulfilled on exchange rate performance as well as the role of gold. Control of international liquidity has yet to be dealt with effectively. Distribution of international reserves is badly skewed, causing a growth of international in-

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debtiness and critical problems in access to international credit. Economic interdependence, fostered by an effective international monetary system, will bring new problems for domestic and international economic policy determinations. Finally, there is a great need to view the monetary system as an integral part of a larger whole, an inter-

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national system of political economy. These are all issues in which Congress must play an important part in its oversight role in respect to United States foreign economic policy.

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The Committee believes that it will be difficult for the United States Government to know whether the amended Articles of the IMF are being adhered to by other members. Both of the key aspects of the amended Articles of Agreement, the floating exchange rate and the elimination of gold, depend on the good faith of other nations to operate within the accepted commitments. Congress, not being directly involved in daily decisionmaking, will have an even more difficult time carrying out its assessment of the new system and U.S. policy toward the system. Furthermore, the move from fixed to floating rates has placed a much heavier emphasis on personal, monetary diplomacy. The understandings reached through these diplomatic contacts will help determine the short-term objectives of international monetary management. These short-term decisions will come to define longer-term goals which will encompass, by necessity, political and economic considerations.

Therefore, the Committee expresses a strong desire to improve formal and informal consultations on international monetary issues with the Department of Treasury and other departments and agencies. Senator Clifford Case emphasized that such consultations must be initiated, in many instances, by the Executive Branch, since Congress cannot know of all major decisions facing the Administration. It is the opinion of the Committee that the Executive Branch must be more forthcoming in its provision of information to Congress on the issues and policy choices facing the United States in international monetary policy. Without effective consultation and cooperation of this sort, there can be little meaningful oversight by Congress in this critical policy area. For this reason, the Committee supports Senator Percy's amendment, Section 4 of H.R. 13955, which provides legislative authority for the request of information provided to the Executive Branch by international financial institutions and economic organizations.

One area that remains poorly defined is the role of the Federal Reserve in international monetary policy formation and implementation. The Committee informally asked the Federal Reserve Board to send a Member to testify during the Committee's hearings. The Board deferred to Treasury and did not appear. Yet Under Secretary of Treasury Edwin Yeo, during his testimony on June 22, 1976, did state that there is a recognized role for central banks outlined in the Rambouillet agreement. It is the Committee's intention to carry out its oversight role in relation to the total operation of the international

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monetary system and it will not limit its interests to one department or agency, or a limited number of more public forums.

The Committee strongly recommends the passage of this legislation to legalize the status quo, to provide a new set of agreed operating procedures, to institute a degree of flexibility in the international

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monetary system, and to promote world-wide economic growth and interdependence. However, the Committee wishes to express caution on the underlying assumption of the Administration that since a little economic interdependence is good, a lot will be much better. Interdependence has placed all the industrial democracies on the same business cycle. The last major recession was deepened by this new phenomenon. While the Committee recognizes the benefits of economic integration, it also recognizes the difficulties in overseeing a system that is as large and as complex as that now being created. It suggests that thought be given to what limits the United States wishes to promote economic integration and that analyses be done as to the potential costs and returns to the United States associated with various degrees of commitment to this concept.

SENATE REPORT NO. 94-1295

[page 1]

The Committee on Banking, Housing, and Urban Affairs, to which was referred H.R. 13955, a bill to amend the Bretton Woods Agreements Act and for other purposes, having considered the same, reports favorably thereon with amendments.

HISTORY OF THE BILL

H.R. 13955 passed the House of Representatives on July 27, 1976 and was referred to the Senate on July 28, 1976. It was thereupon referred to the Committee on Foreign Relations where hearings had been held on a similar measure, S. 3454, on June 22 and June 29, 1976. By voice vote the Foreign Relations Committee approved H.R. 13955 with amendments on August 3, 1976, and ordered it reported favorably to the Senate. On August 26, H.R. 13955, as amended, was referred to this Committee where hearings were held by the Subcommittee on International Finance on August 27, 1976.

The International Finance Subcommittee heard testimony from Senator Charles Percy, Congressman Thomas Rees, Congressman Ron Paul and Undersecretary of the Treasury for Monetary Affairs, Edwin H. Yeo, III. Testimony was also taken from a panel of private witnesses: Eugene A. Birnbaum, Vice President and Chief Economist, First National Bank of Chicago; Robert V. Roosa, Partner, Brown Brothers Harriman & Co.; Jack F. Bennett, Senior Vice Presi-

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dent and Director, Exxon Corporation; Walter S. Salant, Senior Fellow, Brookings Institute; Robert Z. Aliber, Professor of International Trade and Finance, Graduate School of Business Administration.

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University of Chicago; and Sidney
Economist, Deak & Co., Inc.

The Committee agreed by poll as of September 22 to report the legislation favorably to the Senate with an amendment by Senator Stevenson.

The amendments agreed to by the Committee would do the following:

(1) Insure that the Congress has oversight jurisdiction over monetary and financial institutions to which the United States belongs receive all appropriate information furnished by such institutions;

(2) Make it clear that the Exchange Stabilization Fund is to be used only in a manner consistent with U.S. obligations in the IMF regarding orderly exchange arrangements and a stable system of exchange rates;

(3) Require that no loan or credit or entity be extended through the Exchange Stabilization Fund for more than six months in any twelve-month period unless the President provides a written determination to the Congress that unique or exigent circumstances make a longer-term credit necessary.

(4) Make a technical change in the Gold Reserve Act of 1934 to reflect the changed purposes of the Exchange Stabilization Fund; and

(5) Insure that the United States does not vote to dispose of any IMF gold for the benefit of a limited segment of IMF membership beyond the 25 million ounces already agreed to be sold for the benefit of the Trust Fund for DC's established on May 6, 1976, unless Congress expressly authorizes such action by law.

In addition, the bill contains all the provisions approved by the Senate Foreign Relations Committee and the House of Representatives.

PURPOSE OF THE BILL

The purpose of the bill is to amend the Bretton Woods Agreements Act in order to authorize the United States, as a member of the International Monetary Fund ("IMF"), to accept amendments to the IMF Fund's Board of Governors Articles of Agreement approved by the Board of Governors earlier this year. The bill would also authorize the United States to accept the approximate \$2 billion increase in its IMF quota also approved by the Board of Governors earlier this year. In addition, the bill would make related changes in other U.S. laws pertaining to U.S. participation in the international monetary system and U.S. intervention in the foreign exchange markets. Finally, the bill would provide for enhanced Congressional access to the information necessary for effective oversight of U.S. international monetary and economic policy.

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Under the proposed amendments to the IMF Articles of Agreement, fixed exchange rates in terms of gold would be abolished. Instead, members would be permitted to use any other exchange arrangement, fixed or floating, subject to the general obligation to avoid

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September 22 to report the legislation proposed by Senator

Committee would do the

committees having oversight over monetary and international financial institutions to which the United States belongs receive all appropriate information furnished by such institutions;

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to a foreign government through the Exchange Stabilization Fund for more than six months in any twelve-month period unless the President provides a written determination to the Congress that unique or exigent circumstances make a longer-term credit necessary.

Gold Reserve Act of 1934 to reflect the changed purposes of the Exchange Stabilization

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provisions approved by the Senate and the House of Representatives.

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exchange rate manipulation, promote orderly economic, financial, and monetary conditions, and foster orderly economic growth with reasonable price stability. In addition, the official price of gold would be abolished; all requirements for the use of gold in transactions with the Fund, including quota subscriptions, would be ended; and the Fund would be authorized to dispose of its present holdings of gold. Other provisions would liberalize the use of Special Drawing Rights, facilitate IMF use of member country currencies, and authorize creation of a new twenty-member Council to replace the existing Interim Committee which negotiated the Jamaica agreements.

The increase in the United States IMF quota is part of an overall one third increase in total Fund quotas. The purpose of the quota increase is to keep IMF resources in line with growing balance of payments financing needs. The share of quotas held by oil exporting nations would be doubled (from 5 to 10 percent) and the shares of developed countries, reduced. The United States quota would fall to 21.53 percent of the total from its present 22.93 percent, and its voting share would fall to 19.96 percent of the total from its present 20.75 percent. However, the effective U.S. veto over amendments to the IMF Articles and over certain fundamental IMF decisions would be preserved, since the amended Articles would increase the majority required for these decisions from 80 to 85 percent.

Increased quotas for all IMF members, as well as the proposed amendments to the Articles of Agreement, reflect agreements reached in Jamaica in January of this year after extensive negotiations to reform the international monetary system. Taken together, they would legitimize floating exchange rates, reduce the role of gold in the Fund and, possibly, the international monetary system as a whole, increase the Fund's useable resources, and provide an opportunity for continued evolution of the international monetary system toward greater economic cooperation, growth, and stability among all the nations of the world.

~~NEED FOR THE LEGISLATION~~

This legislation is needed in order to bring the Jamaica agreements to fruition. Without U.S. approval, neither the U.S. quota increase nor the amended Articles of Agreement can become effective.

Under present rules, no individual quota increase can become effective until the member concerned has consented. Moreover, none of the new quotas can become effective until the amended Articles of Agreement enter into force. The amended Articles cannot become effective until three-fifths of the members having four-fifths of the voting power approve. The United States, with more than one-fifth of the voting power, thus occupies a pivotal position in the achievement of the international monetary reforms which it has long sought and are now embodied in the proposed new Articles of Agreement.

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HISTORY OF NEGOTIATIONS TO REFORM THE INTERNATIONAL MONETARY SYSTEM

The Jamaica agreements are the product of negotiations which began formally in 1972 but which had their origins in the early 1960's in discussions of international liquidity shortages and the inherent

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instability of an international monetary system dependent on the convertibility of U.S. dollars into gold. Both the world's gold supply and the availability of dollars depend upon factors which have little to do with the needs of world trade and international finance.

The United States took the initiative in these early discussions. Proposals were soon advanced to establish an artificially-created international reserve asset to replace both gold and national currencies.

Agreement was reached in 1960 on the creation of the Special Drawing Right ("SDR") as the new international reserve asset, and allocations of SDRs to IMF member countries were made in 1970, 1971 and 1972.

Events moved swiftly, however, so that by 1971 the central problem in the international monetary system was not so much the insufficiency of monetary reserves, but the failure of the balance of payments adjustment process. Under the Bretton Woods system created immediately after World War II, exchange rates were fixed and based on currency par values expressed in terms of gold. Exchange rate adjustments were infrequent. They were to be made only to correct a "fundamental disequilibrium" in a country's balance of payments.

Despite changes in underlying economic conditions, countries were reluctant to adjust the value of their currencies. Surplus countries feared revaluation because of the resulting adverse impact of higher export prices on export potential and domestic employment. Deficit countries such as the United Kingdom, France, and the United States feared devaluation because of the resulting loss of confidence and prestige. Moreover, among countries heavily dependent on trade, devaluation meant an increase in the cost of imports and resulting domestic inflationary pressures. In addition, because the dollar had become the major reserve asset of many countries of the world, the United States could not devalue without wreaking havoc on a substantial bloc of countries. And because the dollar was used for market intervention purposes by all major countries, U.S. devaluation could be offset by corresponding devaluations by countries holding substantial reserves of gold. The result would be a string of destructive worldwide devaluations greatly impairing world trade, investment, and economic activity.

In 1971, the United States experienced its first trade deficit in decades, and in the face of rising domestic inflation and other economic problems, President Nixon announced on August 15 a series of measures to reverse the trade balance and cope with mounting domestic economic problems. Among them was suspension of the gold convertibility of the dollar, which meant that the U.S. Treasury would no longer redeem foreign official holdings of dollars with gold. The objective was to force a general readjustment of exchange rates vis-a-vis the dollar.

After a period of confrontation and negotiation, a realignment of exchange rates was finally agreed to by the Group of Ten indus-

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trialized countries at the Smithsonian Institution in December 1971. The effect was to produce a long overdue devaluation of the dollar. One of the points upon which the United States insisted at the time was that Smithsonian be followed by further negotiations on general reform of the international monetary system.

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Reform negotiations began in July of 1972 in a specially appointed Ministerial Committee on Reform of the International Monetary System, composed of twenty persons representing the same groups of countries which are entitled to appoint or elect the twenty Executive Directors of the IMF. This "Committee of Twenty" (C-20) struggled to reach agreement, but succeeded only in producing an "Outline of Reform" and a recommendation for continued negotiations on amendments to the IMF Articles of Agreement.

In part, C-20 was overtaken by events. After a hastily negotiated realignment of exchange rates in February 1973, speculative pressures failed to subside in the exchange markets. As a result, from March 1973 onward, most exchange rates were cut loose from stated par values and allowed to float with varying degrees of official intervention.

With a de facto floating rate system in effect, much of the work done by C-20 on adjustment under a pegged rate system became obsolete. Subsequently, the quadrupling of oil prices in 1973 and 1974 diverted C-20's attention to the more immediate problem of the staggering balance of payments deficits arising from the oil price increases.

When C-20 was disbanded in June 1974, it recommended that an oil facility be established in the IMF to help countries meet oil-related payments deficits and that a Development Committee of the Fund and World Bank (International Bank for Reconstruction and Development) be formed. C-20 also recommended that SDRs henceforth be valued in terms of a basket of major currencies rather than in terms of gold, since the gold value of the SDR had ceased to have meaning in a floating rate system. In addition, C-20 recommended that the IMF adopt guidelines for members to follow under floating exchange rates.

The responsibility for negotiating general reform of the international monetary system then passed from C-20 to another specially formed body, an Interim Committee of the Board of Governors. The Interim Committee began work in October 1974 but became bogged down over the two principal issues which had held up agreement all along: the question of fixed versus flexible exchange rates, and the question of gold versus SDRs as the primary international reserve asset.

The impasse over the future exchange rate regime was finally broken with a compromise reached at the Rambouillet Conference in November 1975. France, the principal advocate of fixed exchange rates, and the United States, the main supporter of floating rates, agreed to work toward greater stability in rates through concentration on achieving underlying economic and financial stability among member countries, leaving countries free to choose either pegged or floating rates. The compromise was subsequently drafted into an amendment to the IMF Articles of Agreement.

On the question of reserve assets, the crux of the dispute was the future role of gold. The U.S. goal was to reduce, if not eliminate, the

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role of gold in the system. France and certain other European countries, on the other hand, had long advocated retention of a central role for gold in the international monetary system. The agreement concluded at Jamaica to eliminate the official price of gold in the IMF and

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to eliminate all requirements to use gold in transactions with the Fund, together with the decision to dispose of one-third of the Fund's gold holdings, go a long way toward eliminating the role of gold in the Fund.

The compromises achieved on the exchange rate system and on gold enabled the Interim Committee to conclude its negotiations at Jamaica in January and to recommend amendments to the Fund Articles of Agreement as well as an increase in Fund quotas.

THE JAMAICA AGREEMENTS

The agreements concluded at Jamaica included: (1) amendments to the IMF Articles of Agreement; (2) an agreement on gold among the Group of Ten industrial countries; and (3) a general increase in Fund quotas.

(1) Principal Amendments to the IMF Articles of Agreement

Exchange Rates.—The existing Articles require each member to set a par value (a fixed exchange rate) for its currency in terms of gold and to retain that par value unless a change is necessary to "correct a fundamental disequilibrium" in its balance of payments. Exchange rate changes greater than 10 percent of par value require Fund approval.

The amended Articles would permit members to choose any exchange rate arrangement (fixed or floating rates) except a rate fixed in terms of gold. However, under Article IV of the new Articles, each member would be under a general obligation "to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates." In particular, each member would be required under Article IV to:

- (i) endeavor to direct its economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability, with due regard to its circumstances;
- (ii) seek to promote stability by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions;
- (iii) avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members.

To insure that members observe these obligations, the Fund would be required under Article IV, section 3, to "exercise firm surveillance over the exchange rate policies of members, and . . . adopt specific principles for the guidance of all members with respect to those policies."

Gold.—The proposed amendments would abolish the official price of gold and delete most references to gold in the Articles of Agreement. All requirements for the use of gold in transactions with the

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Fund, including quota subscriptions, would be abolished. In addition, the Fund would be authorized to dispose of its present gold holdings in a variety of ways, all of which would require approval by an 85 percent majority vote (the United States, with a 19.96 percent voting

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share in the Fund, could veto any proposal requiring an 85 percent majority vote). Moreover, the Fund would be barred from acquiring any gold without the approval of an 85 percent majority.

Special Drawing Rights (SDR's).—The basic provisions of the existing Articles with respect to SDR's would remain unchanged, although the proposed amendments would modestly liberalize the use of SDR's. For example, members would be free to exchange SDR's without Fund approval and without having to establish a balance of payments need. The majorities required to change most Fund policies on the use of SDR's would be reduced to 70 percent, although allocations of SDR's and other fundamental decisions would require an 85 percent majority vote.

A new Council for the fund.—The Board of Governors would be empowered to create a twenty member ministerial level "Council" replacing the existing Interim Committee. The Council would be authorized to consider any future amendments to the Articles. In addition, it would be authorized to supervise the management and adaptation of the international monetary system, including the continuing operation of the adjustment process and developments in global liquidity. In this connection, it would also be authorized to review developments in the transfer of real resources to developing countries.

Usable National currencies in the Fund.—An ambiguity in the existing Articles has permitted some member countries to deny the Fund use of its holdings of their currency subscriptions. The amendments would expressly require each member to take the steps necessary to make its currency usable by the Fund and would close a loophole which allowed some members to evade their responsibilities in the past.

(2) *The Group of Ten Agreement on Gold*

In August of 1975, the Group of Ten countries (the United States, Japan, Canada, the United Kingdom, Germany, France, Italy, the Netherlands, Belgium and Sweden) negotiated, and later reaffirmed at Jamaica, an agreement with respect to gold. The purpose of these agreements is to restrict the use of gold as a reserve asset by the principal gold-holding members of the IMF. The most important features are pledges not to peg the price of gold and not to increase the total stock of gold held by the Fund and the Group of Ten countries. The agreement, however, will expire in two years. Thereafter any member may drop out even if the agreement is extended.

(3) *The Increase in IMF Quotas*

The Articles require that the Fund review its quotas at least every five years. No member's quota can be changed without its consent. The Bretton Woods Agreements Act requires that any increase in the U.S. quota must be authorized by the Congress.

Fund quotas were increased by 50 percent in 1958, by 25 percent in 1965 and by 35 percent in 1970 in order to keep pace with growing

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balance of payments financing needs. The Jamaica package includes a 33.6 percent increase in total Fund quotas with an approximate 25 percent increase in the U.S. quota.

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The quota increases have usually included adjustments in the relative quotas of member states to take account of changes in relative economic position. The share of total quotas held by oil exporting countries is to be doubled, and in order to accommodate that change, the shares of developed (but not developing) countries are to be reduced. The U.S. share would be reduced to 21.5 percent of the total from its present 22.93 percent, and its voting share would decline from its present 20.75 percent of the total to 19.96 percent.

~~SPECIAL FACILITIES FOR LESS DEVELOPED AND DEVELOPING COUNTRIES~~

Not part of the proposed new Articles, but of relevance to future IMF activities and to certain provisions of the reported legislation are a number of special credit facilities established by the IMF in recent years to meet the problems faced by less developed and developing countries. Acting under existing authority, the Interim Committee agreed in August 1975 to dispose of about one-third of the IMF's gold holdings (50 million ounces), selling one-sixth to members in proportion to their quotas at the official price of 35 SDR per ounce, and selling the other one-sixth at public auction at market prices. The proceeds from the public sale of the latter one-sixth (25 million ounces) are to be used to benefit developing countries. A portion of the profits is to be transferred directly to developing countries in proportion to their quotas; the remainder is to be placed in a "Trust Fund" to provide balance of payments assistance on concessionary terms to the poorest developing country members (those with average per capita incomes of less than SDR 300).

In addition, the IMF has established a number of special credit facilities in the past few years which are open to all but are most heavily used by developing countries.

A "Compensatory Financing Facility" to help primary product producing countries meet temporary shortfalls in their export receipts was established in 1963 and liberalized in 1966 and 1975. A country may draw up to 75 percent of its quota through this facility.

A "Buffer Stock Facility" was established in 1969 to help members contribute to certain international commodity buffer stock arrangements. A country may draw up to 50 percent of its quota for this purpose. The only buffer stock arrangements to qualify to date are tin and cocoa.

An "Extended Fund Facility" was started in late 1974 to permit countries to draw up to 140 percent of their quotas to meet balance of payments needs arising from "structural" problems in their economies. To be eligible, the country must present a program of structural reform acceptable to the IMF.

OUTSTANDING ISSUES AND FUTURE DIRECTIONS

The Jamaica agreements represent a major step forward for international monetary reform. They are the culmination of international monetary reform objectives which the United States has pursued for years.

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The old system of fixed par values helped bring order out of the chaos following World War II. Fixed exchange rates played a significant

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crucial role in restoring confidence and stability to the international trading system. By reducing the exchange risks of foreign trade and investment, they were a major factor in sustaining the post-war economic recovery.

However, the system of fixed exchange rates contained within it rigidities and imperfections which could not be supported in the vastly changed circumstances of the late sixties and early seventies. As the war-torn economies strengthened and matured, their price and balance of payments conditions diverged, necessitating increasingly frequent changes in par values to reflect changes in underlying conditions. But countries were reluctant to alter their economic policies in order to maintain their exchange rates, and they were unwilling to adjust exchange rates in order to reflect changing economic conditions.

The result was a crisis-prone system, one in which pressures for changes in exchange rates gradually built to irresistible levels. Speculative movements against currencies being supported at unrealistic exchange rates added to the pressures. From time to time the system went through periodic convulsions as finance ministers huddled in the dead of night to prepare for devaluation the next day.

As the dollar came to occupy an increasingly central position in the world monetary system, the stability of the entire system came to depend on the strength or weakness of the dollar. U.S. economic and monetary policies became a dominating factor in world trade, investment, and economic activity. The dominance of the dollar added to the pressure to perpetuate par values for the dollar long after they ceased to reflect the true value of the currency.

Unrealistic exchange rates tended to distort the structure of world trade and investment. Massive investments by U.S. corporations in Europe during the sixties were undoubtedly caused in part by the overvaluation of the dollar. Likewise the dramatic expansion in German and Japanese exports to the United States during the same period was aided by the undervaluation of the mark and the yen. These distortions had serious economic and political ramifications, not easily perceived as attributable in significant part to artificially maintained exchange rates.

As time went on, fixed par values also tended to foster inflation among the industrialized countries. Deficit countries, for a variety of reasons, were unwilling to exert the domestic economic and monetary discipline needed to bring the true value of their currencies into line with their artificially pegged exchange rates. Inflows of foreign exchange into surplus countries resulted in an expansion of the monetary base. In effect, the deficit countries were exporting their inflation.

For these and other reasons, perpetuation of the old Bretton Woods system became impossible, and its breakdown was inevitable. However, what will eventually replace it is far from finally resolved.

The Jamaica agreements are not the final word in a new international monetary system. They are only the beginning. They reflect the reality that Bretton Woods is dead, and that more than three years ago it was replaced with a system of flexible exchange rates, one in which some countries allow their currencies to float freely, others peg their currencies to the dollar, the SDR, or some other basket of

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currencies, and still others maintain fixed exchange rate relationships among themselves within a narrow margin and float their currencies jointly as a bloc against other currencies.

So what now exists is an evolving, and inevitably changing, mixed exchange rate system, one which will see shifts in policies and attitudes among member countries as time goes on and social, political, and economic objectives change. Interdependence here, as elsewhere, will grow, and as it does, the obligations assumed under the amended Articles Agreement will assume increasing significance.

Left unanswered is what specific meaning will be given to these general obligations over time. While the amended Articles call on the Fund to exercise "firm surveillance" over the exchange rate policies of its members and to adopt "specific principles for the guidance of all members with respect to those policies," there is little consensus at present regarding what those "specific principles" should be.

Those "specific principles" are intended to give flesh to the general obligation to direct economic and financial policies toward "orderly economic growth with reasonable price stability" and "to promote stability by fostering orderly economic and financial conditions." But what is meant by "orderly economic growth," "reasonable price stability," and "orderly economic and financial conditions?"

There is hardly any consensus in the United States about the meaning of those goals, about the relative burdens of inflation and unemployment and, hence, about the direction of economic policy. How, then, is the IMF to determine, in light of necessarily divergent views on matters of this significance, whether a country is fostering orderly economic growth with reasonable price stability, and, hence, meeting its obligations under the Articles of Agreement.

In response, Under Secretary of the Treasury Edwin H. Yeo III has correctly pointed out that "there can be no single simple definition of 'orderly economic growth' or 'reasonable price stability' which would cover all nations and all time periods," that "assessments must be on a case by case basis taking full account of the individual country's situation;" and that "(s)uch assessments will reflect the judgment of the IMF—through its Executive Board and perhaps other IMF bodies based on case study, and thorough examination of all circumstances."¹

It is, thus, clear that there are, and of necessity will continue to be, major unresolved questions regarding exchange rate policies of member countries. What the amended Articles establish is a commitment and a process, but as the principles emerge, it will be all the more important for the United States to scrutinize the evolution of the system to insure that countries do not avoid the discipline of floating by exchange market intervention, foreign exchange loans, and other devices and, that the system as a whole is able to discern and counter disorderly exchange markets without forestalling necessary changes in underlying economic conditions.

In this connection, and in the course of considering this legislation, United States to stabilize the exchange value of the dollar, the ESF close scrutiny. Originally created for purposes of permitting the United States to stabilize the exchange value of the dollar, the ESF

¹ Letter from Edwin H. Yeo to Adlai E. Stevenson, Sept. 1, 1976.

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has grown to some \$4 billion in assets and is a major potential vehicle for bilateral assistance to other nations for foreign exchange purposes outside the IMF.

For example, the ESF was recently used in cooperation with other Group of Ten countries to provide \$5.3 billion in standby short-term credits to the United Kingdom. The ESF provided approximately \$1 billion of the total.

To the extent that such assistance permits a country to avoid necessary changes in its economic policies, it undermines the IMF's goal of inducing necessary adjustments in policy to promote orderly economic growth and stability. In order to insure that ESF operations are not inconsistent with the goals of the IMF, the Committee has adopted an amendment emphasizing the intended short-term nature of ESF lending. The goal is for the United States to place primary reliance on the IMF and to confine foreign exchange lending operations outside the IMF to short-term operations.

Under the amendment, the ESF would be barred from extending loans to a foreign government for more than six months in any twelve month period or extending an outstanding loan beyond a six month period unless the President provides a written determination to the Congress that unique or exigent circumstances make a longer-term loan or credit, or extension of an outstanding loan or credit, necessary. Such a provision is perfectly consistent with present U.S. policy. For an example, according to Treasury, the recent ESF credit to the United Kingdom was extended "with a clear understanding that the credit would not be extended for a longer period [than six months] and that the United Kingdom, if necessary, draw from the IMF for longer-term financing where appropriate policy conditions would be applied."³

The Committee recognizes that there may be circumstances where longer-term ESF credits may be necessary, and the amendment provides for that possibility. But the Committee intends, and the amendment expressly provides, that such longer-term financing be provided only where there are unique or exigent circumstances. As indicated by Treasury, these would include natural disasters, trade embargoes, unforeseen economic developments abroad, political assassinations, or other catastrophic events.⁴ In none of these cases should the ESF compete with the IMF, however, and every effort should be made to bring all medium and longer-term financing within the framework of the IMF or other appropriate multilateral facilities. The requirement that the President report to the Congress on any such longer-term financing will provide the Congress with an opportunity to scrutinize such longer-term ESF credits and take appropriate steps to insure that they are consistent with U.S. interests and U.S. obligations under the IMF.

Further opportunity for close scrutiny of the ESF will be provided through a new commitment by the Treasury to establish a system of continuous interchange between the Treasury and the oversight Committees of the Congress regarding the operations of the ESF. That commitment was undertaken in response to a concern

³ *Ibid.*
⁴ *Ibid.*
⁵ *Ibid.*

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that the Committee did not have access to the information necessary to adequate oversight of the ESF and the international monetary system.

Treasury's commitment is welcomed. It will permit the Congress to fulfill its oversight responsibilities in this area more adequately than in the past without jeopardizing the ability of the ESF to perform its sensitive and often necessarily confidential monetary transactions with foreign governments.

The letter evidencing Treasury's commitment follows:

THE SECRETARY OF THE TREASURY,
Washington, D.C., September 20, 1975.

HON. WILLIAM PROXMIRE,
Chairman, Committee on Banking, Housing and Urban Affairs,
U.S. Senate, Washington, D.C.

HON. ADLAI F. STEVENSON III,
U.S. Senate, Washington, D.C.

DEAR SENATOR PROXMIRE AND SENATOR STEVENSON: I recognize and fully share the expressed desire of the Committee on Banking, Housing and Urban Affairs that there be effective Congressional oversight in the international monetary area, and, in particular, of the operations of the Exchange Stabilization Fund. It is essential to the successful implementation of U.S. international monetary policy, as reflected in H.R. 13955, that close contacts and good relations continue between Congress and the Treasury, and that necessary information be provided to the Committee on a prompt and continuing basis:

To achieve our mutual objective, the Treasury Department is prepared to work closely with your Committee to develop a system of effective oversight along the following lines:

1. Consultations by the Secretary of the Treasury and the Under Secretary for Monetary Affairs with interested members of the Committee will take place on a quarterly basis to discuss systemic developments, with more frequent discussions as necessary on extraordinary developments or problem areas.

2. There will be continuing contact between Committee and Treasury staff in order to keep the Committee abreast of any extraordinary or unusual developments, problem areas, and the overall evolution of the system.

3. The Secretary of the Treasury will transmit to the Committee the following:

a. The quarterly reports prepared by the N.Y. Federal Reserve Bank on Treasury and Federal Reserve foreign exchange operations;

b. All international agreements entered into for the account of the ESF;

c. Confidential monthly reports on U.S. foreign exchange operations;

d. The Annual Report of the Secretary of the Treasury on the ESF which includes a report on the Treasury's financial audit of the ESF; and

e. Reports on particular problem areas as necessary.

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4. The Secretary of the Treasury or the Under Secretary for Monetary Affairs will brief interested members of the Committee regarding extensions of credit from the ESF.

5. Oversight hearings would be held on a regular basis—for example, annually—for which the Secretary of the Treasury would prepare a report assessing the operation of the international monetary system during the previous 12-month period, including the following items:

- a. The world balance of payments situation;
- b. Official balance of payments financing provided bilaterally by the U.S. and through multilateral channels by any government to the full extent that information is available to the United States;
- c. Exchange market intervention by the U.S.;
- d. Movements in exchange rates;
- e. Comparative rates of growth and inflation in the U.S. and foreign economies; and
- f. Changes in exchange controls and trade restrictions imposed by IMF member countries.

I am hopeful we can begin to establish a program of oversight along these lines in the near future.

Sincerely yours,

WILLIAM E. SIMON.

In addition to the unanswered questions regarding exchange rate policy and the ESF, there are also unanswered questions regarding gold, international liquidity, and the needs of the less developed and developing countries.

While the agreements on gold go a long way toward reducing the role of gold in the Fund, there are major uncertainties regarding the future role of gold in the international monetary system as a whole. Elimination of the official price of gold in the Fund will have the effect of removing the existing prohibition on purchases of gold by central banks at a price other than the official price. Because the free market price for gold has far exceeded the official price of gold for the past several years, the present prohibition has been an effective barrier to central bank gold purchases.

Some believe that the elimination of the official price may actually enhance the role of gold in the transactions and reserves of important member countries. To alleviate this concern, the countries of the Group of Ten accepted an arrangement—wholly outside the Fund—to limit their holdings of gold and not to attempt to peg the price of gold in the private market. This agreement took effect in February 1976, will be reviewed in two years, and then extended, modified, or terminated. Whether it has the intended effect will bear continued close scrutiny. What happens upon expiration of the Group of Ten agreement as well as what happens in the interim will have an important bearing on the future role of gold in the system.

On the question of international liquidity, a major unanswered question is the relationship between floating exchange rates and controls on monetary expansion. The problem of international liquidity and its control were a major topic of discussion in the C-20 from

BRETTON WOODS AGREEMENTS ACT

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1972 to 1974. But the issue went unresolved partly because of its complexity and partly because of its controversial nature.

Theoretically, problems of international liquidity should be minimal in a floating exchange rate system. But, as pointed out above, the present system is a mixed system, with both short and longer term exchange market intervention necessitating access to reserve credit. The international money markets are now a major source of reserve credit outside the IMF for purposes of market intervention. How and whether they can be controlled and coordinated with IMF reserve resources has not been resolved. Because of the dangers of uncontrolled monetary expansion in the Eurocurrency markets and resulting worldwide inflation, the problem demands continued priority attention.

On the question of assistance to the less developed and developing countries, a major continuing question will be the role of concessional financing in IMF operations. The creation of such special facilities as the Trust Fund, the Compensatory Financing Facility, the Buffer Stock Facility, and the Extended Fund Facility, have raised the question of whether the IMF is assuming an inappropriate role as an aid-giving agency.

It is, of course, true that except for the Trust Fund, none of the IMF's special facilities provide concessional financing and that theoretically, at least, they are available to all IMF members. But beyond that, there is little question that recent shocks to the system caused in part by oil price increases have had a severe impact on the less developed and developing countries and that without special assistance many would be in desperate straits.

The payments problems of the less developed and developing world inescapably effect the health of the entire international economic system. The unresolved question is how to define a proper role for the IMF in this area of extreme political sensitivity.

These and other issues present complex problems. Jamaica provides a vehicle and a context for continued dialogue and cooperation. Amendments made by this legislation will assist Congressional participation in the process. Progress has been made in this sensitive and complex area. Because of its central significance to the health of the international economic system, continued progress should be nurtured and encouraged.

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SECTION-BY-SECTION ANALYSIS OF THE BILL

ACCEPTANCE OF AMENDED ARTICLES OF AGREEMENT

Section 1 of the bill would amend the Bretton Woods Agreements Act by adding a new section 24 authorizing the United States Governor of the International Monetary Fund to accept the amended Articles of Agreement of the IMF approved by the IMF Board of Governors in April of 1976.

INCREASE IN U.S. IMF QUOTA

Section 1 of the bill would also amend the Bretton Woods Agreements Act by adding a new section 25 authorizing the U.S. Governor

LEGISLATIVE HISTORY

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of the IMF to consent to an increase in the U.S. quota equivalent to 1,705 million SDR's or approximately \$2 billion dollars (at 1SDR=\$1.16 U.S.). This represents an approximate 25 percent increase in the present U.S. quota and would leave the United States with 21.5 percent of total IMF quotas as compared to 22.93 percent at present. As a result of the change, the U.S. voting share will fall slightly from 20.75 percent of the total to 19.96 percent of the total.

IMF COUNCIL OF GOVERNORS

Section 1 of the bill would further amend the Bretton Woods Agreements Act to direct the U.S. Governor to vote against establishing a new IMF Council of Governors if the U.S. vote in the Council would be less than its weighted vote in the Fund. This provision was added on the floor of the House of Representatives.

U.S. REPRESENTATIVE TO IMF COUNCIL OF GOVERNORS

Section 2 of the bill would amend section 3(c) of the Bretton Woods Agreements Act to provide that if an IMF Council of Governors is formed, the U.S. Governor of the Fund, the Secretary of the Treasury, shall serve as councillor and designate an alternate and may designate associates. Section 2 of the bill would add a new subsection 3(d) to the Bretton Woods Agreements Act to prohibit payment of any salary or other compensation to the U.S. councillor to the Fund or his alternate or associates.

Subsection 3(d) was added by the House Banking Committee for the purpose of insuring that the Councillor, his alternate, and his associates would be treated the same as the other U.S. representatives to the IMF with respect to compensation by the United States.

PAR VALUES AND IMF TRUST FUNDS

Section 3 of the bill would amend section 5 of the Bretton Woods Agreements Act to prohibit U.S. representatives to the IMF from

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proposing a par value for the U.S. dollar and from voting to approve the establishment of any additional trust fund whereby resources of the International Monetary Fund would be used for the special benefit of a single member, or of a particular segment of the membership of the Fund unless Congress authorizes such action by law. This provision was added in the House of Representatives.

In order to clarify the intent of the House amendment, the amendment added by this Committee also provides that the U.S. representative to the IMF may not approve the disposition of more than the 25 million ounces of Fund gold already agreed to be sold for the benefit of the Trust Fund established by the IMF on May 6, 1970, unless Congress authorizes such action by law. The purpose of this amendment is to make it clear that neither additional IMF gold resources beyond those already agreed to be sold for the benefit of the existing Trust Fund nor the creation of any additional trust funds for the benefit of a limited number of IMF members may be approved by the U.S. representative to the IMF unless authorized by Congress.

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ACCESS TO INTERNATIONAL ECONOMIC INFORMATION

Section 4 of the bill would redesignate section 14 of the Bretton Woods Agreement Act as subsection 14(a) and add a new subsection 14(b) to require the President to provide "any appropriate information" furnished to the executive branch by the IMF or any other international financial or economic organization, "upon the request of any committee of the Congress with legislative jurisdiction" over such organization. This provision was added by the Senate Foreign Relations Committee to enable it to obtain IMF economic analyses and other information helpful in overseeing U.S. participation in the international monetary system and United States foreign economic policy.

This Committee amended the Foreign Relations Committee amendment to require that the designated information also be made available upon request to any Congressional Committee having legislative or oversight jurisdiction over monetary policy. The purpose of this amendment is to insure that the Senate Banking Committee and any other Committee having oversight or legislative jurisdiction over monetary policy or international financial institutions of which the United States is a member have access to the designated information.

The purpose of these amendments is to improve Congressional oversight of U.S. participation in the international monetary system and U.S. foreign economic policy. They will facilitate access to information in United States department or agency files that is necessary for the exercise of a Committee's legislative and oversight functions. They are not intended to change the present constitutional balance between the Executive and legislative branches nor to compel the Executive Branch to take actions inconsistent with U.S. membership obligations in international institutions.

The Treasury Department has expressed its concern with regard to the preservation of the confidentiality of sensitive materials that may be made available to Congressional committee. The Committee believes that the confidentiality of such information can be preserved and that such information should be handled on the same basis as

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classified information obtained from the Executive Branch which is not publicly disclosed until its release has been cleared by the Executive Branch. Thus, sensitive information, such as future economic programs of a member country and confidential financial information, is expected to be made available under appropriate safeguards.

CROSS-REFERENCES

Section 5 of the bill would amend the first sentence of section 17(a) of the Bretton Woods Agreements Act to reflect the renumbering of the proposed new IMF Articles of Agreement.

Section 6 of the bill would amend the Special Drawing Rights Act to make appropriate references to the proposed new IMF Articles of Agreement.

PAR VALUE OF THE DOLLAR

Section 7 of the bill would repeal section 2 of the Par Value Modification Act. Section 2 of that Act requires the Secretary of Treasury

LEGISLATIVE HISTORY

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to set a par value for the dollar equal to one thirty-eighth of a fine troy ounce of gold.

PURPOSES OF THE EXCHANGE STABILIZATION FUND

Section 8(a) of the bill would amend section 10(a) of the Gold Reserve Act of 1934 to delete the present description of the purposes of the Exchange Stabilization Fund *viz.*, to stabilize the exchange value of the dollar. Instead use of the ESF would be authorized only for purposes consistent with United States obligations in the IMF regarding orderly exchange arrangements and a stable system of exchange rates. The bill referred to the Committee would have deleted any reference to the ESF's purpose. The amendment adopted by the Committee makes it clear that the ESF is to be used only for purposes consistent with U.S. obligations in the IMF.

In addition, the Committee adopted an amendment to require that no loan or credit to a foreign government or entity shall be extended by or through the Exchange Stabilization Fund for more than six months in any twelve month period, nor shall any outstanding credit be extended beyond a six month period, unless the President provides a written determination to the Congress that unique or exigent circumstances make a longer term loan or credit necessary.

This amendment would help insure that the Exchange Stabilization Fund is not used for long-term loans to foreign countries unless there are unique or exigent circumstances. The purpose of the Exchange Stabilization Fund is to provide short-term credit to foreign countries to counter exchange market instability. The IMF should be the principal source for longer term credits, particularly in light of the expansion in IMF resources which the proposed quota increases will produce and the orderly exchange arrangement and anti-manipulation responsibilities made explicit in the proposed amendments to the IMF articles. This amendment would not bar the United States from making longer-term credits to foreign countries for exchange market intervention, but it would insure that such longer-term credits are not extended unless the President finds that unique or exigent circum-

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stances exist, such as the unavailability of IMF or other international financial resources for that purpose. By helping to keep ESF financing short-term in nature, the amendment would help insure consistency between use of the ESF and U.S. obligations as a member of the IMF.

Section 8(b) of the bill, which was added by the Committee, would amend section 10(b) of the Gold Reserve Act of 1934 to delete a reference therein to use of the ESF for purposes of stabilizing the exchange value of the dollar and substitute instead a general reference to the purposes prescribed by section 10 of the Gold Reserve Act, *viz.*, for purposes consistent with U.S. obligations in the IMF regarding orderly exchange arrangements and a stable system of exchange rates.

ISSUANCE OF GOLD CERTIFICATES

The only domestic purpose for which it is necessary to define a fixed relationship between the dollar and gold is the issuance of gold certificates. Section 14(c) of the Gold Reserve Act of 1934 (31 U.S.C. 405b) provides that the amount of gold certificates issued and out-

BRETTON WOODS AGREEMENTS ACT

P.L. 94-564

standing shall at no time exceed the value, at the legal standard, of the gold so held against gold certificates. The legal standard presently applicable to all gold certificates is the par value of the dollar as prescribed in Section 2 of the Par Value Modification Act. Section 9 of the bill would provide that this legal standard will continue to apply for purposes of Section 14(c) of the Gold Reserve Act.

Section 9 of the bill would also delete the reference in Section 14(c) of the Gold Reserve Act to the "~~Treasurer of the United States~~" and substitute therefor the "~~United States Treasury~~". This substitution reflects Reorganization Plan No. 26 of 1950 (31 U.S.C. 1001, note) and a reorganization within the Fiscal Service of the Treasury Department, effective February 1, 1974. All accounts of the "~~Treasurer of the United States~~", including accounts relating to gold held against outstanding gold certificates, now are accounts of the "~~United States Treasury~~". The Department of the Treasury proposes to amend or repeal other statutes, as and when appropriate, to make similar substitutions in the law.

EFFECTIVE DATE

Section 10 of the bill would provide that the amendments made by sections 2, 3, 5, 6, and 7 of the bill take effect when the amendments to the IMF Articles of Agreement take effect.

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FISCAL IMPACT STATEMENT

In accordance with section 252(a) of the Legislative Reorganization Act of 1970, the Committee estimates that the bill will have no budgetary impact.

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Public Law 95-147
95th Congress

An Act

To authorize the Secretary of the Treasury to invest public moneys, and for other purposes.

Oct. 28, 1977

[H.R. 5675]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury is authorized, for cash management purposes, to invest any portion of the Treasury's operating cash for periods of up to ninety days in (1) obligations of depositaries maintaining Treasury tax and loan accounts secured by a pledge of collateral acceptable to the Secretary of the Treasury as security for tax and loan accounts, and (2) obligations of the United States and of agencies of the United States: *Provided*, That the authority granted under this section shall not be construed as requiring the Secretary of the Treasury to invest any or all of the cash balance held in any particular account: *Provided further*, That the authority granted under this section shall not be construed as permitting the Secretary of the Treasury to require the sale of such obligations by any particular person, dealer, or financial institution. Investments in obligations of depositaries maintaining such accounts shall be made at rates of interest prescribed by the Secretary of the Treasury, after taking into consideration prevailing market rates of interest.

Sec. 2. (a) Section 3(k) of the Home Owners Loan Act of 1933 (12 U.S.C. 1464(k)) is amended by adding after "Bank" in the first sentence thereof the following: "shall be a depository of public money and" and by striking the period at the end thereof and inserting the following: ", including services in connection with the collection of taxes and other obligations owed the United States, and the Secretary of the Treasury is hereby authorized to deposit public money in any such Federal savings and loan association or member of a Federal home loan bank, and shall prescribe such regulations as may be necessary to carry out the purposes of this subsection."

(b) Section 402(d) of the National Housing Act (12 U.S.C. 1725 (d)) is amended by adding the following at the end thereof: "Insured institutions shall be depositories of public money and may be employed as fiscal agents of the United States. The Secretary of the Treasury is authorized to deposit public money in such insured institutions, and shall prescribe such regulations as may be necessary to enable such institutions to become depositories of public money and fiscal agents of the United States. Each insured institution shall perform all such reasonable duties as depository of public money and fiscal agent of the United States as may be required of it including services in connection with the collection of taxes and other obligations owed the United States."

(c) The Federal Credit Union Act (12 U.S.C. 1751-1790) is amended—

(1) by inserting after section 209 the following new section: "Sec. 210. Any credit union the accounts of which are insured under this title shall be a depository of public money and may be employed as fiscal agent of the United States. The Secretary of the Treasury is authorized to deposit public money in any such insured

Secretary of the Treasury.
Public moneys, investment authority.
31 USC 1038.

Interest rates.

Federal Home Loan Banks, public money depositories.

Insured institutions, public money depositories.

Credit unions, public money depositories.
12 USC 1789a.

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credit union, and shall prescribe such regulations as may be necessary to enable such credit unions to become depositories of public money and fiscal agents of the United States. Each credit union shall perform all such reasonable duties as depositories of public money and fiscal agent of the United States as may be required of it including services in connection with the collection of taxes and other obligations owed the United States.”; and

(2) by redesignating section 210 of the Federal Credit Union Act (19 U.S.C. 1790) as section 211.

State-chartered banks and other institutions, public money depositories. 12 USC 266.



(d) Banks, savings banks, and savings and loan, building and loan, homestead associations (including cooperative banks), and credit unions created under the laws of any State and the deposits or accounts of which are insured by a State or agency thereof or corporation chartered pursuant to the laws of any State may be depositories of public money and may be employed as fiscal agents of the United States. The Secretary of the Treasury is authorized to deposit public money in any such institution, and shall prescribe such regulations as may be necessary to enable such institutions to become depositories of public money and fiscal agents of the United States. Each such institution shall perform all such reasonable duties as depository of public money and fiscal agent of the United States as may be required of it including services in connection with the collection of taxes and other obligations owed the United States.

26 USC 6302.

SEC. 3. (a) Subsection (c) of section 6302 of the Internal Revenue Code of 1954 (relating to use of Government depositories) is amended—

(1) by striking out “or trust companies” and inserting in lieu thereof “, trust companies, domestic building and loan associations, or credit unions”; and

(2) by striking out “and trust companies” and inserting in lieu thereof “, trust companies, domestic building and loan associations, and credit unions”.

26 USC 7502.

(b) Subsection (e) of section 7502 of the Internal Revenue Code of 1954 (relating to mailing of deposits) is amended by striking out “or trust company” each time it appears and inserting in lieu thereof “, trust company, domestic building and loan association, or credit union”.

Effective date. 26 USC 6302 note.

(c) The amendments made by this section shall apply to amounts deposited after the date of the enactment of this Act.

Certain International Monetary Fund deposits, limitation. Additional trust funds, establishment limitation. 22 USC 286c.

SEC. 4. (a) The Bretton Woods Agreements Act (22 U.S.C. 250—256a-2) is amended—

Information, transmittal to congressional committees. 22 USC 286k.

(1) by striking out clause (g) of the first sentence of section 5, and by inserting immediately after clause (f) the following: “or (g) approve either the disposition of more than 25 million ounces of Fund gold for the benefit of the Trust Fund established by the Fund on May 6, 1976, or the establishment of any additional trust fund whereby resources of the International Monetary Fund would be used for the special benefit of a single member, or of a particular segment of the membership, of the fund.”;

(2) (A) by inserting “(a)” immediately after “Sec. 14.”; and

(B) by inserting at the end of section 14 the following new subsection:

“(b) The President shall, upon the request of any committee of the Congress with legislative or oversight jurisdiction over monetary policy or the International Monetary Fund, provide to such committee any appropriate information relevant to that committee’s jurisdiction which is furnished to any department or agency of the United

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Ex Order 10033

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States by the International Monetary Fund. The President shall comply with this provision consistent with United States membership obligations in the International Monetary Fund and subject to such limitations as are appropriate to the sensitive nature of the information."

(b) (1) Section 10(a) of the Gold Reserve Act of 1934 (31 U.S.C. 322a(a)) is amended—

(A) by striking out "to and" immediately following "necessary" and inserting in lieu thereof a comma; and

(B) by inserting immediately after "International Monetary Fund" the following: "regarding orderly exchange arrangements and a stable system of exchange rates: *Provided, however.* That no loan or credit to a foreign government or entity shall be extended by or through such Fund for more than six months in any twelve-month period unless the President provides a written determination to the Congress that unique or exigent circumstances make such loan or credit necessary for a term greater than six months".

(2) Section 10(b) of the Gold Reserve Act of 1934 (31 U.S.C. 322a(b)) is amended by striking out the phrase "stabilizing the exchange value of the dollar" in the fourth sentence thereof and inserting in lieu thereof the phrase "the purposes prescribed by this section".

(c) The joint resolution entitled "Joint resolution to assure uniform value to the coins and currencies of the United States", approved June 5, 1933 (31 U.S.C. 463), shall not apply to obligations issued on or after the date of enactment of this section.

Approved October 28, 1977.

Loans to foreign governments, extension limitation, Presidential determination, submittal to Congress.

31 USC 463 note.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 95-159, Pt. 1 (Comm. on Banking, Finance and Urban Affairs) and No. 95-159, Pt. 2 (Comm. on Ways and Means).

SENATE REPORT No. 95-450 (Comm. on Banking, Housing, and Urban Affairs).

CONGRESSIONAL RECORD, Vol. 123 (1977):

- Apr. 25, considered and passed House.
- Oct. 11, considered and passed Senate, amended.
- Oct. 14, House concurred in Senate amendment.

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provision in any law authorizing obligations to be issued by or under the authority of the United States has been repealed (by the terms of a statute under which any other provisions or authority in such law was saved).¹⁸ It is clear that these statutes do not invalidate the entire contract, but merely render unenforceable that portion of the agreement specifying the medium of payment;¹⁹ consequently, obligations calling for payment in gold coin of the United States are nevertheless dischargeable, dollar for dollar, in any coin or currency of the United States which is legal tender at the time of payment.²⁰

This legislation is within the constitutional grant of power to the Congress to coin money and regulate its value, and its broad aggregate powers over revenue, finance, and currency generally;¹ it has been held to be constitutional as applied to an agreement to pay in gold coin of the United States of a specified standard of weight and fineness,² and to a clause for payment in gold certificates.³

§ 29. Contracts for payment in, or delivery of, gold or silver metal.

The emergency and gold clause legislation above referred to,⁴ and Treasury regulations enacted under it, deprive gold of its status as a medium of payment, and contracts calling for payment in gold of a specified weight and fineness are unenforceable in that respect, and are dischargeable, dollar for dollar, in any legal tender of the United States, measured as provided by law.⁵ The effect

ing currency) payable in money of the United States. 31 USC § 463(b).

As used in 31 USC § 463, the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations. 31 USC § 463(b).

As a result of this legislation, earlier decisions relating to the validity and effect of contracts for payment in gold coin are no longer of practical importance. See PAYMENT (1st ed § 57).

For the history of such clauses, see *Nortz v United States*, 294 US 317, 79 L Ed 907, 55 S Ct 428, 95 ALR 1346; *Norman v Baltimore & O. R. Co.*, 294 US 240, 79 L Ed 885, 55 S Ct 407, 95 ALR 1352.

See also §§ 15, 16, *supra*.

18. 31 USC § 463(a).

Annotation: 84 ALR 1499, s. 88 ALR 1532, 92 ALR 1525, 95 ALR 1383, 101 ALR 1318, 114 ALR 820.

Although agreements to pay in specified money are commonly called "gold clauses," the above statutory prohibition is broad enough in terms to require every obligation measured in United States dollars to be discharged, dollar for dollar, in any coin or currency of the United States which at the time of payment is legal tender for public and private debts. *Nye v Schwab*, 58 Ohio App 422, 12 Ohio Ops 249, 16 NE2d 783.

19. 31 USC § 463(a).

20. *Bethlehem Steel Co. v Zurich General Acci. & Liability Ins. Co.* 307 US 265, 83

L Ed 1280, 59 S Ct 856; *Equitable Life Assur. Soc. v Freda*, 32 Ohio NP NS 65.

1. *Nortz v United States*, 294 US 317, 79 L Ed 907, 55 S Ct 428, 95 ALR 1346; *Norman v Baltimore & O. R. Co.* 294 US 240, 79 L Ed 885, 55 S Ct 407, 95 ALR 1352.

See, also, § 14, *supra*.

2. *Hartmann v United States*, 106 Ct Cl 686, 65 F Supp 397, cert den 330 US 842, 91 L Ed 1288, 67 S Ct 1080.

Bonds stipulating for payment under a gold clause are not contracts for payment in gold coin as a commodity, or in bullion, but are contracts for the payment of money in legal tender currency corresponding to the face value of the bonds; the effect of such stipulation being to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by a lesser value than that prescribed. *Norman v Baltimore & O. R. Co.* 294 US 240, 79 L Ed 885, 55 S Ct 407, 95 ALR 1352.

3. *Nortz v United States*, 294 US 317, 79 L Ed 907, 55 S Ct 428, 95 ALR 1346.

See, as to contractual designation of specified medium, generally, PAYMENT (1st ed §§ 65 et seq.).

4. § 28, *supra*.

5. 31 USC § 463.

Annotation: 84 ALR 1499, s. 86 ALR 1172, 88 ALR 1532, 92 ALR 1525, 95 ALR 1383, 101 ALR 1318, 114 ALR 820.

An agreement by a debtor to pay in gold coins is an agreement to deliver a specific kind

of the joint resolution of Congress was to strike from any contract the specification of gold coin as the medium of payment, and a demand for payment in gold in any past or future contract is discharged by payment in any legal tender, and all persons are conclusively presumed to know that such is the case.⁶ Commercial and certain other specified uses of gold are still permitted under federal regulation.⁷

Contracts requiring payment to be made in foreign currency are discussed in subsequent sections.⁸

VIII. FOREIGN MONEY; EXCHANGE; EXCHANGE CONTROL

§ 30. Generally.

Congress has the exclusive power to regulate within the United States the value of foreign coin,⁹ and may place restrictions on transactions in foreign exchange.¹⁰ Foreign money is generally treated as a commodity in this country, although it may at times serve as a medium of payment where it has a monetary value in terms of an established rate of exchange.¹¹ The duty of ascertaining and declaring the value of foreign coins is imposed upon the Department of the Treasury. Wherever a conversion of foreign money into United States money is required by law, such conversion is to

of money and payment in any other kind was, prior to the enactment of the "gold clauses" legislation, not a fulfillment of the contract. *Carpentier v Atherton*, 25 Cal 564.

6. *Security-First Nat. Bank v De La Cuesta*, 15 Cal App 2d 302, 59 P2d 542.

7. 31 USC § 442.

8. §§ 30 et seq., infra.

9. § 14, supra.

10. *Perry v United States*, 294 US 330, 79 L Ed 912, 55 S Ct 432, 95 ALR 1335.

Annotation: 94 ALR2d 496.

State statutes designed to license and regulate the business of transmitting funds to foreign countries have been held to contain arbitrary and capricious classifications of such business in violation of the federal and respective state constitutions. The distinction made by statute in permitting a partnership, corporation, or joint stock company or association in the general travel and tourist business to apply for a license to transmit money to foreign countries and prohibiting an individual engaged in the same business from applying for a license, has been held to be an arbitrary distinction which bears no relation to the purpose of the legislation. *O'Kane v Catuira*, 212 Cal App 2d 131, 27 Cal Rptr 818, 94 ALR2d 487.

There has been held to be no peculiarity in the condition of those engaged in the business of receiving money for its transmission to foreign countries which justifies the statutory limitation of the issuance of a license therefor to designated companies and the prohibition of all individuals and all other companies from engaging in this business; such sections are

special legislation in violation of the California Constitution and of the equal protection clause of the Federal Constitution. *O'Kane v Catuira*, supra. See also *Wedesweiler v Brundage*, 297 Ill 228, 130 NE 520, holding to like effect.

11. *United States v Smith* (DC Ky) 152 F 542; *Richard v American Union Bank*, 123 Misc 92, 204 NYS 719, revd on other grounds 210 App Div 22, 205 NYS 622, affd 241 NY 163, 149 NE 338, 43 ALR 512; *Equitable Trust Co. v Keene*, 111 Misc 544, 183 NYS 699, affd 195 App Div 384, 186 NYS 468, revd on other grounds 232 NY 290, 133 NE 894, 19 ALR 1137.

Foreign money in this country is, on its barter and sale, generally treated as a commodity, although it may be treated as money having a monetary value fixed by the exchange value. *Wehber v American Union Bank*, 128 Misc 123, 217 NYS 833, revd on other grounds 221 App Div 94, 222 NYS 359.

The term "money" may be used broadly to denote any token of value customarily passing from hand to hand, and this might include foreign coin and notes if so used in this country. *Reisfeld v Jacobs*, 107 Misc 1, 176 NYS 223.

Where the buyer under a contract of purchase of a number of shares of stock in a foreign bank at the rate of a specified number of German marks per share was given the option of paying for the stock with either German marks or American dollars, and elected to pay with marks, he could not, upon exercising his right to rescind the contract upon the failure of the other party to perform, demand back the equivalent in dollars of the marks paid by him. *Petkus v Lietuvos Ukin Bankas*, 123 Misc 193, 204 NYS 726.

be made at the values proclaimed by the Secretary of the Treasury according to the values of the standard coins of the various countries of the world then in circulation.¹² This rule of evaluation is applied, for example, in estimating the invoice values of imported goods chargeable with ad valorem customs duties.¹³

§ 31. Applicable date of currency conversion

Where an action is instituted in this country to enforce an obligation for the payment of money which is expressed in terms of a currency foreign to the forum, the obligation expressed in terms of foreign money must be converted into United States currency to enable the court to make an award, since judgments in American courts must be stated in dollars and cents.¹⁴

Difficulties may arise in determining the appropriate rate of exchange where the foreign currency fluctuates in value between the date specified for performance of the obligation and the date when judgment is entered. There is conflict in the decisions as to whether the amount payable in dollars is to be computed by reference to the rate of exchange prevailing when the obligation matured, or to the rate prevailing at the time the judgment is entered.¹⁵ In determining the date as of which the foreign currency is to be translated into American money, the Supreme Court of the United States

12. 31 USC § 372(a), (b).

Collector v Richards, 23 Wall (US) 246, 23 L Ed 95.

13. As to the valuation of foreign currency for the purpose of customs duties, see 21 Am Jur 2d, CUSTOMS DUTIES AND IMPORT REGULATIONS § 84.

14. Coinage Act of April 2, 1792, Ch 16 § 20, 1 Stat 250. 31 USC 1952 ed § 371.

Serralles v Esbri, 200 US 103, 50 L Ed 391, 26 S Ct 176; Shaw, Savill, Albion & Co. v The Fredericksburg (CA2 NY) 189 F2d 952; Stringer v Coombs, 62 Me 160.

American judgments must be expressed in dollars and cents, and not in terms of a foreign currency. Frontera Transp. Co. v Abaunza (CA3 La) 271 F 199.

The measure of damages for breach of a contract to pay foreign money in a foreign country, when action is brought in this country, is the cost of such money in dollars, since foreign money is a commodity and, unlike gold, is lawful to buy. Anglo-Continentale Treuhand, A. G. v St. Louis S. W. R. Co. (CA 2 NY) 81 F2d 11, 105 ALR 636, cert den 298 US 655, 80 L Ed 1381, 56 S Ct 675.

Foreign money in this country is, on its barter and sale, generally treated as a commodity, although it may be treated as money having a monetary value fixed by the exchange value. Webber v American Union Bank, 128 Misc 123, 217 NYS 833, revd on other grounds 221 App Div 94, 222 NYS 359.

See 22 Am Jur 2d, DAMAGES § 63.

See also Evan, "Rationale of Valuation of Foreign Money Obligations," 54 Mich L Rev 307.

As to contractual designation of specified

medium, see generally PAYMENT (1st ed §§ 55 et seq.).

15. American Nat. Ins. Co. v de Cardenas (Fla App) 181 So 2d 359.

Annotation: 11 ALR 363, 370, s. 33 ALR 1285, 43 ALR 520, 50 ALR 1273, 105 ALR 640.

In the judgment of an American court, a contractual obligation to pay money, designated in the contract in the terms of a foreign currency, must be expressed in American currency, and is to be calculated according to the appropriate rate of exchange. The parties having stipulated that the effective date for conversion of the foreign currency into dollars should be the date of breach, the court expressed no opinion as to whether the operative date of conversion should be the breach date or the judgment date. Sabl v Laenderbank Wien Aktiengesellschaft (Sup) 30 NYS2d 608, supp op 33 NYS2d 764, affd 266 App Div 832, 43 NYS2d 270.

In an action in this country for the contract price of merchandise purchased in France and payable in francs, the recovery must be for dollars, at the rate of exchange prevailing when the debt fell due. Dante v Minioggio, 54 App DC 386, 298 F 845, 33 ALR 1278.

See Fraenkel, "Foreign Moneys in Domestic Courts," 35 Col L Rev 360; Evan, "Rationale of Valuation of Foreign Money Obligation," 54 Mich L Rev 307.

For an extensive discussion of the effective date for conversion of foreign money into United States money, see "Conversion Date of Foreign Money Obligations," 65 Columbia L Rev 190 (March 1965).

See also 22 Am Jur 2d, DAMAGES § 65.

has applied a rule which emphasizes the place of intended performance of the contract. If the payment of foreign currency is to be made in the United States, the agreement, then, is to be performed here, and the foreign currency will be valued as of the date appointed for performance in the contract, that is, the breach date.¹⁶ The American Law Institute has adopted a similar rule.¹⁷ If the payment of foreign currency is to be made in the foreign country, the nondefaulting party will obtain damages in that country in the foreign currency, and the currency will be valued as of the date of judgment entry in the United States.¹⁸

~~§ 32. Applicable rate of currency conversion.~~

The rule that an award in respect of a contract, which by the contract terms is payable in foreign money, must be expressed in United States money does not, of course, determine the rate of exchange at which the amount stated in the contract in terms of foreign money is to be converted into dollars. The onus in such a case is upon the plaintiff to establish the applicable rate of exchange.¹⁹ Where, however, the applicable rate of exchange is established by the contract, or is otherwise agreed upon between the parties, it is a fixed rate and controls all matters within the scope of its operation.²⁰

Where a contract requires payment in the United States of an amount of money in a foreign currency, and there is more than one rate of exchange

16. Hicks v Guinness, 269 US 71, 70 L Ed 168, 46 S Ct 46; Pape v Home Ins. Co. (CA2 NY) 139 F2d 231; Sternberg v West Coast Life Ins. Co. 196 Cal App 2d 519, 16 Cal Rptr 346; American Nat. Ins. Co. v de Cardenas (Fla App) 181 So 2d 359.

17. See Restatement, CONFLICT OF LAWS §§ 423, 424.

See also 22 Am Jur 2d, DAMAGES § 65.

18. Zimmerman v Sutherland, 274 US 253, 71 L Ed 1034, 47 S Ct 625; Deutsche Bank Filiale Nurnberg v Humphrey, 272 US 517, 71 L Ed 383, 47 S Ct 166; Shaw, Savill, Albion & Co. v The Fredericksbure (CA2 NY) 189 F2d 952; Angelo-Continental Treuland v St. Louis S. W. R. Co. (CA2 NY) 81 F2d 11, 105 ALR 636, cert den 298 US 655, 80 L Ed 1381, 56 S Ct 675; The West Arrow (CA2 NY) 80 F2d 853; Royal Ins. Co. v Compania Transatlantica Espanola (DC NY) 57 F2d 288; Tillman v Russo Asiatic Bank (CA2 NY) 51 F2d 1023, 80 ALR 1368, cert den 281 US 539, 76 L Ed 932, 52 S Ct 312.

Where the obligation is performable in a foreign country and in the money of that country, the necessary conversion to American currency is to be computed at the rate of exchange prevailing on the date of the judgment. Deutsche Bank Filiale Nurnberg v Humphrey, 272 US 517, 71 L Ed 383, 47 S Ct 166.

For an extended discussion of the breach-day rule and the judgment-day rule, see Fraenkel, "Foreign Moneys in Domestic Courts," 35 Col L Rev 360; Rifkind, "Money as a Device for Measuring Value," 36 Col L Rev 562.

~~19. Higgins v United Artists Corp.~~ 279 App Div 417, 110 NYS2d 383, affd 304 NY 942, 110 NE2d 884.

The burden is on one suing on a debt due in and payable in the currency of a foreign country to prove the value of such currency in the United States at the date of judgment. Tillman v Russo Asiatic Bank (CA2) 51 F2d 1023, 80 ALR 1368, cert den 285 US 539, 76 L Ed 932, 52 S Ct 312.

~~20. Pape v Home Ins. Co.~~ (CA2 NY) 139 F2d 231; Booth & Co. v Canadian Government Merchant Marine, Ltd. (CA2 NY) 63 F2d 240; Sulyok v Penzintezeti Kozpont Budapest, 279 App Div 528, 111 NYS2d 75, mod on other grounds 304 NY 704, 107 NE2d 604, reh den 304 NY 742, 108 NE2d 407; Sabl v Laenderbank Wien Aktiengesellschaft (Sup) 30 NYS2d 608, supp op 33 NYS2d 764, affd 266 App Div 832, 43 NYS2d 270; Pennsylvania R. Co. v Cameron, 280 Pa 458, 124 A 638, 33 ALR 1281.

To honor in full a bill of lading payable in pounds, shillings, and pence at a specified rate of exchange, there must be sufficient American currency at the fixed rate of exchange to purchase, or be the equivalent of, the sterling named in the bill. Pennsylvania R. Co. v Cameron, supra.

In a suit by a German agent against an American principal to recover the amounts of certain arbitration awards which the agent had paid on the principal's account, the value of the German mark in which such payments were made would be taken at par, in the absence of evidence that it had depreciated at the time of such payments. Birge-Forbes Co. v Heye, 251 US 317, 64 L Ed 286, 40 S Ct 160.

in effect in respect of the foreign currency, namely, an official rate, officially established by the law of the foreign country, and a money market rate of exchange, the money market rate of exchange and not the official rate is the applicable rate for conversion of the foreign currency into a dollar amount.¹ This rule is applied particularly in cases where the official rate of exchange has been established in respect of a "blocked" foreign currency, that is, a currency which cannot be transferred or transmitted at all, or which can be transferred or transmitted only subject to restrictive or penal conditions imposed by the foreign government concerned.² In applying this rule of preference for a market rate of exchange rather than for an official rate, the courts have explained that when the rule, which requires that judgments for an amount of a foreign currency must be expressed in the dollar equivalent in judgments of United States courts, was formulated, the currencies of the world, or of most of the world, were freely convertible into United States money, but the ease with which foreign obligations can now be measured in domestic currency has been impaired by changes in the economic or political policies of many countries, and it has been said that the courts must determine realistically and in the light of all the facts the relative value of a foreign currency in relation to the United States dollar, and should not sacrifice justice to the easy way of resorting, as a substitute for a free market, to an official rate of exchange which may have been established for other purposes, and which does not, or may not, apply to the transactions in controversy.³ A blocked foreign currency, it has been pointed out, has a different value in terms of United States money than has unrestricted currency of the same foreign country, and in such cases the official rate of exchange provides little assistance in determining the rate at which the blocked currency is to be converted into dollars. The official rate of exchange in the case of a blocked currency merely means the rate at which the foreign government will permit its currency to be exchanged into dollars in certain limited classes of transactions which are approved by the foreign state. The view has been taken that in the case of a blocked foreign currency account which is payable in a state in respect of a transaction not expressly sanctioned by the foreign government, there is, in fact, no official rate of exchange, since there is no rate officially recognized for transactions that are prohibited, or limited by the governmental restrictions.⁴

Where, however, the contractual obligation which is being sued upon in a United States court does not call for payment of foreign money to be made

1. *Huntley v Alejandro* (Fla App) 139 So 2d 311. For a discussion of the rule, see *Pan American Life Ins. Co. v Del Valle* (Fla App) 201 So 2d 610; *American Nat. Ins. Co. v de Cardenas* (Fla App) 181 So 2d 359.

Where plaintiff is entitled to a refund of reichsmarks, the dollar equivalent of the sum due in reichsmarks is to be computed at the rate of exchange prevailing at the time and place of demand, and not at the official rate of exchange established by the German government in respect of transactions controlled by that government. *Strauss v United States Lines Co.* 180 Misc 664, 42 NYS2d 618.

2. *Hughes Tool Co. v United Artists Corp.* 279 App Div 417, 110 NYS2d 383, aff'd 304 NY 942, 110 NE2d 884; *Freund v Laender-*

bank Wien Aktiengesellschaft, 277 App Div 770, 97 NYS2d 349; *Strauss v United States Lines Co.* 180 Misc 664, 42 NYS2d 618.

Payment on a life insurance policy, made payable in the United States in Cuban pesos, is to be made in United States dollars equivalent to the specified sum of pesos at the rate of exchange prevailing at the place of payment, and not at the Cuban official rate. *Pan American Life Ins. Co. v Blanco* (CA5 Fla) 362 F2d 167.

3. *Hughes Tool Co. v United Artists Corp.* 279 App Div 417, 110 NYS2d 383, aff'd 304 NY 942, 110 NE2d 884.

4. *Hughes Tool Co. v United Artists Corp.* supra.

in the United States, but requires the obligor to pay a sum in foreign money in the specified foreign country, the applicable rate of exchange for ascertainment of the United States dollar equivalent of the sums specified in foreign currency is the official rate of exchange established by or in the foreign country where payment is to be made, and not the prevailing money market rate of exchange.⁵ The rationale of the rule apparently being that since the specified amount of foreign currency is by the contract made payable in the named foreign country, the successful plaintiff is entitled to be paid so much in dollars as, when reconverted into the foreign currency in the specified country, will produce the required amount, and that therefore the dollar equivalent of the amount of foreign currency named in the contract is to be calculated at that rate which, when converted back into the foreign currency, will produce the specified sum of foreign currency in the foreign country, that is, at the official rate established in the foreign country where payment is to be made.⁶

33. Enforcement of foreign currency laws.

The extent to which the laws of a foreign country are allowed to operate and are given effect within the jurisdiction of another state is regulated by those principles of private international law generally called "conflict of laws." By the application of these principles, the courts determine, first, whether or not the particular transaction before the court involves the consideration of a foreign law, and secondly, if it does involve the application of a foreign law, whether or not effect should be given to the foreign law within the court's jurisdiction. The question whether a foreign law is applicable to the transaction being litigated requires a determination by the court as to what is the proper law governing or controlling the transaction: the law of the forum or the law of another country. Where the matter being litigated involves a contract having foreign aspects, the courts are required to decide whether the law of the place where the contract was made, or of the place where it was intended to be performed, or of the place intended by the parties to govern the contract, or of the place having the most contacts with the transaction is to be applied, or whether the law of the forum is to be applied. Foreign currency regulations are generally enforced in United States courts, where the litigated transaction is governed by foreign law and enforcement is against parties subject to that law,⁷ provided that such laws are not contrary to public policy of the forum or of the United States.⁸

American courts generally will not take judicial notice of the law of a foreign country, except perhaps to recognize the general system of law prevailing therein, and where any foreign law is relied upon in a case before

5. *Huntley v. Alejandro* (Fla. App) 139 So 2d 911.

6. *Huntley v. Alejandro*, supra. For a discussion of the rule, see *American Nat. Ins. Co. v. de Cardenas* (Fla. App) 161 So 2d 359.

7. *Ehag Eisenbahnwerte Holding Aktiengesellschaft v. Banca Nationala A Romaniei*, 306 NY 242, 117 NE2d 346; *Perutz v. Bohemian Discount Bank in Liquidation*, 304 NY 533, 110 NE2d 6; *Industrial Export & Import Corp. v. Hongkong & Shanghai Bank-*

ing Corp., 302 NY 342, 98 NE2d 466; *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 NY 474, 14 NE2d 798; *Dougherty v. Equitable Life Assur. Soc.*, 266 NY 71, 193 NE 897; *M. Salimoff & Co. v. Standard Oil Co.*, 252 NY 220, 186 NE 679, 89 ALR 345; *Meyers v. Credit Lyonnais*, 259 NY 399, 182 NE 61, 83 ALR 268.

8. § 35, infra.

See also 16 Am Jur 2d, CONFLICT OF LAWS §§ 6, 9.

The courts of this country, such law must be pleaded and proved. Consequently, where foreign currency legislation or regulations are invoked to govern a transaction involved in an action before an American court, the burden is on the party asserting those regulations to plead and prove them in due form, since the court will not take judicial notice of them.⁹

§ 34. — As affected by conflict of law rules.

Where the place of the making and the place of the performance are the same, and, particularly, where no jurisdiction other than that of the locus contractus and the locus solutionis has any significant contact with regard to the obligations of the contract, the law of that jurisdiction determines and controls the validity and interpretation of the contract, and the rights and obligations of the parties under it.¹¹ Accordingly a contract made in a foreign country by citizens of that country, and intended to be performed there, is governed by the laws of that country; and, except where contrary to the public policy of the United States, foreign currency control laws are not offensive, and will be recognized by United States courts.¹²

9. See 29 Am Jur 2d, EVIDENCE §§ 49, 50.

10. *Philp v Maeri* (CA9 Wash) 261 F2d 943, 75 ALR2d 523; *Industrial Export & Import Corp. v Hongkong & Shanghai Banking Corp.* 302 NY 342, 98 NE2d 466; *Hughes Tool Co. v United Artists Corp.* 279 App Div 417, 110 NYS2d 383, affd 304 NY 942, 110 NYS2d 884.

Annotation: 23 ALR2d 1437, 1439, § 2; 75 ALR2d 529, 530, § 1.

Where it was claimed that no contract involving dollar transfers between private parties could be validly made in Italy, because of Italian exchange control regulations in force at the time when certain checks were given in Italy, the court said that since no proof of Italian law had been offered and since the particular regulations which allegedly affected the transaction were not identified, it would not take judicial notice of the Italian law when the parties themselves did not indicate in any manner the law upon which they relied, and that accordingly, any restrictions under Italian law that might apply to the transaction would be disregarded because not shown. *Re Mason's Estate*, 194 Misc 308, 86 NYS2d 232.

See also F. D. Trickey, "The Extraterritorial Effect of Foreign Exchange Control," 62 Mich L Rev 1232 (May 1964).

11. *Re Magnus Harmonica Corp.* (CA3 NJ) 262 F2d 515; *Brown v Case*, 80 Fla 703, 86 So 684; *Connor v Elliott*, 79 Fla 513, 524, 85 So 164, cert dismd 254 US 665, 65 L Ed 465, 41 S Ct 148.

See also 16 Am Jur 2d, CONFLICT OF LAWS §§ 36, 39, 51; Restatement, CONFLICT OF LAWS §§ 346, 358; and *Annotation:* 50 ALR 2d 254, 255, 256, 261, §§ 2, 3, 5.

12. *Industrial Export & Import Corp. v Hongkong & Shanghai Banking Corp.* 302 NY 342, 98 NE2d 466; *Re Mason's Estate*, 194 Misc 308, 86 NYS2d 232; *Kraus v Zivnosten-*

ska Banka, 187 Misc 681, 64 NYS2d 208; *Translateur v United States Lines Co.* 179 Misc 843, 42 NYS2d 117; *Lowenhardt v Compagnie Generale Transatlantique* (Sup) 35 NYS2d 347; *Bleiweiss v Cunard White Star, Ltd.* (Sup App T) 34 NYS2d 172; *Branderbit v Hamburg-American Line* (Sup App T) 31 NYS2d 588, affd 266 App Div 1011, 45 NYS2d 188; *Steinfink v North German Lloyd S.S. Co.* 176 Misc 413, 27 NYS2d 918.

A Czech citizen whose pension funds had been impounded in accordance with Czech currency control laws, could not obtain judgment in the New York court for his pension, in violation of these regulations. *Perutz v Bohemian Discount Bank in Liquidation*, 304 NY 533, 110 NE2d 6.

A contract between foreign nationals for performance in the foreign country is governed by the law of that country, and its foreign exchange regulations must therefore be applied. *Branderbit v Hamburg-American Line* (Sup App T) 31 NYS2d 588, affd 266 App Div 1011, 45 NYS2d 188.

Recognition by the Government of the United States of a foreign government does not compel American courts to give effect to foreign laws if they are contrary to the public policy of this country. However, it cannot be against the public policy of the United States to hold nationals of another country to contracts which they have made in their own country, to be performed there according to the laws of that country; and when persons have specifically stipulated that the laws of their native land shall govern their acts, the courts will give effect to those laws after recognition of the foreign government concerned. *Dougherty v Equitable Life Assur. Soc.* 266 NY 71, 193 NE 897, reh den 266 NY 615, 195 NE 226.

Hungarian Government decrees prohibiting payment in foreign currency to foreign holders of Hungarian state bonds were held to be effective to bar an assignee in the United States from recovering in dollars the interest

Where the contract is to be performed in a place other than the place where it is made, the law of the place of performance is generally held to be the proper law of the contract, unless an intention that it is to be governed by some other law is manifested by the parties.¹³ Accordingly where the court concludes that the law of the place of performance is the law governing the contract, the courts of this country will accord recognition, and give effect to the exchange and currency laws of a foreign country, where the foreign country is the place of performance of the contract,¹⁴ provided that the foreign fiscal law is not repugnant to the public policy of the forum state or of the United States.¹⁵

Upon the same principle, where the contract is to be performed within the state of the forum, the law of the forum is the law controlling the contract, unless the parties have manifested an intention that some other law should govern, and accordingly, a foreign exchange or currency law will not be given extraterritorial effect within the forum to render the contract unenforceable by reason of impossibility, or illegality, of performance under the restricting foreign law.¹⁶ A fortiori, such defenses are not available

payable on the bond coupons, since the proper law governing the contract was held to be not the law of the forum, but the law of Hungary imposing the restriction. *Egyes v Magyar Nemzeti Bank* (DC NY) 71 F Supp 360, affd (CA2) 165 F2d 539.

See F. D. Trickey, "The Extraterritorial Effect of Foreign Exchange Control." 62 Mich L Rev 1232 (May 1964).

13. See 16 Am Jur 2d, CONFLICT OF LAWS §§ 40, 41.

14. The cash surrender value of a life insurance policy, issued by a Canadian insurer to a resident of Cuba and providing that all sums payable thereunder be paid in Cuba in United States currency, such policy having become converted from a policy payable in dollars to a policy payable in pesos, by operation of a Cuban currency decree which so provided, was held, on apportion being brought on the policy in Florida, to be governed by Cuban law, as the *lex loci solutionis*, which law was not repugnant to United States policy, and the cash surrender value was therefore payable in Cuba in pesos converted at the rate of exchange obtaining on the date of the original demand. *Confederation Life Assn. v Ugalde* (Fla App) 151 So 2d 315, rev'd in part on other grounds (Fla) 164 So 2d 1, cert den 379 US 915, 13 L Ed 2d 186, 85 S Ct 263.

15. As to the effect of repugnancy to public policy, see § 35, *infra*.

16. *Zimmermann v Sutherland*, 274 US 253, 71 L Ed 1034, 47 S Ct 625; *New York Life Ins. Co. v Dodge*, 246 US 357, 62 L Ed 772, 38 S Ct 337; *Louis-Dreyfus v Paterson S.S., Ltd.* (CA2 NY) 43 F2d 824, 72 ALR 242; *Tweedie Trading Co. v James P. McDonald Co.* (DC NY) 114 F 985; *Pan American Life Ins. Co. v Lorida* (Fla App) 154 So 2d 200, cert den (Fla) 153 So 2d 695, cert den 377 US 990, 12 L Ed 2d 1043,

84 S Ct 1905, reh den 379 US 871, 13 L Ed 2d 77, 85 S Ct 15; *Pan American Life Ins. Co. v Recio* (Fla App) 154 So 2d 197, cert den 377 US 990, 12 L Ed 2d 1044, 84 S Ct 1908, reh den 379 US 871, 13 L Ed 2d 78, 85 S Ct 17; *Krulewicz v National Importing & Trading Co.* 195 App Div 544, 186 NYS 838; *Glynn v United Steel Works Corp.* 160 Misc 405, 289 NYS 1037; *Richards & Co. v Wreschner* (Sup) 156 NYS 1054, affd 174 App Div 484, 158 NYS 1129.

Ralli Bros. v Compania Naviera Sota y Aznar (Eng) [1920] 2 KB 287; *Ashmore & Son v Cox* (C. S.) & Co. (Eng) [1899] 1 QB 436.

Where a German company issued and sold bonds in the United States which were payable on maturity in gold in the United States, and the bondholders sued on the bonds, the defendant could not rely as a defense on the fact that under German exchange control laws forbidding payment of debts by German debtors to foreign creditors, performance by the defendant was rendered impossible or illegal. *Central Hanover Bank & T. Co. v Siemens & Halske Aktiengesellschaft* (DC NY) 15 F Supp 927, affd (CA2) 84 F2d 993, cert den 299 US 585, 81 L Ed 431, 57 S Ct 110.

Where American holders of bonds issued in the United States by a German-based corporation, and secured by a deed of trust executed in the United States, sued upon the bonds and annexed coupons, the court held that the law of New York was the law governing the contract, notwithstanding a provision in the deed of trust that the obligations of the defendant corporation were "covered" by German law, the court stating that it was settled law in New York that foreign law could not control performance in New York of a contract made therein, unless the intent that the foreign law should control was manifest, which was not the case in the instant contract. *Goodman v Deutsch-A-*

where the restricting foreign law is not an insolvency law of general application, applicable alike to all creditors, domestic or foreign, but is instead a law that discriminates against creditors not resident in the foreign country.¹⁷

§ 35. As affected by public policy.

Laws of foreign governments have extraterritorial effect only by virtue of the comity of nations, and where there is a conflict between domestic public policy and the comity of nations and of courts, domestic public policy must prevail, since it is the public policy of the forum which determines whether foreign legislation shall be given effect.¹⁸ Foreign currency or exchange control laws which are declared by a state statute or by the Constitution or by the common law to be contrary to public policy will not be enforced by United States courts. Thus laws which are in themselves confiscatory or which are designed to implement confiscatory laws are generally refused recognition and enforcement.¹⁹ So, where foreign financial legislation or

lantische Telegraphen Gesellschaft, 166 Misc 509, 2 NYS2d 80.

Where plaintiff, an employee of an Austrian company, who had contractual rights to a pension and who was dismissed under penal decrees, sued in New York for payment of the pension, it was held that the pension constituted a debt, and that in the case of a debt the place of payment is, presumably, the residence or place of business of the creditor, even though such place is out of the jurisdiction where the contract was made, and that accordingly, plaintiff having brought his demand in New York, wherein he was resident, the matter was controlled by the *lex loci solutionis*, which was also the law of the forum, and that the defendant employer could not plead as defenses the German decrees or exchange control laws prohibiting payment to persons not resident in Germany, since those laws could not affect the jurisdiction of the forum in relation to a garnishee and a fund both within the jurisdiction of the court. *David v Veitscher Magnesitwerke Actien Gesellschaft*, 348 Pa 335, 35 A2d 346.

Ruling as insufficient a defense which pleaded in bar of payment a foreign moratorium law, the court held that the law applied only to debts and obligations payable within the foreign country, and not to obligations payable in the United States, and further held that the moratorium did not possess any extraterritorial effect, and that even if it did, it would not be upheld in New York. *Perkins v De Witt*, 197 Misc 369, 94 NYS 2d 177, affd in part and revd in part on other grounds 279 App Div 903, 111 NYS2d 752, the court citing as authority: *Feuchtwanger v Central Hanover Bank & Trust Co.* (Sup) 27 NYS2d 518, affd 263 App Div 711, 31 NYS2d 671, rearg den 263 App Div 857, 32 NYS2d 1011, affd 288 NY 342, 43 NE2d 434; *Glynn v United Steel Works Corp.* 160 Misc 405, 289 NYS 1037; *Perry v Norddeutscher Lloyd*, 150 Misc 73, 268 NYS 525.

17. *Central Hanover Bank & T. Co. v Siemens & Halske Aktiengesellschaft* (DC

NY) 15 F Supp 927, affd (CA2) 84 F2d 993, cert den 299 US 585, 81 L Ed 431, 57 S Ct 110.

In *Canada S. R. Co. v Gebhard*, 109 US 527, 27 L Ed 1020, 3 S Ct 363, a Canadian railroad company, having issued bonds in Canada payable in the United States, became insolvent and was reorganized under a Canadian statute providing for the issuance of new bonds in place of the old; and upon the assent by the great majority of bondholders to the reorganization, several non-assenting bondholders brought suit on the old bonds. The United States Supreme Court held that the scheme of reorganization was a type of composition or bankruptcy arrangement which had frequently been employed in England and Canada before the bonds in question were issued, and that bondholders in the United States, as well as those in Canada, were bound by the reorganization. The court in *Central Hanover Bank & Trust Co. v Siemens & Halske Aktiengesellschaft* (DC NY) 15 F Supp 927, affd (CA2) 84 F2d 993, cert den 299 US 585, 81 L Ed 431, 57 S Ct 110, observed that the *Gebhard* Case would not have been decided as it was had the Canadian scheme of reorganization provided that one treatment should be given to Canadian creditors, and another, and less favorable one, to all other creditors.

Freutel, "Exchange Control, Freezing Orders and the Conflict of Laws." 56 Harvard L Rev 30.

18. See 16 Am Jur 2d, CONFLICT OF LAWS §§ 4, 6, 9.

19. *Carl Zeiss Stiftung v V. E. B. Carl Zeiss, Jena* (DC NY) 293 F Supp 892; *Banco Nacional de Cuba v First Nat. City Bank* (DC NY) 270 F Supp 1004; *F. Palicio y Compania, S. A. v Brush* (DC NY) 256 F Supp 481, affd (CA2) 375 F2d 1011, cert den 389 US 830, 19 L Ed 2d 88, 88 S Ct 95; *Moscow Fire Ins. Co. v Bank of New York & Trust Co.* 200 NY 286, 20 NE2d 758, rearg den 280 NY 848, 21 NE2d 890, amend remittitur den 281 NY 818, 24 NE2d 487, affd United

regulations are contrary to the public policy of this country, such as, for example, the nationalization or expropriation decrees of foreign governments, the courts will not enforce them in respect of assets within the jurisdiction of the United States courts, even though the parties to the transaction may with respect to their foreign assets be bound by such legislation.²⁰ Similarly, upon grounds of public policy, the courts will not, in the absence of an overriding paramount public policy declared by the United States Government to the contrary, give effect to laws of a foreign country relating to foreign exchange where the enforcement of such laws would be prejudicial to the interest of domestic creditors, or of distributees or legatees of estates, since those interests must be considered paramount and superior to claims based on international comity.¹ And foreign laws providing for a moratorium

States v. Moscow Fire Ins. Co. 309 US 624, 84 L Ed 986, 60 S Ct 725, reh den 309 US 697, 84 L Ed 1036, 60 S Ct 706; Dougherty v Equitable Life Assur. Soc. 266 NY 71, 193 NE 897, reh den 266 NY 615, 195 NE 226; Vladikavkazsky R. Co. v New York Trust Co. 263 NY 369, 189 NE 456, 91 ALR 1426, reh den 264 NY 395, 191 NE 581; Petrogradsky Mejdunarodny Kommerchesky Bank v National City Bank, 253 NY 23, 170 NE 479, reh den 254 NY 563, 173 NE 867, cert den 282 US 878, 75 L Ed 775, 51 S Ct 82; Fred S. James & Co. v Russia Ins. Co. 247 NY 262, 160 NE 364, reh den 248 NY 503, 162 NE 502; Fred S. James & Co. v Second Russian Ins. Co. 239 NY 248, 146 NE 369, 37 ALR 720, amend remittitur den 240 NY 581, 148 NE 713; Russian Socialist Federated Soviet Republic v Cibrario, 235 NY 255, 139 NE 259, motion for reh den 236 NY 591, 142 NE 296; Sulyok v Penzintezesi Kozpont Budapest, 279 App Div 528, 111 NYS2d 75, mod on other grounds 304 NY 704, 107 NE2d 604, reh den 304 NY 742, 108 NE2d 407; Stern v Pesti Magyar Kereskedelmi Bank, 278 App Div 811, 105 NYS2d 352, affd 303 NY 881, 105 NE2d 106; Plesch v Banque Nationale de la Republique D'Haiti (Sup) 77 NYS2d 41, revd on other grounds 273 App Div 224, 77 NYS2d 43, affd 298 NY 573, 81 NE2d 106; Merilaid & Co. v Chase Nat. Bank, 189 Misc 285, 71 NYS2d 377; Perry v Norddeutscher Lloyd, 150 Misc 73, 268 NYS 525.

A foreign exchange control decree purporting to substitute blocked and nontransferable francs for American securities physically situate in New York is confiscatory as to a non-resident of Belgium, and such decree is without extraterritorial effect. *Marcu v Fischer* (Sup) 65 NYS2d 892.

Financial and exchange control regulations providing for expropriation of securities held by persons who had left France between certain dates were unenforceable and incapable of barring plaintiff's action for conversion, in that the regulations were contrary to the statutorily declared public policy of the state of New York as being confiscatory; were contrary to public policy at common law as retroactive penal legislation; and were repugnant to the public policy expressed in the Constitution of the United States and in

that of the state of New York as being ex post facto legislation. *Bollack v Societe Generale Pour Favorisor le Developpment du Commerce*, 263 App Div 601, 33 NYS2d 986, leave to app den 264 App Div 767, 35 NYS2d 717.

A currency regulation which alters either the value or character of the money to be paid in satisfaction of contracts is not a "confiscation" or a "taking." *French v Banco Nacional de Cuba*, 23 NY2d 46, 293 NYS 2d 433, 242 NE2d 704.

20. *United States v President & Directors of Manhattan Co.* 276 NY 396, 12 NE2d 518; *Volchok v Statni Banka Ceskoslovenska*, 15 App Div 2d 103, 222 NYS2d 140, affd 12 NY2d 784, 235 NYS2d 3, 186 NE2d 678, cert den 374 US 828, 10 L Ed 2d 1051, 83 S Ct 1865; *Stephen v Zivnostenska Banka Nat. Corp.* 23 Misc 2d 855, 199 NYS2d 797, affd 15 App Div 2d 111, 222 NYS2d 128, affd 12 NY2d 781, 235 NYS2d 1, 186 NE2d 676.

1. *Russian Reinsurance Co. v Stoddard*, 240 NY 149, 147 NE 703, motion for reh den 240 NY 682, 148 NE 757; *Re Lieb's Estate*, 201 Misc 1092, 106 NYS2d 705; *Re Kahn's Estate*, 179 Misc 939, 38 NYS2d 839; *State Land Board v Kolovrat*, 220 Or 448, 349 P2d 255, revd other grounds *Kolovrat v Oregon*, 366 US 187, 6 L Ed 2d 218, 81 S Ct 922 (wherein a paramount and overriding public policy of the United States was found to be expressed by reason of the existence of a "most favored nation" treaty, and by membership in the International Monetary Agreement).

Annotation: 37 ALR 726, s. 41 ALR 745, 65 ALR 1494, 139 ALR 1209.

Where a New York resident became entitled to an account held in the name of her mother in a Prague bank, the mother herself being a resident of New York who had died while temporarily resident in Czechoslovakia, the court would not give effect to Czechoslovak exchange control regulations which forbade the transfer of funds in Czechoslovakia save under license from that government, since it could not be said that the Prague bank owned something which the court would help it to keep, but rather that

of payment of debts will not be enforced so as to delay or defeat the performance of obligations which, under the proper law of the contract, are payable in the United States.²

It has been a fundamental principle of the common law since the time of Lord Mansfield that in the absence of an international treaty or agreement to the contrary effect, the courts of one country will not enforce the revenue laws of a foreign country, since the revenue laws of one country have no force in another,³ and so, where foreign exchange or foreign currency laws or regulations are found by a domestic court to be, or to have the character of, ~~revenue-raising measures, they will not be enforced~~ and this principle is held to be applicable even though the state imposing the exchange or currency regulations is a member of the International Monetary Fund, established by the Bretton Woods International Monetary Agreement, to which the United States is also a subscriber.⁴

Where foreign exchange control laws are not confiscatory or otherwise contrary to the public policy of the United States, but are merely regulatory of foreign exchange transactions, or where they are not dissimilar to fiscal measures adopted by the government of the United States in relation to its own citizens, such foreign exchange laws will be given recognition and effect by the courts in matters of contract which are affected by those laws.⁵

the deceased's daughter owned something which the court would help her to get, and further, since such a view appeared to be in accord not only with the public policy of the state of New York, but also with the public policy of the United States in relation to the country concerned. *Re Liehl's Estate*, 201 Misc 1102, 106 NYS2d 715.

2. *Perkins v De Witt*, 197 Misc 369, 94 NYS2d 177, *affd in part and revd in part on other grounds* 279 App Div 903, 111 NYS 2d 752.

3. *Moore v Mitchell* (CA2 NY) 30 F2d 600, 65 ALR 1354, *affd* 281 US 18, 74 L Ed 673, 50 S Ct 175; *United States v Horst* (DC Del) 270 F Supp 365; *Colorado v Harbeck*, 232 NY 71, 133 NE 357; *Beadall v Moore*, 199 App Div 531, 191 NYS 826; *Banco Do Brasil, S. A. v A. C. Israel Commodity Co.* 12 NY2d 371, 239 NYS2d 872, 190 NE2d 235, *cert den* 376 US 906, 11 L Ed 2d 605, 84 S Ct 657.

Holman v Johnson, 1 Cowp pt 1, p 341, 98 Eng Reprint 1120.

It is a universally recognized principle that the revenue laws of one country have no force in another. *Marshall v Sherman*, 148 NY 9, 42 NE 419, *motion for reh den* *Marshall v Murdock*, 148 NY 755, 43 NE 988.

4. *Banco Do Brasil, S. A. v A. C. Israel Commodity Co.* 12 NY2d 371, 239 NYS2d 872, 190 NE2d 235, *cert den* 376 US 906, 11 L Ed 2d 605, 84 S Ct 657; *Cermak v Bata Akciová Společnost* (Sup) 80 NYS2d 782, *affd* 275 App Div 919, 90 NYS2d 680. *Annotation*: 165 ALR 796.

5. "If the international agreements entered into as a result of the Bretton Woods Con-

ference of July, 1944, are to change that rule [that is, the rule that courts do not enforce the revenue laws of another state or country], I will at least await a decision of some appellate court blazing that trail or a case before me in which that point is briefed and decision of it is actually necessary." *Cermak v Bata Akciová Společnost*, *supra*.

Where an agency of the Brazilian Government sued to recover damages for alleged conspiracy between a Brazilian coffee exporter and an American importer to contravene the exchange control regulations imposed by that government in purported compliance with the Bretton Woods Agreement, as a result of which it was alleged that such government was deprived of United States dollars which it would otherwise have received, it was held that the plaintiff could not succeed, first because the exchange control regulations in question were, in fact, revenue-raising laws of a foreign country, and would not, on settled principles of international law, be enforced; and secondly, because the questioned transaction did not come within the ambit of Article 8 § 2(b) of the Bretton Woods Agreement (60 Stat 1411). *Banco Do Brasil, S. A. v A. C. Israel Commodity Co.* 12 NY2d 371, 239 NYS2d 872, 190 NE 2d 235, *cert den* 376 US 906, 11 L Ed 2d 605, 84 S Ct 657.

As to the effect of the Bretton Woods Agreement, see § 36, *infra*.

6. *Bethlehem Steel Co. v Zurich General Acci. & Liability Ins. Co.* 307 US 265, 83 L Ed 1280, 59 S Ct 856, *reh den* 307 US 650, 83 L Ed 1529, 59 S Ct 1040, *reh den* 308 US 631, 84 L Ed 526, 60 S Ct 65, and *revd* 279 NY 495, 18 NE2d 673; *Guaranty Trust Co. v Henwood*, 307 US 247, 83 L Ed 1266, 59 S Ct 847; *Holzer v Deutsche Reichs-*

And this principle applies with even greater force where the foreign control laws are in accordance with international treaties or arrangements to which the United States Government and the foreign government concerned are parties, since adherence to such treaties or arrangements by the United States Government is a manifestation of the national public policy.⁷

Public policy may be consistent in itself, but in its application to particular circumstances, it may be subject to variation due to political, economic, or other factors.⁸ The changes in public policy, or rather in its application, are frequently reflected in the decided cases relating to the enforcement or nonenforcement in domestic courts of currency laws of other countries.⁹

bahn-Gesellschaft, 277 NY 474, 14 NE2d 798; Amstelbank, N. V. v Guaranty Trust Co. 177 Misc 548, 31 NYS2d 194.

"If morals enter into the discussion of the conflict of laws in matters purely monetary, then what we deem right for the preservation of our financial structure cannot be wrong when employed by others." Goodman v Deutsch-Atlantische Telegraphen Gesellschaft, 166 Misc 509, 2 NYS2d 80.

Exchange control laws which were not confiscatory but were merely regulatory, and which applied to all nonresidents and foreigners, under which funds paid by the plaintiff to the defendant were held in a blocked account in Germany so that payment could not be rendered without the consent of the German foreign exchange control authority, could not be disregarded by the courts, and the necessary permission not having been obtained, plaintiff's case must fail. Steinfink v North German Lloyd S. S. Co. 176 Misc 413, 27 NYS2d 918.

A former resident of Czechoslovakia was not entitled to recover a deposit previously made by her in the defendant bank in Czechoslovakia at a time when, and with the knowledge that under the currency laws then in force, delivery of foreign currencies could not be made without the permission of the exchange control authorities, plaintiff never having made a demand of the bank for payment in Czechoslovakia, nor having obtained the requisite permission from the control authority. Werfel v Zivnostenska Banka, 260 App Div 747, 23 NYS2d 1001, reh den 261 App Div 817, 25 NYS2d 781, revd on other grounds 287 NY 91, 38 NE2d 382.

An expropriation decree of the Netherlands Government in exile having been held to be valid and not violative of the public policy of the United States or of the state of New York, the state of the Netherlands was by comity entitled to have effect given to that decree in an action to replevy securities claimed to have been looted during the occupation of Holland and subsequently placed on deposit in New York banks. The Netherlands v Federal Reserve Bank (DC NY) 79 F Supp 966.

7. A Cuban currency decree providing that all sums payable to residents of Cuba must be paid in Cuban pesos, irrespective of the currency stipulated by the contract, was not

violative of United States public policy, and, the contract being governed by Cuban law and Cuba being then a member of the International Monetary Fund, recognition and effect must be given to that law in relation to the contract. Confederation Life Assn. v Ugalde (Fla App) 151 So 2d 315, revd in part on other grounds (Fla) 164 So 2d 1, cert den 379 US 915, 13 L Ed 2d 186, 83 S Ct 263.

Czechoslovakian currency laws which prohibited, except under license issued by the Czechoslovakian currency control authority, the payment of any currency or foreign exchange to persons not resident in Czechoslovakia, were enforced in Perutz v Bohemian Discount Bank in Liquidation, 304 NY 533, 110 NE2d 6 (holding that a former Czech citizen whose pension was blocked under Czech currency control laws could not obtain a judgment in the New York courts for payment of the blocked pension, since neither he nor his administratrix had procured the necessary license required by the controlling regulations. The court pointed out that the Czech regulations, being conformable with the provisions of the Bretton Woods Agreement, could not be considered as contrary to the public policy of the United States, in view of the fact that both governments were members of the International Monetary Fund established by the Bretton Woods Agreement).

8. "Even between our citizens it has been remarked that public policy is a dangerous ground on which to base invalidity." McQuade v Stoneham, 263 NY 323, 189 NE 234, reh den 264 NY 460, 191 NE 514.

It has been said that public policy "is a very unruly horse; when once you get astride it, you never know where it will carry you." Richardson v Mellish, 2 Bing 229, 130 Eng Reprint 294.

9. The principle applied in Perutz v Bohemian Discount Bank in Liquidation, 304 NY 533, 110 NE2d 6, namely, that a state court could not refuse recognition and enforcement of a foreign exchange control law upon the ground that it was contrary to the public policy of the United States, since the application by the United States of similar currency regulations, coupled with the United States' membership of the International Monetary Fund, to which the foreign restricting state also subscribed, precluded this view, was

The public policy of any individual state of the United States must give way in the face of the assertion of a federal interest in the disposition of litigation affecting foreign relations, and so, where the Government of the United States has manifested, by treaty or compact or executive agreement made with a foreign power, a public policy which recognizes and will enforce laws of the foreign government, even though they are confiscatory in their nature, the courts of a state must give effect to this paramount public policy, even though it runs counter to the public policy of the state itself.¹⁰

~~10. The public policy of a state is not affected by Bretton Woods Agreement.~~

The United Nations International Monetary and Financial Conference, held at Bretton Woods, New Hampshire, in 1944, produced as its final act the Bretton Woods International Monetary Agreement (commonly called the Bretton Woods Agreement).¹¹ The Agreement, which was intended to promote international monetary co-operation, to regulate the international flow of capital, and to establish exchange stability among the member countries, established the International Monetary Fund as the instrumentality for implementing the objects of the Agreement. Although contemplating the eventual disappearance of all exchange restrictions, as constituting barriers to international trade and commerce, the Agreement recognized that in the

not followed in *Sulyok v Penzintezeti Kozpont Budapest*, 279 App Div 528, 111 NYS2d 75, mod 304 NY 704, 107 NE2d 604, reh den 304 NY 742, 108 NE2d 407, nor in *Stern v Pesti Magyar Kereskedelmi Bank*, 278 App Div 811, 105 NYS2d 352, affd 303 NY 881, 105 NE2d 106, in both of which cases Hungarian exchange control regulations were denied recognition and enforcement on grounds of public policy.

The same Czechoslovakian exchange control legislation which was upheld in *Werfel v Zivnostenska Banka*, 260 App Div 747, 23 NYS2d 1001, reh den 261 App Div 817, 25 NYS2d 781, revd on other grounds 287 NY 91, 38 NE2d 382, was held in *Re Liehl's Estate*, 201 Misc 1102, 106 NYS2d 713, in factual circumstances not markedly dissimilar but against a changed international background, to be unenforceable as contravening public policy, in that it was confiscatory in nature and prejudicial to the rights of claimants in this country.

10. *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 14 L Ed 2d 804, 84 S Ct 923; *United States v Pink*, 315 US 203, 86 L Ed 796, 82 S Ct 552; *United States v Belmont*, 301 US 324, 81 L Ed 1134, 57 S Ct 758; *United States v National City Bank (DC NY)*, 90 F Supp 448; *Anderson v N. V. Transandine Handelmaatschappij*, 289 NY 9, 43 NE2d 502; *United States v President & Directors of Manhattan Co.* 276 NY 396, 12 NE2d 318, reh den 277 NY 671, 14 NE2d 383; *Stephen v Zivnostenska Banka Nat. Corp.* 23 Misc 2d 855, 199 NYS2d 797, affd 15 App Div 2d 111, 222 NYS2d 128, affd 12 NY2d 781, 235 NYS2d 1, 186 NE2d 676; *Amstelbank, N. V. v Guaranty Trust Co.* 177 Misc 548, 31 NYS2d 194.

The public policy of the United States, as

declared by the Constitution, that private property is not to be taken without just compensation, does not preclude the maintenance of an action in the United States by the Federal Government, as assisnee of claims of the Soviet Government, against American nationals, to recover from a depository funds deposited by a Russian corporation, the assets of which were thereafter nationalized and expropriated by the Soviet Government. *United States v Belmont*, 301 US 324, 81 L Ed 1134, 57 S Ct 758.

The currency regulations of a foreign state, in the context of a given case, may not be an appropriate subject for evaluation by state courts applying local conceptions of public policy. *French v Banco Nacional de Cuba*, 23 NY2d 46, 295 NYS2d 433, 242 NE2d 704.

Rights of succession to property under local law may be affected by an overriding federal policy where a treaty makes different or conflicting arrangements. In such event, the state policy must give way. *State Land Board v Kolovrat*, 220 Or 448, 349 F2d 255, revd on other grounds *Kolovrat v Oregon*, 366 US 187, 6 L Ed 2d 218, 81 S Ct 922.

Paulsen and Sovern, "Public Policy" in the Conflict of Laws". 56 Columbia L Rev 969.

11. The Bretton Woods International Monetary Agreement of 1945 was ratified and given statutory effect by Act of Congress of December 27, 1945. 60 Stat 1411; Bretton Woods Agreement Act, 22 USC § 286(h).

The Bretton Woods Agreement is a multi-lateral international treaty and, as such, is, by virtue of Article 6 clause 2 of the Constitution of the United States, part of the supreme law of the land. *Kolovrat v Oregon*, 366 US 187, 6 L Ed 2d 218, 81 S Ct 922.

period of economic disruption following World War II, exchange control restrictions would probably be necessary for the member countries, or for some of them. The Agreement provided, inter alia: "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member."¹² The Agreement merely requires the member countries not to enforce "exchange contracts" which "involve the currency of a member" and which are "contrary to the exchange control regulations" of a member, where those controls are "maintained or imposed consistently with the Agreement."¹³ Furthermore the provision of the Bretton Woods Agreement¹⁴ that exchange contracts which involve the currency of any member state adherent to the Agreement, shall be ~~unenforceable~~ in the territories of any other member state adherent to the Agreement, is merely an obligation to withhold judicial assistance to secure the benefits of such contracts, but does not create any obligation to impose tort penalties on those who have fully executed such contracts, and the fact that by virtue of the Agreement United States courts ~~must not enforce~~ a contract between individuals which contravenes the exchange control regulations of any member state, imposes no obligation on those individuals not to enter into such contracts; it merely means that if they do so agree, they act at their peril inasmuch as they may not look to the courts for enforcement, but this does not imply that one who enters into such a contract commits a tort for which he must respond in damages.¹⁵ Upon a strict construction, the scope of the clause, at least insofar as it may be urged as requiring recognition and enforcement of exchange control laws of foreign countries, appears to be limited. In general, in cases where the Bretton Woods Agreement has been relied on as requiring recognition by the courts of foreign exchange control laws, the courts have, even where upholding the restricting exchange law, and although making some reference to the Bretton Woods Agreement, tended to base their decisions upon principles of conflict of laws, rather than upon the provisions of Article 8 of the Agreement.¹⁶ It has, for example, been stated

12. Bretton Woods International Monetary Agreement, Art 8 § 2(b).

13. Bretton Woods International Monetary Agreement, Art 8 § 2(b).

14. Bretton Woods International Monetary Agreement Act, 60 Stat 1411, Art 8 § 2(b).

15. Banco Do Brasil, S. A. v A. C. Israel Commodity Co. 12 NY2d 371, 239 NYS2d 872, 190 NE2d 235, cert den 376 US 906, 11 L Ed 2d 603, 84 S Ct 637.

16. Perutz v Bohemian Discount Bank in Liquidation, 304 NY 333, 110 NE2d 6; Kraus v Zivnostenska Banka, 187 Misc 681, 64 NYS 2d 208.

In the Perutz Case and in the Kraus Case, the plaintiffs sought recovery in United States courts of pension money and of deposited securities respectively, to which the defendants pleaded as a defense the same Czechoslovakian exchange control decrees, as barring payment outside Czechoslovakia, except under authority of a license from the Czechoslovakian control authorities. In each case the validity of the

legislation was upheld and relief was denied to the plaintiffs, but, although reference was made to the Bretton Woods Agreement and to the obligations of members thereof, the rationale of the decisions apparently was that the law governing the contract was the law of the place of performance, the *lex solutionis*, which was also the law of the restricting country, Czechoslovakia; therefore the Czechoslovakian exchange control legislation was given effect.

Similarly, a Cuban currency law providing that payment of all sums due to residents of Cuba was to be made in pesos, irrespective of the currency specified in the contract, was valid and not violative of United States policy, and since Cuban law governed the contract, the court felt obligated by the International Monetary Fund Agreement to give effect to the currency law. *Confederation Life Assn. v Ugalde* (Fla App) 151 So 2d 315, rev'd in part on other grounds (Fla) 164 So 2d 1, cert den 379 US 915, 13 L Ed 2d 186, 85 S Ct 263.

In one case, however, the provisions of the Bretton Woods Agreement, Article 8 § 2(b),

that the courts, not only of this country but of foreign countries as well, have, in interpreting contracts involving matters affected by the Bretton Woods Agreement consistently held that the laws of the state where the parties intended the contract to be performed govern the transaction.¹⁷

Although it would appear from some of the cases that the provisions of Article 8 § 2(b) of the Bretton Woods Agreement do not have a coercive effect to compel the courts to recognize and enforce foreign exchange control laws, there is authority for the view that since the United States is a signatory of the Agreement and has enacted its provisions into the domestic law, the courts cannot, upon the ground of repugnancy to public policy, refuse to give effect to foreign exchange control laws consistent with the Agreement, especially in view of the fact that this country itself applies, or has the power to apply, currency and foreign exchange control laws. The argument is that exchange control legislation cannot, per se, be considered as contrary to the public policy of the United States, and that, a superior and paramount national public policy having been manifested by the United States' adherence to the Agreement and by its membership in the International Monetary Fund, a multilateral, international treaty, the courts cannot hold foreign exchange control legislation, conformable to the agreement, to be invalid or inoperative here.¹⁸ Further, it has been held that if the exchange laws and regulations

were treated by the court as determinative in barring the plaintiff from recovering a deposit in a Czechoslovakian bank, payment of which was barred under the same Czechoslovakian exchange control laws as were under consideration in the Perutz Case and the other Czechoslovakian cases noted supra. However, upon Czechoslovakia's ceasing to be a member of the International Monetary Fund between the date of the referee's finding and the date of judgment by the court, the plaintiff was allowed to recover. *Stephen v Zivnostenska Banka Nat. Corp.* 23 Misc 2d 855, 199 NYS2d 797, affd 15 App Div 2d 111, 222 NYS2d 128, affd 12 NY2d 781, 235 NYS2d 1, 186 NE2d 676.

17. *Theye Y Ajuria v Pan American Life Ins. Co.* (La App) 154 So 2d 450, revd on other grounds 245 La 755, 161 So 2d 70 (cert den 377 US 997, 12 L Ed 2d 1046, 84 S Ct 1922, reh den 379 US 872, 13 L Ed 2d 79, 85 S Ct 20), citing: *Menendez v Aetna Ins. Co.* (CA5 Fla) 311 F2d 437, vacated on other grounds 376 US 781, 12 L Ed 2d 82, 84 S Ct 1131; *Menendez Rodriguez v Pan American Life Ins. Co.* (CA5 Fla) 311 F2d 429, vacated on other grounds 376 US 779, 12 L Ed 2d 82, 84 S Ct 1130; *Pan American Life Ins. Co. v Raij* (Fla App) 156 So 2d 785, quashed (Fla) 164 So 2d 204, cert den 379 US 920, 13 L Ed 2d 334, 85 S Ct 275; *Pan American Life Ins. Co. v Recin* (Fla App) 154 So 2d 197, cert den 377 US 990, 12 L Ed 2d 1044, 84 S Ct 1908, reh den 379 US 871, 13 L Ed 2d 78, 85 S Ct 17; *Cermak v Bata Akciovna Spolecnost* (Sup) 80 NYS2d 782, affd 275 App Div 919, 90 NYS2d 680; *Kraus v Zivnostenska Banka*, 187 Misc 681, 64 NYS2d 208.

Kahler v Midland Bank, Ltd. [1949] 2 All Eng 621, [1950] AC 24 (HL).

Where a policy of insurance issued in the United States to a resident of Cuba provided that all premiums were to be paid in the United States and that payment of moneys due by the insurer would be paid in the United States in United States dollars, since the contract created by the policy was not a foreign "exchange contract" within the meaning of Article 8 § 2(b) of the Bretton Woods Agreement, the Agreement did not affect such policy, and because the contract was to be performed in Louisiana, the controlling law was the law of Louisiana, and effect would not be given to the currency decrees of the Cuban Republic promulgated after the policy had become a fully paid-up policy, since those decrees could not affect the previously existing obligation under the policy. *Theye Y Ajuria v Pan American Life Ins. Co.* (La App) 154 So 2d 450, revd on other grounds 245 La 755, 161 So 2d 70, cert den 377 US 997, 12 L Ed 2d 1046, 84 S Ct 1922, reh den 379 US 872, 13 L Ed 2d 79, 15 S Ct 20.

18. *State Land Board v Kolovrat*, 220 Or 448, 349 P2d 255, revd on other grounds *Kolovrat v Oregon*, 366 US 187, 6 L Ed 2d 218, 81 S Ct 922; *Perutz v Bohemian Discount Bank in Liquidation*, 304 NY 533, 110 NE2d 6.

Plaintiff whose pension funds, payable in Czechoslovakia, were impounded and blocked in accordance with Czechoslovak currency control laws, could not obtain judgment in a New York court for his pensions, since he had not obtained the license for transfer of funds required by those laws, and, in view of the United States membership in the Bretton Woods Agreement, the exchange control laws could not be said to be contrary to the public policy either of the United States or of New

of a foreign country satisfy the requirements of the International Monetary Fund Agreement and the foreign state is an adherent to that agreement, no member state of the United States may, by statute or judicial decision, refuse to give to nationals of the foreign state rights secured to such nationals by treaties made between their government and the Government of the United States because of fear that the implementation of laws affecting foreign exchange might possibly not operate to the complete satisfaction of the particular state authorities in that the exchange control legislation might adversely affect citizens of the United States.¹⁹

But even the view that the courts of the forum are estopped by the Agreement from holding that foreign currency laws are invalid as being repugnant to the public policy of the forum, has been challenged, and it appears that the courts will, notwithstanding the Agreement, refuse to recognize or implement foreign exchange or currency laws which are found to be revenue-raising laws, upon the well-settled rule of conflict of laws that foreign revenue laws are refused recognition and implementation in other countries.²⁰ The view has also been taken that the Bretton Woods Agreement can have no application to enforcement of foreign exchange control legislation where that legislation is retrospective, and the foreign government has lost its in personam jurisdiction over litigants seeking to enforce in this country payment of moneys purportedly blocked by the foreign currency regulations.¹

The Bretton Woods Agreement can have no application to the exchange or currency regulations of a country which has ceased to be a member of the International Monetary Fund and which is therefore no longer a party to the Agreement.²

York. *Perutz v Bohemian Discount Bank in Liquidation*, supra.

19. Where, under a state statute which severely restricted the right of nonresident aliens to take by succession or testamentary disposition real or personal property situate in Oregon, unless the law of the foreign state concerned conferred an unqualified and enforceable right upon citizens of the United States to inherit and receive property situate in the same foreign country, the Oregon Supreme Court held that since the effect of certain Yugoslav exchange control laws and regulations might prevent American citizens from receiving the full value of a Yugoslavian inheritance, the claims of relatives, resident in Yugoslavia, of two Oregon intestate decedents were barred. In reversing this decision, the United States Supreme Court declared that since both the United States and Yugoslavia were adherent to the Bretton Woods Agreement and since the Yugoslav exchange control laws and regulations met the requirements of that agreement, any state was precluded from holding that such exchange laws or regulations provided a basis for defeating rights conferred upon Yugoslavian citizens by a pre-existing "most-favored nation" treaty with the United States. *Kolovrat v Oregon*, 366 US 167. 6 L Ed 2d 218, 81 S Ct 922.

20. § 35, supra.

1. Where an insurer in a policy of insurance issued to a former resident of Cuba who, subsequent to the issue of the policy, had departed that country and assumed residence in the United States, pleaded the provisions of Cuban monetary decrees and the provisions of Article 8 § 2(b) of the Bretton Woods Agreement as prohibiting payment on the policy, it was held that the agreement had no application to the case, since the Cuban government not only had lost whatever jurisdiction it had possessed over the subject matter of the litigation, but also had lost any in personam jurisdiction over the insured; and the Cuban monetary decrees did not apply to the situation of a national of that country who was seeking enforcement here of an executory contract according to the terms of an obligation existing prior to the promulgation of the monetary decrees. *Blanco v Pan-American Life Ins. Co.* (DC Fla) 221 F Supp 219, affd in part and revd in part on other grounds (CA5) 362 F2d 167.

2. *Pan American Life Ins. Co. v Blanco* (CA5 Fla) 362 F2d 167; *Stephen v Zivnostenska Banka Nat. Corp.* 31 Misc 2d 45, 140 NYS2d 323, affd 286 App Div 999, 145 NYS2d 310.

The laws of a nonmember nation are not given extraterritorial effect by the terms and conditions of the Bretton Woods Agreement. *Confederation Life Assn. v Vega Y Arminan* (Fla) 207 So 2d 33.

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§ 37. Exchange control legislation as not affecting adversely title to foreign securities.

The prime purpose of certain United States exchange control legislation³ "freezing" foreign funds or securities situate in the United States by prohibiting the transfer thereof, save by an assignment made expressly subject to a release of the credit by the Treasury, was to prevent the use of such foreign funds or securities in a manner prejudicial to the interests of the country. The legislation did not constitute a seizure by the government of the foreign property, nor forbid its attachment here by legal process, since payment of the funds might be permitted by the Treasury where the object of the legislation would not be frustrated.⁴ The intent and effect of the legislation was not to sequester or adversely affect the title to the "frozen" funds or securities, nor to destroy choses in action in respect of them,⁵ nor to bar claims against decedents' estates.⁶ The Executive orders interdicted only payment, and not the prosecution of an action, nor the assignment of a claim to the "frozen" funds.⁷ A similar view has been taken in construing exchange control and currency regulations of foreign countries prohibiting payment of money or assignment of securities except under the authority of a license issued by the foreign government.⁸

3. Executive Order No. 8389 as amended by Executive Order No. 8565, 12 USC § 95.

4. *Commission for Polish Relief, Ltd. v Banca Nationala A Romaniei*, 176 Misc 1070, 29 NYS2d 189, affd 262 App Div 543, 30 NYS2d 690, affd 288 NY 332, 43 NE2d 345.

5. *Singer v Yokohama Specie Bank*, 293 NY 542, 38 NE2d 726, reh den 294 NY 689, 60 NE2d 842; *Stern v Pesti Magyar Kereskedelmi Bank*, 278 App Div 811, 105 NYS2d 352, affd 303 NY 881, 105 NE2d 106; *Bollack v Societe Generale Pour Favoriser le Developpement du Commerce*, 263 App Div 601, 33 NYS2d 986, leave to app den 264 App Div 767, 35 NYS2d 717; *Merilaid & Co. v Chase Nat. Bank*, 189 Misc 285, 71 NYS2d 377; *Leeds v Guaranty Trust Co. (Sup)* 65 NYS2d 431, affd 272 App Div 909, 72 NYS 2d 409, affd 297 NY 1019, 80 NE2d 538; *R. & L. Goldmuntz Sprl v Fischer (Sup)* 54 NYS2d 635; *Commission for Polish Relief, Ltd. v Banca Nationala A Romaniei*, 176 Misc 1070, 29 NYS2d 189, affd 262 App Div 543, 30 NYS2d 690, affd 288 NY 332, 43 NE2d 345.

6. *Re Mason's Estate*, 194 Misc 308, 86 NYS2d 232.

7. The obtaining of the United States Treasury's consent, as required by the relevant Executive orders, was not a condition precedent to the assignment by a nonresident alien of securities held for her account in a New York trust company, since such consent was required merely to permit the bank to make payment to the plaintiff as assignee. *Leeds v Guaranty Trust Co. (Sup)* 65 NYS2d 431, affd 272 App Div 909, 72 NYS2d 409, affd 297 NY 1019, 80 NE2d 538.

The fact that foreign funds or foreign currency could not lawfully be transferred save under a license from the Secretary of the Treasury issued pursuant to an Executive order, does not affect a plaintiff's title to those funds and, if the plaintiff is found to be entitled to such funds, judgment may be entered in his favor, provision being made therein that no payment shall be made to the plaintiff by the defendant except in accordance with such conditions as may be prescribed by the Treasury if, and when, a license is granted. *Merilaid & Co. v Chase Nat. Bank*, 189 Misc 285, 71 NYS2d 377.

8. Entry of judgment for money due to the plaintiff under a contract with an Austrian bank and its French principal was not barred by German or French foreign exchange regulations prohibiting payment save under the authority of a government license, since such regulations do not, per se, prevent an adjudication of liability, and, if judgment were rendered for the plaintiff, a license to pay might be forthcoming from the appropriate exchange control authority. *Sabl v Laenderbank Wien Aktiengesellschaft (Sup)* 30 NYS 2d 608, supp op 33 NYS2d 764, affd 266 App Div 832, 43 NYS2d 270 (distinguishing *Werfel v Zivnostenska Banka*, 260 App Div 747, 23 NYS2d 1001, rearg den 261 App Div 817, 25 NYS2d 781, revd on other grounds 287 NY 91, 38 NE2d 382, upon the ground that in the *Werfel* Case an application for a license to transfer the blocked funds had been made and had been refused, whereas in the *Sabl* Case no such application had been made prior to the time of judgment).

POPE MFG. CO. vs. GORMULLY

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(1892)

"Clean Hands Doctrine"

CONFIDENTIAL

U.S. AIR FORCE
(1951)

"Clean Air Act"

until September 21. Here the record becomes silent.

It is nowhere disclosed that the defendant appeared to prosecute his motion on the 21st of September, and whatever liberality might be indulged under the provisions of the territorial code, as now expounded by the Supreme Court of the State, we are not prepared to hold, in passing upon the question before us, that any motion was pending on the 7th of December, 1889, there being no evidence whatever that a motion was ever made, except the action of the court assigning the hearing of a proposed motion for a day more than two months before, which came and went without such hearing, the meditated motion having apparently been waived and abandoned.

This bill of exceptions was not settled and filed within the time allowed by law or under any order of the court. The alleged motion for a new trial was not filed until December 14, 1889, and had not been made, and no notice of intention to make it given, within the time allowed by law or by any order of the court. If such notice of intention could lawfully have been given or renewed, or such motion lawfully been made, within the view of the state tribunal, notwithstanding the expiration of time, this had not been done, and the motion was not pending within the intent and meaning of the twenty-third section of the Enabling Act, when the application for removal was made, even if a removal could have been had thereunder, if such a motion had been then pending. And the renewal of notice and motion after the State was admitted, if it could have been made, would necessarily have been made in the state court, whose jurisdiction would have attached to determine it. On August 22, 1890, notice was given that "the motion for a new trial heretofore made in this action" would be brought on for hearing, in the Circuit Court, on September 5, 1890, and the record recites that on October 10, 1890, "defendant moves for a new trial." The motion could not be treated as having come over from the territorial court, nor could such a motion be made in the Circuit Court, as final judgment precluded the transfer.

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We are of opinion that the motion to remand should have been sustained; and, therefore,

Reverse the judgment and remand the case to the Circuit Court with directions to send it back to the district court for the fifth judicial district, Stutsman county, North Dakota, and to return the original files to that court.

THE POPE MANUFACTURING COMPANY, Appt.,

R. PHILIP GORMULLY.

(See S. C. Reporter's ed. 224-232.)

Contract, when in violation of public policy—unconscionable contract—specific performance, when not enforced.

1. A court of equity will not decree specific performance of a contract wherein defendant is

consideration of a license to use certain patents belonging to plaintiff, agrees never to import, manufacture, or sell any machines covered by certain other patents, nor to dispute or contest the validity of such patents or plaintiff's title thereto, and to morally assist plaintiff in maintaining public respect for and preventing infringements upon the same; and further agrees that if after the termination of his license he shall continue to make, sell or use any machine or part thereof containing such patented inventions plaintiff shall have the right to treat him as an infringer, and to sue out an injunction against him without notice.

2. It is the duty of a court of equity to refuse aid in the enforcement of unconscionable, oppressive, or injurious contracts; and to turn the party claiming the benefit of such contract over to a court of law.

3. Specific performance is not of absolute right, but one which rests entirely in judicial discretion, exercised according to the settled principles of equity, and not arbitrarily or capriciously, and always with reference to the facts of the particular case.

4. Specific performance of a contract which was an artfully contrived snare to bind the defendant in a manner which he did not comprehend at the time he became a party to it, will not be enforced by a court of equity.

[No. 204.]

Argued March 9, 10, 1892. Decided April 4, 1892.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, dismissing a bill in equity, wherein the plaintiff sought an accounting upon a contract, and an injunction prohibiting the defendant from manufacturing and selling bicycles and tricycles containing certain patented devices, in violation of a contract entered into between the parties. *Affirmed.*

See same case below, 34 Fed. Rep. 877.

Statement by Mr. Justice Brown:

This was an appeal from a decree dismissing a bill in equity, wherein the plaintiff sought an accounting upon a contract, and an injunction prohibiting the defendant from manufacturing and selling bicycles and tricycles containing certain patented devices, in violation of a contract entered into between the parties on December 1, 1884. A copy of this contract is printed in the margin.*

*This agreement made this first day of December, 1884, by and between the Pope Manufacturing Company, a corporation established under the laws of Connecticut and having a place of business in Boston, Massachusetts, party of the first part, and R. Philip Gormully, of Chicago, Illinois, party of the second part, witness:—

That whereas letters patent of the United States, numbered and dated as in the following list, were duly granted for the inventions therein set forth, and by certain good and valid assignments the same are now owned by the party of the first: (Here follows a descriptive list of sixty-five patents.)

And whereas said party of the second part is desirous of making, using, and selling to others to be used bicycles embodying in their construction and modes of operation certain of the said inventions, and of securing license thereof under certain of said letters patent: Now, therefore, in consideration of one dollar by the party of the second part to the party of the first part, the receipt whereof is

Note.—As to construction of written contracts: how far a question for the court, see note to Ward v. United States, 22: 702.

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As to contracts: their interpretation and validity: see note to Bell v. Struen, 11: 83.

As to what contracts are void as against public

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(225) The bill alleged that the plaintiff was engaged in the manufacture and sale of bicycles and tricycles of superior quality; that these machines embodied in their construction inventions covered by letters patent owned by the plaintiff; that in pursuance of a plan adopted by it, it reserved to itself the right to manufacture and sell the highest grades, and among others a style of bicycle known as the Standard Columbia bicycle; that under the agreement entered into with the defendant the latter was granted the right to make, use, and sell bicycles 52 inches in size and upwards, and of certain style and finish, and embodying the inventions set forth in certain patents named; and that he should not manufacture bicycles embodying the features of certain other patents specified in the agreement. That said defendant expressly agreed that he would not manufacture or sell, directly or indirectly, bicycles, etc., containing any of the inventions or claims in either of said letters patent, nor make, use, or sell, directly or indirectly, certain parts of bicycles specified in the contract, other than according to the conditions and terms in said license.

(226) That it was provided by the eleventh clause of said contract that the defendant might surrender the license at any time by written notice, but it was provided in the same clause that no revocation, surrender, or termination of said license, or any part of it, should release or discharge said Gormully from any liability which might have accrued, become due, or arisen prior to, or at the date of, said surrender, or from the obligations, admissions,

and agreements contained in sections 6, 7, 8, 9, and 11; that such admissions and agreements were a part of the consideration for the granting of the license, and were irrevocable except by the written consent of the licensor; that it was provided in said clause 11 that if the licensee should continue, after the termination of said license, to make, sell, or use any of the machines or parts thereof containing either of the parts referred to in section 9, plaintiff should have the right to treat the defendant as a party to, and in breach of, the contract; and that defendant, by said section 9, consented that if he did make, use, or sell any machine containing such parts, an injunction might issue in favor of the plaintiff restraining him from so doing.

After setting forth an immaterial modification of such contract subsequently agreed upon, it further averred that the defendant entered upon the manufacture of bicycles under said license, made returns thereof, and paid royalties to plaintiff in accordance with the same, and that said license in respect to the clause claimed to have been violated is still in full force and effect. The bill further charged that since March 1, 1880, defendant has violated the ninth clause of the contract in constructing bicycles of a kind prohibited by the contract, in violation of the first and ninth clauses of said contract.

For which reasons the plaintiff prayed for an account of the machines made in violation of the agreement, and for an injunction.

The court below found that there was no contest between the parties as to the execution

policy or as illegal; illegal consideration, when a license; agreement not to bid; lobby services; for contingent fees; to prevent competition, see note to *Hartle v. Nutt*, 7: 223.

As to contracts in restraint of trade, see note to *Oregon Steam Nav. Co. v. Wilson*, 22: 315.

As to when specific performance of contracts decreed, and when refused, see notes to *Hopburn v. Dunlop*, 4: 65, *Colson v. Thompson*, 4: 233, and *Brashler v. Gratz*, 5: 222.

That plaintiff must show performance, or readiness to perform, and offer to perform; decreed against subsequent purchaser, see notes to *Colson v. Thompson*, 4: 233, and *Pratt v. Carroll*, 3: 67.

That title may be made any time before decree; necessary parties to action; when objection made; striking out parties, see notes to *Hopburn v. Dunlop*, 4: 65, and *Morgan v. Morgan*, 4: 242.

As to laches of plaintiff; change of circumstances; time, when material, see notes to *Pratt v. Carroll*, 3: 67, and *Hopburn v. Dunlop*, 4: 65.

As to time or excess of price when not a bar to action for specific performance, see note to *Brashler v. Gratz*, 5: 222.

As to when court will decree conveyance of land situated beyond its territorial jurisdiction, see note to *Oakley v. Bennett*, 13: 593.

herely acknowledged, and in further consideration of the covenants, agreements, and stipulations hereinafter contained, said parties have consented and agreed as follows:

First. The party of the first part agrees to license, and does hereby license, the party of the second part, subject to the conditions and provisions herein named, to manufacture at the shop or factory of the party of the second part, in Chicago, in the State of Illinois, and in no other place or places, bicycles of fifty-two inch size and upwards, of such quality, construction, grade, and finish as to be sold in the market at retail prices not greater than ninety per cent of the retail list prices of the Standard Columbia bicycles of same or nearest similar sizes and styles, severally embodying the inventions set forth in those of the said letters patent numbered there follow the numbers of fifteen patents, or either of them or either claim thereof and no others, so far as applicable within the conditions and restrictions herein contained, and to sell said bicycles to others to be used, and to use the same within and throughout the United States and the territories thereof. This license is not to be understood or construed as a license to import, manufacture, buy, sell, or deal in bicycles or tricycles, or in wheels, saddles, springs, rims, bearings, or other patented parts thereof otherwise than as herein expressly stipulated. This license is not transferable, and is in addition to and

not to modify or supersede previous ones except as herein expressed.

Second. The party of the second part hereby agrees to maintain a suitable place of business in said Chicago, and to keep there on hand a stock of bicycles as above referred to, and to promote and aid in extending the interest in bicycling and tricycling and the use of bicycles among those not already wheelmen, and to advertise the business by occupying and paying for one page space continuously during the term of this license in the monthly magazine published by the Wheelman Company of Boston, Massachusetts, and to a reasonable extent to other publications of general circulation, and to advertise that it is licensed by the Pope Manufacturing Company.

Third. The party of the second part agrees to keep at its place of business full, true, and correct books of account, open at all reasonable times to the party of the first part and to its delegate, in which shall be set down all bicycles made or sold by the party of the second part, with the name or description, size, style, and number thereof, and the names and addresses of the parties to whom sold.

Fourth. The party of the second part agrees to make full and true returns in writing to the party of the first part on or before the tenth day of each calendar month in each year, beginning with the tenth day of January, A. D. 1885, of all bicycles

of the instrument set out in the bill; that the terms of the contract were such as to prohibit the defendant from making the high grade styles and kinds of bicycles and tricycles complained of; that, if the contract was valid and in force, it was being violated by the defendant; but that the contract was not of such a nature as to entitle the plaintiff to any relief in a court of equity. 34 Fed. Rep. 877. From a decree dismissing the bill for the want of equity the plaintiff appealed to this court.

Messrs. Lewis L. Coburn and Edmund Wetmore, for appellant:

A court of equity has jurisdiction to enjoin parties from doing things which the defendant agreed for a valuable consideration not to do. *Eureka Co. v. Bailey Co.* 78 U. S. 11 Wall. 493 (20: 209); *Woodworth v. Weed*, 1 Blatchf. 163; *Wilson v. Sherman*, 1 Blatchf. 336; *McKay v. Smith*, 29 Fed. Rep. 293; *Pope Mfg. Co. v. Oslev*, 27 Fed. Rep. 100.

Defendant is estopped from denying the validity of plaintiff's patents, and a court of equity will enjoin him from making machines

containing the devices covered by those patents.

Magic Ruffle Co. v. Elm City Co. 13 Blatchf. 151; *Eureka Co. v. Bailey Co.* 78 U. S. 11 Wall. 493 (20: 209); *Lockwood v. Hooper*, 25 Fed. Rep. 910; *Erroy v. Canice*, 17 Blatchf. 200; *Hurr v. Kimbark*, 23 Fed. Rep. 574; *Kinsman v. Parkhurst*, 50 U. S. 19 How. 289 (15: 385).

Parol evidence is not admissible to vary or add to a written instrument.

1 Spence, Eq. Jur. 553; *Stackpole v. Arnold*, 11 Mass. 80; *Preston v. Mercereau*, 3 W. Bl. 1240; *Bayard v. Malcolm*, 1 Johns. 467; *McLellan v. Cumberland Bank*, 21 Me. 560.

Messrs. W. C. Goudy and C. K. Offield, for appellee:

The contract is void, on its face, as against public policy, and iniquitous.

Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537 (34: 997).

The appellant comes not into court with clean hands.

Boyce v. Grundy, 29 U. S. 3 Pet. 210 (7: 655); *Smith v. Richards*, 38 U. S. 13 Pet. 20 (10: 42);

(and whether any or not) made, used, or sold in the United States by the party of the second part during the preceding calendar month, with the size, style, number, name, or description, and make of the said machines and the names and addresses of the purchasers, and also of such machines held in stock by the party of the second part at the end of the said preceding month, said returns to be made under oath whenever required by the party of the first part, and to pay the royalties or license fees herein stipulated on or before the said tenth day of each said month, on all said bicycles used or sold by them or removed from their said factory or place of business in the preceding month.

Fifth. The party of the second part agrees to pay to the party of the first part the sum of ten dollars upon and for each and every bicycle in whole or in part made by or for it at any time prior to the 1st day of April, A. D. 1884, or the termination of this license, no part license fees or part royalties under said several letters patent or such or either claim thereof as may be used, and as part of the consideration for this agreement; and it is agreed that the party of the second part shall so pay to the party of the first part under this license and agreement, at least the sum of one thousand dollars within and for each and any consecutive twelve calendar months during the continuance of this license.

Sixth. The party of the second part agrees to sell said bicycles at retail and not to sell the same or any of them to any person or party, either directly or indirectly, except upon such terms and at such prices as shall be satisfactory to the party of the first part and as shall first be submitted to and approved by the said party of the first part, such written submission of rates, terms, and prices, with the said approval, to be taken as and to form a part of this agreement, and not to have or sell through any agent or agents in any other place than the said Chicago, nor pay or allow freight beyond the said Chicago, nor any bonus, rebate, allowance, or commission on sales or from prices except as expressly agreed in writing between the parties hereto.

Seventh. The party of the second part agrees to mark or stamp in a legible manner the word "patented" on each machine made or sold under this license, together with the date or dates of the patents under which each machine is made or sold. A list of such patents to be furnished by the party of the first part.

Eighth. The party of the second part hereby expressly admits the validity of the several letters patent hereinbefore mentioned, and of each and every claim thereof, and the title of the party of the first part thereon; and further admits specifically that the following inventions are embodied in the "Pilot" bicycle and the "Standard Columbia" bicycle and the "Expert Columbia" bicycle, as follows, to wit: (a) the invention claimed in the

second clause of claim of said patent, R. 357, in the handles of said bicycle, and their connection therewith; (b) the invention claimed in the third clause of claim of the last named patent in the cranks of said bicycles; (c) the invention claimed in the fourth clause of claim of said last named patent in the backbones and rear forks of bicycles; (d) the invention claimed in third clause of claim of said patent No. 8557 in the leg-guards of said bicycles; (e) the invention claimed in second clause of claim of said patent 8554 in the brake mechanism of said bicycles and its connections; (f) the invention claimed in the third clause of claim of said patent 8554 in the steering head of the said bicycles and its connections; (g) the invention claimed in the fifth clause of claim of said patent 8713 in the tires of the wheels of said bicycles; (h) the inventions claimed in the third clause of claim of said patent No. 8557 in the front forks of said bicycles; (i) the inventions claimed in the fourth clause of claim of said last named patent in the points of said bicycles; (k) the inventions claimed in the claim of letters patent No. 141884 in the balance gear and its connections in the "Columbia" and "Victor" tricycles; (l) the invention claimed in the second clause of claim of said patent No. 17529 as embodied in the ball bearings of said Expert bicycle and Victor tricycle and in "Eolas" ball pedals; and further admits that any machines or part of machines constructed in a substantially similar manner are or would be infringements of said claims respectively; and these admissions are unqualified and may at any time hereafter be pleaded or proved in estoppel of the party of the second part.

Ninth. The party of the second part agrees that it will not import, manufacture, or sell, either directly or indirectly, any bicycle, tricycle, or other velocipede, or the pedals, saddles, bearings, rims, or other patented parts or devices containing any of the inventions or claims in either of the hereinbefore recited letters patent, nor make use, or sell, directly or indirectly, either (a) backbones bifurcated for a rear wheel, or (b) balance gear allowing two wheels abreast, differing speeds on curves, or (c) bearings containing balls or rollers and laterally adjustable, or (d) brakes combined with the handle bars and front wheel, or (e) cranks adjustable to different lengths of throw, or (f) forks of tubular construction, or (g) mud-shield for steering wheels, constructed to turn within the wheel, or (h) pedals that are polygonal or offering two or more sides for the foot, or (i) round contractible rubber tires in grooved rims or rims containing or adapted for rubber or elastic tires, or (j) saddles adjustable fore and aft, or (k) saddles having a flexible seat and means of taking up the slack, or (l) steering heads, open or cylindrical, with stop for complete turning, or (m) leg-guards over front wheel, or (n) rims of wrought metal tubing and adapted to receive a tire, or (o) rims composed of sheet metal.

Neville v. Wilkinson, 1 Bro. Ch. 516; 1 Story, Eq. 201, 202; *M'Ferran v. Taylor*, 7 U. S. 3 Cranch, 281 (2-410); *King v. Hamilton*, 29 U. S. 4 Pet. 323 (7: 675); *Tobey v. Bristol County*, 3 Story, 821; *Nemphis v. Broien*, 1 Flip. 202; *Tufts v. Tufts*, 3 Woodb. & M. 603; *Willard v. Taylor*, 75 U. S. 3 Wall. 557 (19: 501); *Rutland Marble Co. v. Ripley*, 77 U. S. 10 Wall. 330 (19: 655); *Jackson v. Ashton*, 36 U. S. 11 Pet. 229 (0: 698); *McNeil v. Meyer*, 3 Mason, 244; *Bozman v. Cunningham*, 78 Ill. 48.

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Mr. Justice Brown delivered the opinion of the court:

This case involves the question whether a court of equity can be called upon to decree the specific performance of a contract, wherein the defendant, in consideration of receiving a license to use certain patents belonging to the plaintiff during the life of such patents, agrees never to import, manufacture, or sell any machines or devices covered by certain other patents, unless permitted in writing so to do, nor to dispute or contest the validity of such patents or plaintiff's title thereto, and further to aid and morally assist the plaintiff

with overlapping edges, or (p) wheels containing hollow metallic rim and rubber tires, or (q) steering spindle and fork inclined to each other at an angle, or (r) two speed or power gears, or (s) "Tangent" spools or "Warwick" rims, or (t) any other device or invention secured by either of these patents, other than according to the permission, conditions, and description in paragraph numbered "first" in this agreement or as otherwise agreed in writing with the party of the first part, nor in any way, either directly or indirectly, dispute or contest the validity of the letters patent hereinbefore mentioned, or either of them or the title thereto of the party of the first part, but will aid and morally assist the party of the first part in maintaining public respect for and preventing infringements upon the same.

Tenth, If and whenever the party of the first part shall reduce the royalties on bicycles of similar sizes, construction, and grade, to any other licensee, the above named royalties shall be reduced in like manner and proportion to the party of the second part, and the party of the first part will immediately notify the party of the second part of any such reduction of royalties.

The party of the second part may sell said herein licensed bicycles to regular agents and dealers in the trade and doing business as such in any part of the United States at discounts from the said retail list prices not exceeding twenty-five per cent. in any case, and to the smaller agents not exceeding fifteen per cent. It being understood and agreed that said discount of not exceeding twenty-five per cent. may be allowed only to our (one?) dealer in each or either of the following cities: New York, N. Y.; Philadelphia, Pennsylvania; Boston, Massachusetts; Baltimore, Maryland; St. Louis, Missouri; San Francisco, California; St. Paul, Minnesota; and one city in the southern states, and to two dealers in Chicago, Illinois. Said party of the second part also agrees to keep the retail list prices fixed, and not to allow said licensed bicycles to be sold at retail at less than said retail prices, either by his own concern or by agents or dealers.

The party of the second part may sell the said licensed bicycles outside of the United States for actual use in foreign parts without the herein contained restrictions as to prices and discounts, and upon satisfactory evidence of such export and foreign sale of said bicycles there shall be allowed a rebate or credit of one half of said royalties thereon.

Eleventh, If and whenever the party of the second part shall fail to make returns or to make payments as herein provided, or shall violate or fail to keep and perform the terms, conditions, promises, or agreements, or either of them herein mentioned on his part to be kept and performed, the party of the first part may withdraw and terminate this license and the agreements on its part mentioned to be kept and performed, by notifying

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in maintaining public respect for and preventing infringements upon the same; and further agrees that if, after the termination of his license, he shall continue to make, sell or use any machine or part thereof containing such patented inventions the plaintiff shall have the right to treat him as an infringer, and to sue out an injunction against him without notice.

There are other covenants in this contract which show that the plaintiff intended to reserve to itself a large supervision and control of the defendant's business; for example, in the second clause, wherein the defendant agrees to maintain a place of business in Chicago, keep on hand a stock of bicycles, and advertise his business by occupying and paying for one page space continuously, during the term of his license, in a certain periodical published in Boston, and in other publications of general circulation; and to advertise that it is licensed by the plaintiff. By the sixth clause he agrees to sell bicycles at retail, and not to sell to any person except upon terms and prices satisfactory to the plaintiff, and as shall first be submitted to and approved by it; and shall not have or sell to any agent in any other place than

the party of the second part in writing that the license herein contained has been revoked, and the party of the first part may in like manner revoke this license whenever the reported sales by the party of the second part for any consecutive twelve calendar months shall be less than one hundred machines. The party of the second part may surrender the license herein contained at any time by written notice to that effect and the returning of this contract to the party of the first part; but no such revocation or surrender, and no termination of this contract or any part of it, shall release or discharge the party of the second part from any payment, return, liability, or performance which may have accrued, become due or arisen hereunder, prior to or at the date of such revocation or surrender, or from the obligations, admissions, and agreements contained in the sections hereof numbered "sixth," "seventh," "eighth," "ninth," and "eleventh" hereof, which are a part of the consideration for the granting of the license herein and are irrevocable, except by written consent of the party of the first part; and it is agreed that at the termination of the license herein contained at any time by expiration, revocation, or surrender the party of the second part shall pay the within named royalty on all said herein licensed machines or parts of machines, whether wholly finished or not, or purchased or on hand, or ordered by or for said party of the second part at the date of said termination, and that the party of the second part will not sell, the same except by first paying the full amount of said royalty and by complying with all the terms and conditions of this contract; and, further, that if the party of the second part shall continue after such termination of the license to make, sell, or use any machine or substantial part thereof containing either of the parts specifically referred to in section "ninth" hereof, or in any invention in any form set forth and claimed in the letters patent aforesaid, or any of them, the said party of the first part shall have the right to treat the party of the second part either as a party to and in breach of this contract or as a mere infringer, and the said party of the second part consents that in such case, upon any suit brought by the said party of the first part against the said party of the second part in any court, either upon this contract or for an infringement of the said letters patent, or any of them, an injunction may issue without notice to the said party of the second part restraining him from making, selling, or using the said part or devices or the invention or inventions in said letters patent, or any of them set forth.

Witness our hands and seals the day and the year first above written.

THE PORE MANUFACTURING COMPANY.

R. PHILIP GORNULLY.

THE PORE MFG. CO.

by CHARLES E. PRATT, Atty.

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[233] Chicago, nor pay nor allow freight beyond Chicago, nor any bonus, rebate, allowance, or commission on sales. By the seventh clause he agrees to stamp the word "patented" on each machine, together with the dates of the patents under which each of the machines is made or sold, according to a list furnished by the plaintiff.

It is rarely that this court is called upon to consider so unique a contract, and we have found some difficulty in assigning to it its proper place among legal obligations. Its requirement is not merely that the licensee shall refrain during the term of his license from infringing other patents than those which he is expressly authorized to use, but shall forever afterwards, at least during the life of such patents, refrain from importing, making, or selling articles covered by them, and from disputing the validity thereof or plaintiff's title thereto, and shall afford his moral aid and assistance in securing proper aid and respect for such patents. The exact nature and amount of moral sanction the licensee is bound to exert in behalf of the plaintiff is not specified, but is apparently left to be determined by the circumstances of the case.

(1) Ordinarily the law leaves to parties the right to make such contracts as they please, demanding however, that they shall not require either party to do an illegal thing, and that they shall not be against public policy or in restraint of trade. It is argued with much earnestness here that this contract is open to the last objection, as an attempt to fetter the defendant from importing or making bicycles, in which he might otherwise have a perfect right to deal, and thus foreclose himself from the ability to earn an honest living in his chosen calling. It is scarcely necessary to say that, without this contract, the defendant would have no right to manufacture or sell bicycles covered by valid patents of the plaintiff so that the contract is not needed for the protection of the plaintiff to this extent. The real question is whether the defendant can estop himself from disputing patents which may be wholly void, or to which the plaintiff may have no shadow of title. It is impossible to define with accuracy what is meant by that public policy for an interference and violation of which a contract may be declared invalid. It may be understood in general that contracts which are detrimental to the interests of the public as understood at the time fall within the ban. The standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interests, at a more advanced stage are treated as legal and binding. In certain [234] cases a man may doubtless agree that he will interpose no defense to a specified claim, and that another may take judgment against him without notice. This is a matter of every-day occurrence in connection with what are termed judgment notes. But if one should agree for a valuable consideration that he would set up no defense to any action which another might bring against him, and such other person might enter up judgment against him in any such action without notice, we think that no court would hesitate to pronounce such an agreement invalid. There are certain fundamental rights which no man can barter away, such, for in-

stance, as his right to life and personal freedom, and, in criminal cases, the right to be tried by a jury of his peers. Courts have even gone so far as to say that a man cannot consent to be tried by a jury of less than twelve men, whatever may be the circumstances under which the twelfth man is taken from the panel. *Cooley, Const. Lim. 319.* We are reluctant to say that a right to defend a whole class of unjust claims may not be one of these. It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly; and it is a serious question whether public policy permits a man to barter away beforehand his right to defend unjust actions or classes of actions, though, in an individual case, he may doubtless assent that a judgment be rendered against him, even without notice.

The reports are not entirely barren of authority upon this subject. Thus in *Crane v. French*, 39 Miss. 503, it was held that though a party may omit to take advantage of a right, such as the right to plead the Statute of Limitations, secured to him by law, he could not bind himself by contract not to avail himself of such right if it be secured to him on grounds of public policy. "But there appears to be," says the court, "a clear distinction between declining to take advantage of a privilege which the law allows to a party, and binding himself by contract that he will not avail himself of a right which the law has allowed to him on grounds of public policy. A man may decline to set up the defense of usury, or the Statute of Limitations, or failure of consideration, to an action on a promissory note. But it would scarcely be contended that a stipulation inserted in such a note, that he would never set up such a defense, would debar him of the defense if he thought fit to make it. . . . Suppose, then, an agreement made by the maker of a note that he would not set up the defense of usury. Would an action lie for a breach of that agreement, in case the party should make the defense in disregard of it? It appears not, and the reason is, that the right to make the defense is not only a private right to the individual, but it is founded on public policy which is promoted by his making the defense, and contravened by his refusal to make it. . . . With regard to all such matters of public policy, it would seem that no man can bind himself by estoppel not to assert a right which the law gives him on reasons of public policy." There are cases wherein it is held that a promise not to plead the Statute of Limitations is a good bar, but they are those wherein the promise was made after the cause of action had accrued, and where it was considered by the court as a new promise. There are a few cases, however, which hold that an agreement not to plead the statute, made upon the instrument, or at the time of its execution, may be pleaded as an estoppel. So in *Stoutenburg v. Lybrand*, 13 Ohio St. 223, it was held that a contract which provides that a defendant in a proceeding for divorce shall make no defense thereto, is against public policy, and therefore void. "The tendency of such agreements," said the court, "is to mislead the court in the administration of justice, and injuriously affect

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public interests." A like ruling was made in *Sayles v. Sayles*, 21 N. H. 312; and in *Viser v. Hertrand*, 14 Ark. 267. So in *Belt v. Leggett*, 7 N. Y. 176, 179, it was said that "all contracts or agreements which have for their object anything which is repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void;" and that this principle has often been applied by our courts to contracts which had for their objects the perversions of the ordinary operations of the government. In that case a note given by a third person to a creditor in consideration of his withdrawing opposition to the discharge of a bankrupt debtor, was held to be void as against the policy of the law. In most of the states wherein the question has arisen it has been held that a debtor is not bound by his waiver of his homestead or other exemptions upon execution. *Kneetle v. Newcomb*, 22 N. Y. 249, 251. "In these cases," said the court, "the law seeks to mitigate the consequences of man's thoughtlessness and improvidence, and it does not, I think, allow its policy to be invaded by any language which may be inserted in the contract." The exigencies of this case do not require us to decide the question whether a man may or may not contract beforehand not to set up a certain defense to a particular action; but we are of the opinion that a contract not to set up any defense whatever to any suit that may be begun upon fifty different causes of action is in violation of public policy. See, as pertinent to this question, *Hoine Ins. Co. v. Morse*, 37 U. S. 20 Wall. 445 [22: 365]; *Doyle v. Continental Ins. Co.* 94 U. S. 535 [24: 143]; *Barron v. Burnside*, 121 U. S. 186 [30: 915].

But whether this contract be absolutely void as contravening public policy or not, we are clearly of the opinion that it does not belong to that class of contracts, the specific performance of which a court of equity can be called upon to enforce. To stay the arm of a court of equity from enforcing a contract it is by no means necessary to prove that it is invalid; from time to time immemorial it has been the recognized duty of such courts to exercise a discretion: to refuse their aid in the enforcement of unconscionable, oppressive, or iniquitous contracts; and to turn the party claiming the benefit of such contract over to a court of law. This distinction was recognized by this court in *Cathart v. Robinson*, 30 U. S. 5 Pet. 294, 276 [9: 120, 124], wherein Chief Justice Marshall says: "The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. *Mortlock v. Buller*, 10 Ves. Jr. 392; *Day v. Newman*, 2 Cox. Ch. Cas. 77. It is said that the plaintiff must come into court with clean hands, and that a defendant may resist a bill for specific performance, by showing that under the circumstances the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement, or that it is unconscientious or unreasonable, or that there has been concealment, misrepresentation, or any unfairness, are enumerated among the causes which will induce the court to refuse its aid." This principle is reasserted in *Hennecy v. Whitworth*, 128 U. S. 438, 442 [32: 500, 501], in which it was said that specific performance

is not of absolute right, but one which rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, and always with reference to the facts of the particular case. *Willard v. Tayloe*, 75 U. S. 8 Wall. 557, 567 [19: 501, 504]; *Rutland Marble Co. v. Ripley*, 77 U. S. 10 Wall. 339, 357 [19: 953, 961]; 1 Story, Eq. Jur. § 742; *Seymour v. Delancy*, 6 Johns. Ch. 222, 224, 2 L. ed. 106, 108; *White v. Damon*, 7 Ves. Jr. 30, 35; *Radelife v. Warrington*, 13 Ves. Jr. 326, 331.

These principles apply with great force to the contract under consideration in this case. Not only are the stipulations in paragraphs 9 and 11 unusual and oppressive, but there is much reason for saying that they were not understood by the defendant as importing any obligation on his part beyond the termination of his license. Indeed, the operation of these covenants upon his legitimate business was such that it is hardly possible he could have understood their legal purport. The testimony upon this point was fully reviewed by the court below in its opinion, and the conclusion reached that the contract "was an artfully contrived snare to bind the defendant in a manner which he did not comprehend at the time he became a party to it." We have not found it necessary to go into the details of this testimony. While we are not satisfied that his assent to this contract was obtained by any fraud or misrepresentation, or that the defendant should not be bound by it to the extent to which it is valid at law, we are clearly of the opinion that it is of such a character that the plaintiff has no right to call upon a court of equity to give it the relief it has sought to obtain in this suit. We express no opinion upon the question whether an action at law will lie upon the covenants of the ninth clause of the contract not to manufacture or sell the devices therein specified.

The decree of the court below dismissing the bill is, therefore, affirmed.

THE POPE MANUFACTURING COMPANY, Appt.

THE GORMULLY & JEFFERY MANUFACTURING COMPANY ET AL.

(See S. C. Reporter's ed. 23.)

1. Pope Manufacturing Co. v. Gormully, ante, 411, followed.

[No. 203.]

Argued March 9, 1892. Decided April 4, 1892.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, dismissing this suit. Affirmed. Messrs. Lewis Coburn and Edmund Wetmore for appellant. Messrs. W. C. Goudy and C. E. O'Field for appellees.

Mr. Justice Brown delivered the opinion of the court:

The bill in this case appears to be brought against the defendants as successors of Gor-

nullify under the contract of December 1, 1884, which was also made the basis of the suit No. 201, just decided. As it is admitted in the brief that if the court refused relief against Mr. Gornully for want of equity in the prior suit, there is no reason why it should not refuse it in this case, it is unnecessary to go into its details.

The decree of the court below dismissing the bill is therefore affirmed.

THE POPE MANUFACTURING COMPANY, Appt.,

THE GORNULLY & JEFFERY MANUFACTURING COMPANY ET AL

(See S. C. Reporter's ed. 23-215.)

Case followed—construction of bicycle patents.

- 1. The decision in Pope Manufacturing Co. v. Gornully ante, p. 411, followed us to the construction and effect of the contract therein construed.
- 2. Patent No. 252280 issued January 10, 1885, to Curtis H. Veeler for a seat for bicycles is not infringed by defendant's champion saddle.
- 3. The second claim of patent No. 197239 issued November 20, 1877, to A. L. G. M. and O. E. Peters for an anti-friction journal box, is destitute of invention and seems to have been anticipated.
- 4. Patent No. 245542 issued August 9, 1881, to Thomas W. Moran for handles for velocipedes, it seems does not involve invention, but if it does, it was anticipated by the English patent to Harrison.
- 5. The first and third claims of patent No. 310778 issued January 13, 1885, to William P. Benham, for improvements in velocipedes was anticipated by the English patent to Ilston, and was not infringed by defendants.
- 6. The second and third claims of patent No. 323162 issued July 23, 1885, to Emmitt G. Latta, for an improvement in velocipedes, have no novelty and were not infringed by defendants.

[No. 206.]

Argued March 10, 11, 1892. Decided April 4, 1892.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, dismissing a suit in equity for the infringement of eight patents granted to different parties for devices used in the manufacture of bicycles and velocipedes. Affirmed. See same case below, 34 Fed. Rep. 885.

[239] Statement by Mr. Justice Brown: This was a bill in equity for the infringe-

ment of eight patents granted to different parties for devices used in the manufacture of bicycles and velocipedes. Upon a hearing in the court below the bill was dismissed, and the plaintiff appealed to this court. 34 Fed. Rep. 885.

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The assignment of errors covers only five patents:

1. Patent No. 252280, issued January 10, 1885, to Curtis H. Veeler, for "a seat for bicycles," which the court below held to be limited by previous patents to Lamplugh and Brown, to Shire and to Fowler, and as so limited, not to have been infringed by the defendants.

2. Patent No. 197239, issued November 20, 1877, to A. L. G. M. and O. E. Peters for an anti-friction journal box, which was held to be anticipated, and, if not anticipated, not to have been infringed.

3. Patent No. 245542, issued August 9, 1881, to Thomas W. Moran for handles for velocipedes, which the court held did not involve invention, and was void. [240]

4. Patent No. 310778, issued January 13, 1885, to William P. Benham, for improvements in velocipedes, which the court held had not been infringed by the defendants.

5. Patent No. 323162, issued July 23, 1885, to Emmitt G. Latta, for an improvement in velocipedes, which the court, in view of the state of the art, held to be void for want of novelty.

Messrs. L. L. Colburn and Edmund Wetmore for appellants.

Mr. C. K. O'Field for appellees.

Mr. Justice Brown delivered the opinion of the court:

The bill in this case, in addition to the usual allegations of a bill for the infringement of a patent, sets forth as a distinct ground for recovery the violation of the contract of December 1, 1881, which it was claimed was obligatory upon the defendants. As this claim was, however, disposed of in the cases Nos. 204 and 205, just decided adversely to the plaintiff, upon grounds which are equally available here, we shall take no further notice of it. The case is, therefore, resolved into an ordinary suit for the infringement of a patent.

(1) Patent No. 252280, to Curtis H. Veeler, is for a "seat for bicycles." In his specification the patentee states that his "improvements relate to the class of seats known as 'saddles,' and especially to devices for suspending the leather or other flexible material of which the seating surface is composed, and for stretching

As to what relief may cover, see note to O'Reilly v. Morse, 15: 601.

As to assignment, before leasing and reassigning patent; recording; when assignment transfers extended terms, see note to Gayler v. Wilder, 13: 501.

As to when assignee may sue for infringement; when patents must; when they must join, see note to Wilson v. Rousseau, 11: 1111.

As to damages for infringement of patent; treble damages, see note to Hoag v. Emerson, 13: 821.

As to notes given for patent rights; purchaser before maturity, see note to Mandeville v. Welch, 5: 57.

As to prior use or sale of invention renders patent void, see note to French v. Carter, 34: 661.

or taking up the slack in the same, and for connecting the same with the perch or supporting bar for the seat, and by means of which the seat is made adjustable backward and forward over the perch or bar; and my present invention . . . consists, first, in a divided metallic spring, or supporting plate for the flexible seat; second, in a modification of that portion of said metallic spring which forms the framework for the rear of the seat; third, in mechanism for elongating or extending said metallic spring so as to take up the slack of the flexible seat; and fourth, in mechanism for completing the support of the seat and connecting the same with the perch or supporting bar of the vehicle, so as to be adjustable backward and forward thereon."

[241] He further states that he is aware "that a spring has been used to support the seat or saddle of a bicycle," and, therefore, does not claim the general application of a spring for this purpose, but does claim:

"1. A suspension saddle, constructed with a flexible portion C, and having an under spring in two or more parts, B D, to which the flexible portion is attached at either end, and which metallic parts are extensible, substantially as and for the purposes set forth.

"2. In a velocipede seat, the combination of plates B and D, clamp F, stop G, adjusting bolt F', substantially as shown and described."

Referring to the state of the art, as disclosed by prior patents, there appears in the patent of John C. Miller, of April 10, 1866, a saddle seat suspended at both ends upon springs; the seat, however, has a framework of iron, and consequently is not flexible, and, of course, has no provision for taking up the slack. In the patent to Fowler of 1880, there is a saddle seat, suspended, at the front end, upon a coil spring, and at the rear end upon a long plate spring; the seat is rigid, however, and lacks the flexibility which characterizes the Veeder patent, and there was apparently no provision for mutual adjustment of the springs. The Shire patent of 1879 has a flexible saddle seat, the front end of which is attached to a strap which passes through a loop, and is susceptible of being shortened or lengthened by means of a buckle. It also has an under spring to which is attached the forward end of the flexible saddle. It differs principally from the Veeder patent in the fact that the slack is taken up by means of a strap and buckle, instead of by adjustment of the two springs of the Veeder patent. The Bishop patent of 1889 exhibits a flexible seat suspended upon springs at either end, but it also lacks the adjustable feature.

[242] None of these prior patents exhibit a flexible seat supported at either end by two parts of a spring, which are made adjustable relatively to each other, in such manner as to take up the slack; and for the purposes of this case it may be conceded that there was invention in this device, notwithstanding that other patents showed flexible seats suspended upon springs at either end, and in some cases with the feature of adjustability. The Veeder patent, however, differs no more from the prior patents than do the defendant's saddles from it. In the defendant's Champion saddle a flexible saddle is supported at either end upon springs, the rear one being made adjustable in such a

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way as to take up the slack. But as Veeder's invention, in view of the state of the art, is a very narrow one, we think it cannot be properly considered as covering the defendant's device. The springs of the defendant's saddle are not only wholly different in form from those of the Veeder patent, but there is no relation between them, the rear one being independently adjustable. The feature of extensibility does not pertain at all to the springs, but to the peculiar manner in which the rear spring is adjusted to the perch. If Veeder had been the first to invent a saddle supported upon springs, or a flexible spring seat capable of adjustment, it might be thought that the defendant could be held to infringe, though they do not employ the double spring of the Veeder patent, but in view of the state of the art, we think the court below was correct in holding that there was no infringement.

(2) Patent No. 187,339 to the Peters is for an "improvement in anti-friction journal-boxes" for overcoming the friction of the bearing of all vehicles mounted on wheels, and the journals of all revolving shafts, etc. The invention is "a combination of rollers or cylinders, made of iron, steel, or any suitable metal or other material, of sufficient number and suitable in length, size, and form, which revolve around the spindle or bearing of the axle within the hub of the wheel, and around the journal or bearing of the shaft or cylinder, and within the journal box, the rollers being independent of the bearing and the hub or journal box."

The only claim in issue in the case is the second, which is for "the bearings with the shoulder beveled or notched, combined with the nut, or its equivalent, correspondingly beveled or notched, as shown in figure 4."

This patent is in substance for a method of overcoming the friction of an ordinary journal by causing the same to revolve upon elongated rollers, whose action is guided and secured by putting them in a cage, so that their relative relations to each other in their revolution shall be the same. "To support and keep the rollers from running against one another and thereby producing friction, both ends of each are made with a bearing, which goes into rings, or their equivalents, in such a manner as to allow the rollers to turn freely on their bearings as they revolve around the bearing of the axle or shaft. These rings may be flat, or one or both sides rounding or oval, and of one entire piece, or made in sections or parts, and the parts fitted or binged together in such a manner as to form the required ring." "To retain the wheel on the bearing of the axle, as the wheel of a common road vehicle, the ordinary nut in use for that purpose, or its equivalent, is made to bevel in conformity with the beveled ends of the rollers, and the bearing or axle at the inner ends of the rollers is made with a beveled shoulder to correspond with the ends of rollers."

The patent to Allcott, of March 29, 1870, has also for its "object the diminution of friction in ordinary axle boxes, and consists in constructing the hub box larger than the journal of the axle, and filling the space between the journal and the box with longitudinal metallic rollers, of which two sizes are employed, the

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larger and smaller alternating, and more completely filling said space." The axle is formed with a grooved flange and the journal with a similarly grooved or beveled nut. The ends of the rollers are also somewhat beveled to correspond with the tapering portions of the journal and nut. When the beveled ends of the rollers become worn down the beveled sleeve on the nut may be filed down, and the nut screwed up, thus keeping the rollers from any longitudinal motion.

[244] This patent seems to be very nearly, if not quite, a complete anticipation of the Peters patent. Such differences as exist between them are of minor consequence; the beveled shoulder combined with the beveled nut or its equivalent being present in, and the essential feature of, both patents. In any view of the case it required no invention to make the slight alterations apparent in the Peters patent.

In addition to this, however, the Jewett patent of May, 1868, shows "a journal or axle box, provided with a series of spherical balls, which are placed in a circular recess or chamber, and revolve in contact with the journal or axle, thereby reducing the friction to a great extent, and entirely avoiding the necessity of employing oil or other lubricating material." The grooves of this patent at the opposite ends of the axles are practically the same in their operation as the beveled shoulder and nut of the Peters patent, the balls giving both vertical and lateral support, and preventing endwise movements. Similar arrangements are shown in the patent to Perley of 1863, and the English patent to Menoons of 1860.

There was also a patent issued to one Smith upon the same day the Peters' patent was issued, namely, November 20, 1877, but upon an application filed September 1, 1877, prior to Peters' application, and, therefore, anticipating Peters' patent, in which was represented an axle formed with a spindle, having a collar at its inner end, in which collar was a circumferential half-round groove. The outer end of this spindle is reduced, in circumference, and another collar is placed thereon and fastened by a screw, this collar being also provided with a similar groove. In each collar is placed a series of anti-friction balls, which are of such diameter as to be one half within the groove in the collar. The other half of the ball is within a groove formed one half in the hub and the other half in the flange upon an annular plate. The operation of this patent is practically the same as that of the device used by the defendant.

[245] This device appears to be, however, a minor variation upon the English provisional specification of 1833 to Chinnock, which also consisted in securing the axle in the box by means of one or more spherical balls running in a circular channel, formed partly in the axle and partly in the box in which it fits. Defendants are the owners of and manufacturing under this patent, and the fact that this and the Peters' applications were pending before the Patent Office at the same time, and that patents were issued upon the same day, is strong evidence that they were not even considered as competitive inventions.

As the defendants' manufacture was not of the elongated rollers of the Peters' patent, but

of the spherical balls of the Chinnock, Jewett, and other patents, it would seem to follow that, if its device be an infringement of the Peters' patent, the Peters' patent itself must be an infringement of the prior ball-bearing patents.

(3) The Moran patent, No. 245343, of August 9, 1881, is for a handle for velocipedes, and consists simply in providing rubber bands for countermuting the jar on the hands in traveling, and preventing injury to the machine when falling. The claims are:

"1. The handle of a velocipede provided with rubber ends, as set forth.

"2. The handle of a velocipede, in combination with rubber tips sleeved upon its ends, as set forth.

"3. A rubber handle for a velocipede, consisting of a ball and neck combined in one piece, as set forth."

Briefly stated, this patent is for nothing more nor less than the application of a rubber ball or cushion upon the extremities of the handle. The patentee states in his specification that he justly claims this rubber in its application to velocipedes, it being a not uncommon device as applied to other handles. We have very grave doubt as to whether this involves any invention; but if it does, it is fully anticipated in the English patent to Harrison, of July, 1877, which exhibits a similar method of covering the handles of bicycles with a sheath or glove of india-rubber. There is a slight difference in the form of the sheath in this case, but it is identical in principle, and used for the same purpose. Indeed, the defendant in this connection seems to rely not upon the validity of his patent, but upon the estoppel alleged to have arisen under the contract of 1884, which we have already held not to exist.

(4) Patent No. 310726, to Benjamin is for a method of attaching the horizontal handle bar to the steering head of a bicycle, and consists in making the handle bar, which may be either solid or tubular, continuous, and attaching to the middle of it a lug or detent, which serves not only to locate the handle bar evenly and quickly by an even division of its length on either side of the middle line of the head, but also to prevent the handle bar when in position from turning or revolving on its axis. The first and third claims of the patent, which are alleged to be infringed, are as follows:

"1. The combination of an undivided or and an open-slotted lug, and two sleeve-nuts, or their equivalents, one on either side the lug, surrounding the bar and adapted to lock it rigidly to the lug, essentially as set forth."

"3. In combination with the handle bar B, the detent D, constructed and adapted to operate substantially as and for the purposes set forth."

The patent is really for making the handle-bar in one piece and so attaching it to the steering head of the bicycle so as to prevent any lateral or rotary movement. This is done by the use of sleeve-nuts surrounding the handle bar and engaging with threaded portions of a lug, through which the bar is thrust.

If there be any scope for invention in the attachment of a horizontal bar to a vertical one in such manner that it shall be firm and immovable in any direction, this device ap-

pears to have been substantially anticipated by the English patent to Illston, issued in 1870, which shows substantially the same elements operating for the same purpose, and in substantially the same manner. Illston states that he makes "near the top of the head of the bicycle or tricycle a cross-hollow bracket open at its ends and top," corresponding to the open-slotted lug of the Benham patent. "The said bracket has externally a nearly cylindrical figure, and its ends are furnished with convex screws. . . . On each side of the middle flattened part of the handle bar is a sliding collar milled externally, and screwed internally with a concave screw proper to fit on the convex screw at the end of the hollow or trough bracket on the head." The screw collars of this patent correspond very closely with the sleeve nuts of the Benham patent.

[247] Upon the whole, it does not seem to us that there was any patentable difference between these two devices, and if there were, we agree with the opinion of the court below, that it is certainly not infringed by the defendants, who, while they use an undivided handle bar, have adopted a different method for fastening the same to the steering head, and do not use either the complainant's open slotted lug and two sleeve nuts or their detent.

(5) Patent No. 323162, of July 28, 1885, to Emmit G. Latta, relates to a form of protecting or cushioning the pedals of a velocipede with india rubber. There are eight claims to this patent, the second and third only of which are alleged to be infringed. They are as follows:

"2. The combination, with the pedal frame, of a rubber pedal bar, II, provided with a central longitudinal groove, *h*, and two bearing-surfaces, *h'* *h'*, on opposite sides of the groove, *h*, substantially as set forth.

"3. The combination, with the pedal-frame, of a rubber pedal bar, II, pivoted to the frame by a rod, *t*, and provided on each of its sides with a longitudinal groove, *h*, and two bearing faces, *h'* *h'*, on opposite sides of the groove, whereby the bar, II, is adapted to receive the pressure at its sides or edges and be compressed on opposite sides of the rod, *t*, substantially as set forth."

The invention in these claims consists in the pedal bar, combined with the pedal frame, the pedal bar being rubber, constructed with grooves and bearing faces; the second claim providing for the bar being pivoted to the frame, so that it works easily either side up, and will turn on its bearings as the foot presses on the front face or the rear face of the pedal. The pedal is centrally grooved and has two bearing faces, one on each side of the center-rod on which it is pivoted.

The application of india rubber to foot pedals is shown in the English patent to Harrison of July, 1877, to prevent the slipping of the feet on the pedals. This rubber is made corrugated, and is placed in the same position upon the pedals as the ordinary smooth surface rubber had been placed. The English patent to Jackson, of 1876, also shows a treadle cast in one piece, having suitable grooves formed therein to allow of india rubber being mixed within them by means of cement. It is entirely clear that the coating of pedals to pre-

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vent slipping being once conceded to be old, there is no novelty in the particular shape in which these rubber coverings are made, or the form which the corrugations or groovings shall take; it is a mere matter of taste or mechanical skill.

If there be any novelty at all in the Latta patent it must receive such an exceedingly narrow construction that the defendant cannot be held to have infringed it.

In short, the patents, which are made the basis of this bill are, in view of the state of the art, all of them of a trivial character, and, so far as they possess any merit at all, are not infringed by the devices employed by the defendant.

The decree of the court below dismissing the bill is therefore affirmed.

THE POPE MANUFACTURING COMPANY, Appt.

THE GORMULLY & JEFFERY MANUFACTURING COMPANY ET AL

(See S. C. Reporter's ed. 248-251.)

Right of patentee to assign his monopoly, limited—when assignee may sue—when assignment is mere license—legal title—infringement.

1. The monopoly granted by the patent laws is one entire thing, and cannot be divided into parts, except as authorized by those laws.
2. The right of the patentee to assign his monopoly, so as to vest a title in the patent in the assignee with the right to sue infringers, is limited either to the whole patent, comprising the exclusive right to make, use, and vend the invention throughout the United States; or, to an undivided part or share of that exclusive right; or, to the exclusive right under the patent within and throughout a specified territory.
3. If the assignment is of the whole patent, or of the exclusive right under the patent in a specified territory, the assignee may sue infringers in

NOTE.—For what patents are granted; when declared void, see note to Evans v. Eaton, 4: 431.

As to patentability of inventions, see notes to Thompson v. Bousheller, 29: 78, and Corning v. Burdick, 11: 651.

As to abandonment of invention, see note to Pennock v. Dialogue, 1: 37.

As to distinction between inventions of mechanism, articles, or products and processes; when latter patented, see note to Corning v. Burdick, 11: 651.

As to including process and product in same patent; separate patents therefor, see note to Evans v. Eaton, 4: 431.

As to what reliefs may enter, see note to O'Reilly v. Morse, 14: 601.

As to assignment, before issuing and returning patent; recording; when assignment transfers extended term, see note to Gayler v. Wilder, 13: 561.

As to when assignee may sue for infringement; when patentee must; when they must join, see note to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages, see note to Hoag v. Emmons, 13: 821.

As to notes given for patent rights; purchaser before maturity, see note to Mandeville v. Welch, 5: 87.

That prior use or sale of invention renders patent void, see note to French v. Carter, 31: 661.

his own name; if the assignment is of an undivided part or share of such exclusive right, the assignee may sue infringers jointly with the assignor.

4. An assignment or transfer, short of the whole patent or of the exclusive right in a specified territory or of an undivided part of the exclusive right, is a mere license, which gives the licensee no title in the patent, and no right to sue at law in his own name for an infringement.
5. An assignment of all the patentee's right, title and interest in and to certain letters patent on velocipedes, so far as said patent relates to or covers the adjustable hammock seat or saddle, which is the second claim of the patent, except the right to use said seat or saddle in connection with the velocipede made by the assignor, is a mere license and does not vest in the assignee or his assigns the legal title to the second claim nor the right to sue in his own name upon it.
6. The first claim of patent No. 314142 issued to Thomas J. Kirkpatrick, March 17, 1885, for a bicycle saddle, is limited to a forward spring adapted to extend forward of the head and turn upward and backward to connect with the forward end of the seat; and, so limited, the defendants do not infringe it.

[No. 207.]

Argued March 10, 11, 1892. Decided April 4, 1892.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, dismissing a suit in equity for the infringement of letters patent No. 216231 issued to John Shire, June 3, 1879, for an improvement in velocipedes and of letters patent No. 314142 issued March 17, 1885, to Thomas J. Kirkpatrick for a bicycle saddle. *Affirmed.*
See same case below, 34 Fed. Rep. 893.

Statement by Mr. Justice Brown:

This was a bill in equity for the infringement of two letters patent, namely, No. 216231, issued to John Shire, June 3, 1879, for an improvement in velocipedes, and, second, patent No. 314142, issued March 17, 1885, to Thomas J. Kirkpatrick, for a bicycle saddle.

Both patents were contested by the defendants upon the grounds of their invalidity and non-infringement, and in addition thereto it was insisted that plaintiff had no title to the Shire patent. Upon the hearing in the court below the bill was dismissed, and plaintiff appealed to this court. 34 Fed. Rep. 893.

Messrs. L. L. Coburn and Edmund Wetmore for appellant;

Mr. C. K. Osfeld for appellees.

Mr. Justice Brown delivered the opinion of the court:

There are two patents involved in this case, both of which relate to what is known as hammock saddles for bicycles.

(1) The second claim of the Shire patent, No. 216231, which is the only one alleged to be infringed, and the only one to which the plaintiff appears to have the title, is as follows:

"2. In a velocipede, an adjustable hammock seat J, substantially as set forth."

Plaintiff derives its title to this patent by assignment from Thomas Kirkpatrick, who him-

self claimed title to it from Shire, the patentee, under the following instrument:

"Be it known, that I, John Shire, of Detroit, Wayne county, Michigan, for and in consideration of one dollar and other valuable considerations to me paid, do hereby sell and assign to Thomas J. Kirkpatrick, of Springfield, Clark county, Ohio, all my right, title, and interest in, and to the letters patent on velocipedes granted to me June 3, 1879, and No. 216231, including all rights for past infringement so far as said patent relates to or covers the adjustable hammock seat or saddle, except the right to use said seat or saddle in connection with the velocipede made by me under said patent, in my business at Detroit.

"Signed and delivered at Detroit, this 10th day of July, 1884.

"JOHN SHIRE.

"Witness: J. M. EVERTSON."

The instrument should evidently be read as though there were a comma after the word "infringement," as the following words are evidently intended as a limitation upon the prior granting clause. It is then only so far as this patent "relates to or covers the adjustable hammock seat or saddle," that the patentee conveys his right to the same to Kirkpatrick. The patent itself contains four claims, and covers not only the adjustable hammock seat mentioned in the second claim, but three combinations set forth in other claims, of which the hammock seat is an element in only one.

Did this instrument, then, vest in Kirkpatrick the legal title to that element in the patent embodied in the second claim, or was this a mere license, giving him a right to make, use, and sell the device in this claim, but not vesting in him the legal title, or enabling him to sue thereon in his own name, nor to convey such right to the plaintiff? It really involves the question, which is one of considerable importance, whether a patentee can split up his patent into as many different parts as there are claims, and vest the legal title to those claims in as many different persons. This question has never before been squarely presented to this court, but, in view of our prior adjudications, it presents no great difficulty. The leading case upon this subject is that of *Gaylor v. Wilder*, 51 U. S. 10 How. 177, 494 [13: 504, 511], wherein it was held that the grant of an exclusive right to make and vend an article within a certain territory, upon paying to the assignor a cent per pound, reserving to the assignor the right to use and manufacture the article by paying to the assignee a cent per pound, was only a license, and that a suit for the infringement of the patent right must be brought in the name of the assignor. While that of course was a different question from the one involved in this case, the trend of the entire opinion is to the effect that the monopoly granted by law to the patentee is for one entire thing, and that in order to enable the assignee to sue, the assignment must convey to him the entire and unqualified monopoly which the patentee held in the territory specified, and that any assignment short of that is a mere license. "For," said Chief Justice Taney, "it was obviously not the intention of the Legislature to permit

several monopolies to be made out of one, and divided among different persons within the same limits. Such a division would inevitably lead to fraudulent impositions upon persons who desired to purchase the use of the improvement, and would subject a party who, under a mistake as to his rights, used the invention without authority, to be harassed by a multiplicity of suits instead of one, and to successive recoveries of damages by different persons holding different portions of the patent right in the same place. Unquestionably, a contract for the purchase of any portion of the patent right may be good as between the parties as a license, and enforced as such in the courts of justice. But the legal right in the monopoly remains in the patentee, and he alone can maintain an action against a third party who commits an infringement upon it. As the assignment was neither of an undivided interest in the whole patent, nor of an exclusive right within a certain territory, it was held to be a mere license.

In *Waterman v. Mackenzie*, 139 U. S. 252 (31: 923), an agreement by which the owner of a patent granted to another "the sole and exclusive right and license to manufacture and sell" a patented article throughout the United States, (not expressly authorizing him to use it), was held not to be an assignment, but a license, and to give the licensee no right to sue in his own name. The language used by the court in this case was a restatement of that employed by Chief Justice Taney in *Gayler v. Wilder*, to the effect that the monopoly granted by the patent laws is one entire thing, and cannot be divided into parts, except as authorized by those laws; and that the right of the patentee to assign his monopoly was limited, either, first, to the whole patent, comprising the exclusive right to make, use, and vend the invention throughout the United States; or, second, to an undivided part or share of that exclusive right; or, third, to the exclusive right under the patent within and throughout a specified territory. Rev. Stat. 4898. "A transfer," said the court, "of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers: in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement."

We see no reason to qualify in any way the language of these opinions. While it is sometimes said that each claim of a patent is a separate patent, it is true only to a limited extent. Doubtless separate defenses may be interposed to different claims, and some may be held to be good and others bad, but it might lead to very great confusion to permit a patentee to split up his title within the same territory into as many different parts as there are claims. If he could do this, his assignees would have the same right they now have to assign the title to certain territory, and the legal title to the patent might thus be distributed among a hundred persons at the same time. Such a division of the legal title would also be provo-

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cative of litigation among the assignees themselves as to the exact boundaries of their respective titles. We think the so-called assignment to Kirkpatrick was a mere license, and did not vest in him or his assigns the legal title to the second claim nor the right to sue in his own name upon it.

This disposition of the assignment renders it unnecessary to discuss the validity of the patent.

(2) Patent No. 314142, to Thomas J. Kirkpatrick, issued March 17, 1883, contains four claims, the first one of which is relied upon to sustain this bill. This claim is as follows:

"1. The combination, with the perch or backbone of a bicycle or similar vehicle, of independent front and rear springs secured to said perch or backbone, and a flexible seat suspended directly from said springs at the front and rear, respectively, substantially as set forth."

"My invention," says the patentee in his specification, "consists in a peculiar arrangement of front and rear springs secured independently to the perch or 'backbone' of the machine in connection with the flexible seat suspended at the front and rear from said springs. . . . These springs, D and E, are secured independently to the perch or backbone A, each spring being preferably secured as nearly as practicable under the end of the saddle to which said spring is attached."

. . . In order to extend the suspended flexible seat as far forward as possible, and at the same time secure the full elasticity of the forward spring D, I construct the said spring with two wings, d' d', adapted to extend forward of the head B, and turn upward and backward to connect with the forward end of the seat C."

If this claim be extended, as is insisted by the appellant, to include every device by which a flexible seat is suspended upon the perch or backbone of a bicycle by independent springs at the front and rear ends of such seat, it is anticipated by several patents put in evidence by the defendants. Thus in the Fowler patent of 1880, a saddle seat is shown to be suspended above the perch or backbone upon a coil spring in front and with a grooved leaf spring in the rear, these springs being entirely independent of each other. In the Fowler patent of 1881 there is exhibited a saddle seat suspended from the backbone by independent front and rear springs, though there may be some doubt whether the seat in either of these cases is flexible. There is no doubt, however, that in the Veeder patent of 1892 there is a flexible saddle seat carried upon the perch or backbone of a bicycle, and resting upon two parts of the same spring, which, however, cannot be said to be entirely independent of each other. Evidently, however, the feature of flexibility cuts no figure in this case, since it would manifestly require no invention to adapt the Fowler saddles to a flexible seat.

In view of these patents, the Kirkpatrick patent cannot be sustained for the combination indicated without the qualification, "substantially as set forth," at the end of the claim, which limits it to a forward spring adapted to extend forward of the head and turn upward

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and backward to connect with the forward end of the seat; the effect of this being to throw the seat as far forward as possible, and to render unnecessary any intervening mechanism or device between the forward end of the saddle and the perch.

[254] Limited in this way, it is clear the defendants do not infringe, making use, as they do, of springs, which are not only quite different from the Kirkpatrick springs in their design, but omit the important particular of projecting in front of the steering post.

There was no error in the action of the court below, and its decree is therefore affirmed.

THE POPE MANUFACTURING COMPANY, *Appl.*,

THE GORMULLY & JEFFERY MANUFACTURING COMPANY ET AL.

(See *S. C. Reporter's ed.* 234-230.)

Patents for vehicle wheels—case followed.

1. The second and third claims of Patent No. 249278, issued November 8, 1881, to Albert E. Wallace, for an axle bearing for vehicle wheels; and the second and third claims of patent No. 280421, issued July 3, 1883, to the same person for a similar device are mechanical adaptations of, or variations from, what had before been exhibited by the English patents, and are not inventions of anything essentially novel.
2. The decision in *Pope Mfg. Co. v. Gormully*, ante, p. 111, that the contract of December 1, 1881, entered into by defendants with the plaintiff, in which they acknowledged the validity of these patents, did not estop the defendants from contesting the validity of these patents, followed.

[No. 208.]

Argued March 10, 11, 1892. Decided April 4, 1892.

A PPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, dismissing a suit in equity for the infringement of letters patent No. 249278, issued November 8, 1881, to Albert E. Wallace, for an axle bearing for vehicle wheels; and patent No. 280421, issued July 3, 1883, to the same person and for a similar device. **Affirmed.**

See same case below, 34 Fed. Rep. 800.

Statement by Mr. Justice Brown:

This was a bill in equity for the infringement of letters patent No. 249278, issued November 8, 1881, to Albert E. Wallace, for an axle bearing for vehicle wheels; and patent No. 280421, issued July 3, 1883, to the same person and for a similar device. In addition to the usual allegations of the bill for an infringement, it was alleged that the defendants were bound by certain covenants in the contract of December 1, 1881, entered into with the plaintiff, in which they acknowledged the validity of these patents, and agreed not to manufacture ball bearings such as described and shown, and made the subject-matter of its claim, and that they are, therefore, estopped to deny the validity of such patents; and that it was also

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stipulated in said agreement that the devices such as were being made by the defendant were contained in said patents and covered by the claims thereof, whereby the defendants were estopped to deny infringement.

The court below held that the defendants [255] were not estopped by this contract; that the patents were invalid; and that, if valid, they were not infringed; and dismissed the bill, from which decree the plaintiff appealed to this court. 34 Fed. Rep. 800.

Messrs. L. L. Coburn and Edmund Wetmore for appellant.

Mr. C. E. Ofield for appellees.

Mr. Justice Brown delivered the opinion of the court:

As we have already held, in the case between the plaintiff and defendant Gormully, No. 204, that the contract of December 1, 1881, did not operate to estop the defendants from contesting the validity of these patents, it is not necessary to consider this case any farther so far as the claim for recovery based upon this contract is concerned. The case must be tried as an ordinary suit in equity for the infringement of a patent.

(1) Patent No. 249278, to Albert E. Wallace, is for an improvement in axle bearings for vehicle wheels. The object of the invention seems to have been the construction of a ball bearing in two parts in such manner as to admit of the wear of the balls being taken up gradually, as the wear progresses, in order to keep the bearings tight. In reference to this he says in his specification:

"Heretofore many anti-friction bearings have been made and described, including various forms of ball bearings, and the latter class have been constructed so as to be adjustable for wear by having the bearing box made in two or more parts, and so that they may be made to approach each other to tighten the bearings. In respect to bearings for light wheels, particularly for bicycles, it is desirable to make the parts as light and snug and of as little material [256] as possible, consistently with strength. To make them true—that is, so that the balls shall be perfect spheres—and of even diameter, and that the bearing surfaces in which they revolve shall be of even distance apart, and of even curvature and shape and shall be kept so, and that in putting together and adjusting the bearing parts shall be made to approach each other with perfect evenness. It is also desirable to make the parts and their joints as few as possible, so that the structure composed of them when put together and in operation shall not be liable to displacement, breakage, or accident.

"It is the object of my improvement to secure these desirable qualities in an adjustable anti-friction ball bearing, and to obviate the difficulties and imperfections existing in previous attempts in this direction."

The second and third claims only are alleged to have been infringed. They are as follows:

"2. The described anti-friction bearing for a wheel and axle, consisting of a one part bearing box and a two part sleeve, having a circular row of balls within said box and between bearing surfaces in the box and on either part of the

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sleeve, and adapted for adjustment for wear and securement in position on an axle by a screw thread at the outer end of one part of the sleeve, operating to draw it toward and from the other part, substantially as set forth.

"3. The described anti-friction bearing for a wheel and axle, consisting of a two part collar or sleeve adapted to inclose the axle, a one part bearing box inclosing said sleeve and containing a recess with bearing surfaces between which and a bearing surface on either part the said sleeve is held, a circular row of balls combined and constructed essentially as shown and described, for securement in position and adjustment for wear by the pressure of one part of the sleeve against the hub of the wheel, and by an external thread on the other part of the sleeve, operating in an internal thread in a boss secured to the axle on the opposite side, substantially as set forth."

In reference to the adjustability of his device he says that "it is obvious that this bearing will be readily adjustable to compensate [257] for any wear of the bearing parts by simply loosening the set screw, and turning the collar S', so that the thread shall force it farther into the bearing box, the impinging of the surface, p', upon the balls tending to send them to and a properly close bearing upon the surfaces. qq and pp', as in putting the parts together."

The essence of this patent, as we gather from the drawings and the application, consists of two sleeves sliding upon the axle from opposite directions, the inner ends of which are each beveled so that when the ends are brought together, or nearly so, they will form a V-shaped groove upon the axle, the inner one of these sleeves resting upon the hub of the axle, and the outer one connected with the crank, both the crank and the sleeve being threaded with a screw. Upon the axle is fitted a solid bearing box with a similar V-shaped groove containing metallic balls, and adapted to be partly retained in the groove upon the axle formed by the two beveled sleeves, one of which is made adjustable, so as to approach very near to or in contact with the other sleeve, and thus take up the wear of the balls by narrowing the V-shaped groove in which they are contained.

The use of ball bearings for bicycle and other wheels was so common at the date of this patent that it is needless even to allude to the large number of prior patents upon this subject.

Bearing in mind that the peculiarity of this patent consists in a sleeve of two parts, adapted for adjustment for wear and securement in position by a screw-thread at the outer end of one part of the sleeve, operating to draw it toward and from the other part, we find practically the same device in the English patent to James Bate for improvements in velocipedes, dated November 14, 1873. Figure 20 of this patent indicates in section a method of affixing and adjusting the cones of a velocipede front or back axle bearing. A fixed cone corresponding to the plaintiff's sleeve, S, is screwed on to a spindle, and has a sleeve formed solid therewith, and screwed inside and out. Another adjustable cone, corresponding to plaintiff's sleeve, S', is screwed upon the sleeve and is locked by a nut or collar, also [258]

screwed upon the sleeve. The groove corresponding to the V-shaped groove of the plaintiff's patent is formed by the contact of these two cones, precisely as in the Wallace patent, and the feature of adjustability is attained by screwing the adjustable cone upon the sleeve as far as necessary to tighten the bearings and even up to actual contact with the fixed cone. So far as the object to be accomplished is concerned, it makes no difference which one of these cones is adjustable, so long as it affords opportunity for a gradual tightening of the bearing. If there be any difference between this and the Wallace patent, it is not such a difference as affects the essential feature of both, namely, that of adjustability, or such as to involve any patentable novelty.

The English patents to Lewis of 1879, and to Bown and Hughes, of March, 1880, also exhibit a somewhat similar device of a loose adjustable cone, but the resemblance to the Wallace patent is not so obvious as in case of the Bate patent.

As the Bate patent anticipates every valuable feature of the second and third claims of the Wallace patent, it is unnecessary to consider the question of infringement.

(2) Patent number 280421, granted July 3, 1893, to the same party, is for an improvement upon the device covered by the prior patent, and consists in providing the inner sleeve of that patent, which surrounds the axle and rests against the hub of the wheel, with a flange annulus, and attaching to the hub and wheel a locking button, which engages with notches or teeth on the edge of the annulus, and locks it to the hub so that the sleeve will always turn with the axle or hub. This construction also provided for an adjustment of the inner sleeve on the axle as well as the outer sleeve.

Another modification of this patent not contained in the first, consists in the construction of the bearing box. In the first patent the bearing box is attached directly to the frame of the machine, while in the second it is placed within a shell, which in turn is attached to the frame of the machine.

The claims of this patent alleged to be infringed are the second and third, which read as follows:

"2. Constructed and combined substantially as herein set forth, a two part sleeve, a bearing box, a row of balls, a serrated annulus, and a locking button, with an axle and hub and flange, essentially as shown and described.

"3. The combination, in a ball bearing device, of a free bearing box, G, and a shell case, E, substantially as set forth."

This patent contains in addition all the substantial features of the first patent. Neither of them presented any lateral or side bearing for the bearing box, its entire bearing being through the balls, both to support the weight vertically and to resist the thrust. Both have two sleeves surrounding the axle. In the first patent, one sleeve was adjustable, while in the other the second sleeve was also made adjustable, and provided with an annular flange serrated on its circumference to engage with a locking button, to lock it at any desired adjustment to the flange. A similar serrated ring, with a corresponding locking device, is found in the English patent to Monks, of 1880, who states

that he employs "a turned bush, conical at the outer end, and a somewhat similar one which is screwed upon the outside of the first said bush. In the V-shaped groove which is formed by these two bushes, when in position, I arrange a series of balls which rotate between the bushes and the lower part of the fork, which forms a cap, somewhat circular, with a segmental groove in it for the balls to work in.

The outer end of the bush is formed into a milled or ratchet bend, and is prevented from turning round after adjustment by means of a pawl fastened to a plate, my object being adjustment in a simple and efficacious manner when required." The shell case described in the third claim of this patent seems to be found in the Salamon bearing patent of 1830 and the Jeffery patent of 1833, under the latter of which the defendant is manufacturing. The patent, though issued the same year as the Wallace patent, antedates it, both in respect to the application and the patent itself. We agree with the conclusion of the court below, that "with these old devices found in the art, it seems clear to us that the defendants had the right to use the ball bearing boxes which are shown by the proof to have been embodied in their machine."

[260] It may be said of both these patents that they are mechanical adaptations of or variations from what had before been exhibited by the English patents, rather than inventions of anything essentially novel. They appear to involve such immaterial changes as would be required to adapt a known device to use in a combination with other elements already existing, and such as would occur to any skilled mechanic. Indeed, the objects of these patents, and the same remark may be made of all, or nearly all, involved in these suits, seems to have been principally to forestall competition rather than to obtain the just rewards of an inventor. It is true, the defendants make use of devices similar in many particulars to those employed by the plaintiff, but they, too, seem rather to have adopted prior and known devices, and fitted them to the peculiar construction of their machine, rather than to have purloined them from the plaintiff.

These cases are not without their difficulties, owing somewhat to the complicated nature of some of the devices, the number of anticipating patents, the difficulty of determining how far the later ones are merely colorable variations of the prior ones, and how far they involve invention; but upon the best consideration we have been able to give them, we have seen no reason to differ from the judgment of the court below in its estimate of their value.

The decree of the Circuit Court is therefore affirmed.

MIRAM H. McLANE ET AL., *Appls.*,

Z. KING ET AL.

(See S. C. Reporter's ed. 23-231.)

Liability of contractor to subcontractor.

Where one contracts to build a bridge for certain stock of the bridge company and for its notes secured by mortgage on the bridge, and a subcontractor agrees with him to build the bridge for such stock, and the original contractor forecloses his mortgage on the bridge after it is built, and buys it in on the foreclosure sale, thereby rendering the stock worthless, these facts create no liability on the part of the original contractor to the sub-contractor; and the latter cannot in a suit against the former be decreed to have a joint interest in the bridge and obtain an accounting of tolls and profits arising therefrom.

[No. 235.]

Argued and Submitted March 23, 1892. Decided April 5, 1892.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Texas, dismissing on demurrer, a suit in equity to have the plaintiffs decreed to be jointly interested in a bridge and for an accounting of tolls and profits. *Affirmed.*

Statement by Mr. Justice Brewer:

This suit was originally commenced in the District Court of Karnes county, Texas, on September 12, 1882, and thereafter properly removed to the Circuit Court of the United States for the Western District of Texas. The facts as disclosed by the bill were, that in 1876 [261] there existed a corporation, known as the Helena Bridge Company, and organized for the purposes of building an iron bridge over the San Antonio river at the town of Helena. The defendants King & Sou had a contract with the bridge company for the full construction of the bridge, payment therefor to be made partly by the transfer of \$10,000 of full-paid stock and partly in notes of the corporation, secured by a mortgage on the bridge. The stock was never issued, but the notes and mortgage were duly executed and delivered. King & Sou contracted with the plaintiff Ruckman to do part of the work. By the terms of this contract they were to have transferred to Ruckman, in full payment of his work, the

As to fraud and undue influence in avoidance of deed or will, see note to Hamling v. Handy, 6: 429.

As to fraud, or illegal consideration, how far will avoid contract, see note to Armstrong v. Toler, 6: 403.

As to cancellation of a deed or a contract in equity for fraud, concealment, or misrepresentation, see note to Neblett v. Macfarland, 22: 471.

As to fraud and false representations in sale of goods raised by suing for the price, or selling, or receiving pay for goods; cause of action for money or goods obtained by false representation, assignable; relief for fraud is barred by assent to transaction, or by election to affirm the contract, see note to Fenimore v. United States, 1: 611.

As to action for deceit, what necessary to sustain, [189] see note to Ming v. Woolfolk, 29: 740.

As to fraud as a plea to a judgment of another State, see note to Christmas v. Russell, 18: 475.

As to Statute of Limitations in cases of fraud, in equity, see note to Stearns v. Page, 12: 924.

22 UNITED STATES CODES 611 et seq.

1938 FOREIGN AGENTS REGISTRATION ACT

UNITED STATES CODE ANNOTATED

Title 22

Foreign Relations and Intercourse

§§ 1 to 1250

Under Arrangement of Official Code of
the Laws of the United States
with
Annotations from Federal and State Courts

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1919 (47 U.S.C. 111)" on authority of section 2(b) of Pub.L. 90-420, Oct. 22, 1968, 82 Stat. 1365, section 1 of which enacted Title 14, Public Printing and Documents.

1954 Amendment. Subsec. (a). Pub.L. 83-177 substituted provisions limiting appropriations to not more than 25 per centum of the expenses for provisions which authorized an appropriation of not more than \$1,750,000 per annum for payment of expenses.

1950 Amendment. Subsec. (a). Joint Res. Sept. 21, 1950, § 1(e)(1), (2), increased the authorized annual appropriation from \$1,091,750 to \$1,750,000, and changed the reference to the Organization's constitution from article 13(c) to article 12(2)(e) and 12(2).

Subsec. (a). Joint Res. Sept. 21, 1950, § 1(e)(3), struck out a limitation of \$95,000 on the authorized annual appropriation for expenses.

1919 Amendment. Subsec. (b)(1). Act Oct. 28, 1919 substituted "Classification Act of 1949" for "Classification Act of 1927".

Repeals. Act Oct. 29, 1919, c. 782, set out in the credit of this section, was repealed subject to a savings clause by Pub.L. 90-531, § 8, Sept. 6, 1968, 80 Stat. 632, 657.

Limitation of Contributions. Contributions by United States, except for special projects, limited to amount provided by Joint Res. Sept. 21, 1950; consent by State Department and reports to Congress, see section 262a of this title.

Annual Appropriations. Annual appropriation to meet the obligations of membership in the International Labor Organization was contained in the following Department of State Appropriation Acts.

- 1978—Pub.L. 95-431, Title I, § 101, Oct. 10, 1978, 92 Stat. 1022.
1977—Pub.L. 95-80, Title I, § 101, Aug. 2, 1977, 91 Stat. 420.
1976—Pub.L. 94-362, Title I, § 101, July 14, 1976, 90 Stat. 938.
1975—Pub.L. 94-121, Title I, § 101, Oct. 21, 1975, 89 Stat. 613.
1974—Pub.L. 93-433, Title I, § 101, Oct. 3, 1974, 88 Stat. 1588.
1973—Pub.L. 93-162, Title I, § 101, Nov. 27, 1973, 87 Stat. 637.
1972—Pub.L. 92-544, Title I, § 101, Oct. 25, 1972, 86 Stat. 1110.
1971—Pub.L. 92-77, Title I, § 101, Aug. 10, 1971, 85 Stat. 217.
1970—Pub.L. 91-472, Title I, § 101, Oct. 21, 1970, 84 Stat. 1011.

Legislative History. For legislative history and purpose of Act Sept. 21, 1950, see 1950 U.S.Code Cong.Service, p. 3758. See also, Pub.L. 87-477, 1968 U.S.Code Cong. and Adm.News, p. 2755.

Library References

United States 687.

C.J.S. United States § 123.

§ 272b Loyalty check on United States personnel. No person shall serve as representative, delegate, or alternate from the United States until such person has been investigated as to loyalty and security by the Office of Personnel Management.

June 30, 1948, c. 756, § 3, 62 Stat. 1152; Apr. 5, 1952, c. 159, § 1, 66 Stat. 43; 1978 Reorg. Plan No. 2, § 102, 43 F.R. 36037, 92 Stat. —.

Historical Note

1952 Amendment. Act Apr. 5, 1952 substituted "Civil Service Commission" for "Federal Bureau of Investigation".

Transfer of Functions. "Office of Personnel Management" was substituted for "Civil Service Commission" pursuant to Reorg. Plan No. 2 of 1978, § 102, 43 F.R. 36037, 92 Stat. —, set out in the Appendix to Title 5, Government Organization and

Employees, which, except as otherwise specified in the Plan, transferred all functions vested by statute in the United States Civil Service Commission, or the Chairman of said Commission, or the Boards of Examiners established by section 1105 of Title 5 to the Director of the Office of Personnel Management.

Library References

United States 636.

C.J.S. United States §§ 30, 37, 62 to 64.

SEE: EXECUTIVE 10422 - LOYALTY PROCEDURES FOR EMPLOYEES - 22 USC 272b-248 (PART III)

26 Under Sec Gen of

CHAPTER 11—FOREIGN AGENTS AND PROPAGANDA

SUBCHAPTER I—GENERALLY

Sec.

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621. Reports to Congress.

SUBCHAPTER I—GENERALLY

Library References

International Law § 10.24.

C.J.S. International Law § 12.

§ 601. Repealed. June 25, 1948, c. 645, § 21, 62 Stat. 862

Historical Note

Section, Acts June 15, 1917, c. 30, Title section 251 of Title 18, Crimes and Criminal Procedure. VIII, § 3, 40 Stat. 226; Mar. 28, 1940, c. 72, § 6, 54 Stat. 60, related to acting as a foreign agent without notice to Secretary of State, and is now covered by section effective Sept. 1, 1948, see Act June 25, 1948, c. 645, § 20, 62 Stat. 862.

SUBCHAPTER II—REGISTRATION OF FOREIGN PROPAGANDISTS

EXECUTIVE ORDER NO. 9176

May 29, 1942, 7 F.R. 4127

TRANSFER OF REGISTRATION FUNCTIONS FROM THE SECRETARY OF STATE TO THE ATTORNEY GENERAL

By virtue of the authority vested in me by Title I of the First War Powers Act, 1941, approved December 18, 1941 (Public Law No. 354, 77th Congress [section 601 et seq. of the Appendix to Title 50, War and National Defense]), and as President of the United States, it is hereby ordered as follows:

1. All functions, powers and duties of the Secretary of State under the act of June 8, 1938 (52 Stat. 631), as amended by the act of August 7, 1939 (53 Stat. 1244) [this subchapter], requiring the registration of agents of foreign principals, are hereby transferred to and vested in the Attorney General.

2. All property, books and records heretofore maintained by the Secretary of State with respect to his administration of said act of June 8, 1938, as amended, are hereby transferred to and vested in the Attorney General.

3. The Attorney General shall furnish to the Secretary of State for such comment, if any, as the Secretary of State may desire to make from the point of view of the foreign relations of the United States, one copy of each registration statement that is hereafter filed with the Attorney General in accordance with the provisions of this Executive order.

4. All rules, regulations and forms which have been issued by the Secretary of State pursuant to the provisions of said act of June 8, 1938, as amended, and which are in effect shall continue in effect until modified, superseded, revoked or repealed by the Attorney General.

5. This order shall become effective as of June 1, 1942.

§ 611. Definitions

As used in and for the purposes of this subchapter—

(a) The term "person" includes an individual, partnership, association, corporation, organization, or any other combination of individuals;

(b) The term "foreign principal" includes—

(1) a government of a foreign country and a foreign political party;

(2) a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and

(3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

(c) Except as provided in subsection (d) of this section, the term "agent of a foreign principal" means—

(1) any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person—

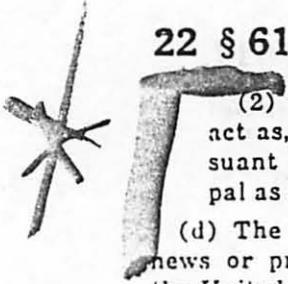
(i) engages within the United States in political activities for or in the interests of such foreign principal;

(ii) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal;

(iii) within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or

(iv) within the United States represents the interests of such foreign principal before any agency or official of the Government of the United States; and

ATTORNEYS



(2) any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1) of this subsection.

(d) The term "agent of a foreign principal" does not include any news or press service or association organized under the laws of the United States or of any State or other place subject to the jurisdiction of the United States, or any newspaper, magazine, periodical, or other publication for which there is on file with the United States Postal Service information in compliance with section 3611 of Title 39,² published in the United States, solely by virtue of any bona fide news or journalistic activities, including the solicitation or acceptance of advertisements, subscriptions, or other compensation therefor, so long as it is at least 80 per centum beneficially owned by, and its officers and directors, if any, are citizens of the United States, and such news or press service or association, newspaper, magazine, periodical, or other publication, is not owned, directed, supervised, controlled, subsidized, or financed, and none of its policies are determined by any foreign principal defined in subsection (b) of this section, or by any agent of a foreign principal required to register under this subchapter;

(e) The term "government of a foreign country" includes any person or groups of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or over any part of such country, and includes any subdivision of any such group and any group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been recognized by the United States;

(f) The term "foreign political party" includes any organization or any other combination of individuals in a country other than the United States, or any unit or branch thereof, having for an aim or purpose, or which is engaged in any activity devoted in whole or in part to, the establishment, administration, control, or acquisition of administration or control, of a government of a foreign country or a subdivision thereof, or the furtherance or influencing of the political or public interests, policies, or relations of a government of a foreign country or a subdivision thereof;

(g) The term "public-relations counsel" includes any person who engages directly or indirectly in informing, advising, or in any way representing a principal in any public relations matter pertaining to political or public interests, policies, or relations of such principal;

(h) The term "publicity agent" includes any person who engages directly or indirectly in the publication or dissemination of oral, visual, graphic, written, or pictorial information or matter of any

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kind, including publication by means of advertising, books, periodicals, newspapers, lectures, broadcasts, motion pictures, or otherwise;

(i) The term "information-service employee" includes any person who is engaged in furnishing, disseminating, or publishing accounts, descriptions, information, or data with respect to the political, industrial, employment, economic, social, cultural, or other benefits, advantages, facts, or conditions of any country other than the United States or of any government of a foreign country or of a foreign political party or of a partnership, association, corporation, organization, or other combination of individuals organized under the laws of, or having its principal place of business in, a foreign country;

(j) The term "political propaganda" includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence. As used in this subsection the term "disseminating" includes transmitting or causing to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce or offering or causing to be offered in the United States mails;

(k) The term "registration statement" means the registration statement required to be filed with the Attorney General under section 612(a) of this title, and any supplements thereto required to be filed under section 612(b) of this title, and includes all documents and papers required to be filed therewith or amendatory thereof or supplemental thereto, whether attached thereto or incorporated therein by reference;

(l) The term "American republic" includes any of the states which were signatory to the Final Act of the Second Meeting of the Ministers of Foreign Affairs of the American Republics at Habana, Cuba, July 30, 1940;

(m) The term "United States", when used in a geographical sense, includes the several States, the District of Columbia, the Territories, the Canal Zone, the insular possessions, and all other places now or hereafter subject to the civil or military jurisdiction of the United States;

(n) The term "prints" means newspapers and periodicals, books, pamphlets, sheet music, visiting cards, address cards, printing proofs, engravings, photographs, pictures, drawings, plans, maps, patterns to be cut out, catalogs, prospectuses, advertisements, and printed, engraved, lithographed, or autographed notices of various kinds, and, in general, all impressions or reproductions obtained on paper or other material assimilable to paper, on parchment or on cardboard, by means of printing, engraving, lithography, autography, or any other easily recognizable mechanical process, with the exception of the copying press, stamps with movable or immovable type, and the typewriter;

(o) The term "political activities" means the dissemination of political propaganda and any other activity which the person engaging therein believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, persuade, or in any other way influence any agency or official of the Government of the United States or any section of the public within the United States with reference to formulating, adopting, or changing the domestic or foreign policies of the United States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party;

(p) The term "political consultant" means any person who engages in informing or advising any other person with reference to the domestic or foreign policies of the United States or the political or public interest, policies, or relations of a foreign country or of a foreign political party;

(q) For the purpose of section 613(d) of this title, activities in furtherance of the bona fide commercial, industrial or financial interests of a domestic person engaged in substantial commercial, industrial or financial operations in the United States shall not be deemed to serve predominantly a foreign interest because such activities also benefit the interests of a foreign person engaged in bona fide trade or commerce which is owned or controlled by, or which owns or controls, such domestic person: *Provided*, That (i) such foreign person is not, and such activities are not directly or indirectly supervised, directed, controlled, financed or subsidized in whole or in substantial part by, a government of a foreign country or a foreign political party, (ii) the identity of such foreign person is disclosed to the agency or official of the United States with whom such activities are conducted, and (iii) whenever such foreign person owns or controls such domestic person, such activities are substantially in furtherance of the bona fide commercial, industrial or financial interests of such domestic person.

June 8, 1938, c. 327, § 1, 52 Stat. 631; Aug. 7, 1939, c. 521, § 1, 53 Stat. 1244; Apr. 29, 1942, c. 263, § 1, 56 Stat. 249; Proc.No.2695, July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; Sept. 23, 1950, c. 1024, Title I, § 20(a), 64 Stat. 1005; Aug. 1, 1956, c. 849, § 1, 70 Stat. 899;

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Oct. 4, 1961, Pub.L. 87-366, § 1, 75 Stat. 784; July 4, 1966, Pub.L. 89-486, § 1, 80 Stat. 244; Aug. 12, 1970, Pub.L. 91-375, § 6(k), 84 Stat. 782.

¹So in original. Probably should read "Except".

²So in original. Reference should probably be to section 3625 of Title 39.

Historical Note

Codification. Words "including the Philippine Islands," were deleted from the definition of the "United States" in subsection (m) pursuant to Proc. No. 2625, which granted independence to the Philippines under the authority of section 1394 of this title, under which section Proc. No. 2625 is set out as a note.

1970 Amendment. Subsec. (d), Pub.L. 91-375 substituted "file with the United States Postal Service information in compliance with section 3611 of Title 39" for "file with the Postmaster General a sworn statement in compliance with section 2 of the Act of August 24, 1912 (37 Stat. 533), as amended".

1966 Amendment. Subsec. (b), Pub.L. 89-486, § 1(1), redesignated former pars. (3) and (4) as (2) and (3), substituted in such par. (3) "combination of persons" for "combination of individuals" and eliminated from the definition of "foreign principal" former pars. (2), (3), and (6) which included "(2) an individual affiliated or associated with, or supervised, directed, controlled, financed, or subsidized, in whole or in part, by any foreign principal defined in clause (1) of this subsection"; "(3) a domestic partnership, association, corporation, organization, or other combination of individuals, subsidized directly or indirectly, in whole or in part, by any foreign principal defined in clause (1), (3), or (4) of this subsection"; and "(6) a domestic partnership, association, corporation, or other combination of individuals, supervised, directed, controlled, or financed, in whole or in substantial part, by any foreign government or foreign political party."

Subsec. (c), Pub.L. 89-486, § 1(2), amended provisions generally to redefine "agent of a foreign principal" by specifying four categories of activities creating the agency relationship where person acts as agent, employee, representative, or servant or at the order of, or under the control of, a foreign principal, by requiring a showing not only of foreign connections but also of certain activities performed by the agent for foreign interests, by making change as it relates to problem of indirect control exerted by foreign principals over their agents, by including political activities and actions

as political consultant, by excluding attorneys from the relationship, by incorporating provisions of former par. (3) in par. (2) where a person assumes or purports to act as an agent of a foreign principal, and by eliminating the separate category for military or governmental officials contained in former par. (4).

Subsec. (d), Pub.L. 89-486, § 1(3), struck out "clause (1), (2), or (4) of" preceding "subsection (b)".

Subsec. (g), Pub.L. 89-486, § 1(4), inserted "public relations" preceding "matter pertaining to" and "of such principal" following "or relations".

Subsecs. (o) to (q), Pub.L. 89-486, § 1(5), added subsecs. (o) to (q).

1961 Amendment. Subsec. (b)(6), Pub.L. 87-366 added par. (6).

1956 Amendment. Subsec. (c)(5), Act Aug. 1, 1956 repealed par. (5), which included within the definition of "agent of a foreign principal" any person trained in foreign espionage systems with certain exceptions, and is now covered by sections 551 and 872 of Title 50, War and National Defense.

1950 Amendment. Subsec. (c)(5), Act Sept. 23, 1950 added par. (5).

1942 Amendment. Act Apr. 29, 1942 amended section generally to redefine terms used in this subchapter.

1939 Amendment. Act Aug. 7, 1939 amended section generally to redefine terms used in this subchapter.

Effective Date of 1970 Amendment. Amendment by Pub.L. 91-375 effective within 1 year after Aug. 12, 1970, on date established therefor by the Board of Governors of the United States Postal Service and published by it in the Federal Register, see section 15(a) of Pub.L. 91-375, set out as a note preceding section 101 of Title 39, Postal Service.

Effective Date of 1966 Amendment. Section 9 of Pub.L. 89-486 provided that: "This Act [which enacted sections 219 and 613 of Title 18, Crimes and Criminal Procedure, and amended sections 611 to 616 and 618 of this title] shall take effect ninety days after the date of its enactment [July 4, 1966]."

Effective Date of 1942 Amendment. Section 3 of Act Apr. 29, 1942 provided that: "This Act [this subchapter] shall take effect on the sixtieth day after the date of its approval, except that prior to such sixtieth day the Attorney General may make, prescribe, amend, and rescind such rules, regulations, and forms as may be necessary to carry out the provisions of this Act [this subchapter]."

Effective Date. Section 7 of Act June 8, 1938 provided that this subchapter shall take effect on the ninetieth day after June 8, 1938.

Short Title. Section 14 of Act June 8, 1938, as added by Act Apr. 29, 1942, § 1, provided that: "This Act [this subchapter] may be cited as the 'Foreign Agents Registration Act of 1938, as amended'."

Separability of Provisions; Effect on Existing Law. Sections 12 and 13 of Act June 8, 1938, as added by Act Apr. 29, 1942, § 1, provided that:

"Sec. 12. If any provision of this Act [this subchapter], or the application thereof to any person or circumstances, is held invalid, the remainder of the Act [this subchapter], and the application of such provisions to other persons or circumstances, shall not be affected thereby.

"Sec. 13. This Act [this subchapter] is in addition to and not in substitution for any other existing statute."

Transfer of Functions. Section 2 of Act Apr. 29, 1942 provided that: "Upon the effective date of this Act [see Effective Date of 1942 Amendment note above], all powers, duties, and functions of the Secretary of State under the Act of June 8, 1938 (52 Stat. 631), as amended [this subchapter], shall be transferred to and be-

come vested in the Attorney General, together with all property, books, records, and unexpended balances of appropriations used by or available to the Secretary of State for carrying out the functions devolving on him under the above-cited Act [this subchapter]. All rules, regulations, and forms which have been issued by the Secretary of State pursuant to the provisions of said Act [this subchapter], and which are in effect, shall continue in effect until modified, superseded, revoked, or repealed."

Policy and Purpose of Subchapter. Act Apr. 29, 1942, amending generally Act June 8, 1938, added an opening paragraph preceding section 1 of the latter Act and reading as follows: "It is hereby declared to be the policy and purpose of this Act [this subchapter] to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons, and may appraise their statements and actions in the light of their associations and activities."

Legislative History. For legislative history and purpose of Act Sept. 2, 1950, see 1950 U.S.Code Cong.Service, p. 3882. See, also, Act Aug. 1, 1950, 1950 U.S.Code Cong. and Adm.News, p. 465; Pub.L. 87-360, 1961 U.S.Code Cong. and Adm.News, p. 3218; Pub.L. 89-450, 1966 U.S.Code Cong. and Adm.News, p. 2297; Pub.L. 91-375, 1970 U.S.Code Cong. and Adm.News, p. 3649.

Cross References

Military or civilian censorship prohibited, and preservation of certain constitutional rights, see section 793 of Title 50, War and National Defense.
Registration functions of Secretary of State transferred to Attorney General, see Ex.Ord.No.9170, set out preceding this section.

Code of Federal Regulations

Administration and enforcement, see 28 CFR 11 et seq.

Notes of Decisions

Agent 4
Constitutionality 1
Domestic organization 5
Power of Congress 3
Purpose 2

1. Constitutionality

This subchapter is valid and is not subject to any constitutional infirmity. *U. S. v. Pearl Inform. Center*, D.C.D.C. 1951, 97 F.Supp. 255.

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This subchapter is sufficiently definite to establish and formulate an ascertainable standard of guilt and is not unconstitutional as denying due process of law. *Id.*

2. Purpose

The purpose of this subchapter is to identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda, and to require them to make public record of the nature of their employment. *Viereck v. U. S.*, 1943, 63 S.Ct. 561, 318 U.S. 236, 87 L.Ed. 731.

Purpose of this subchapter is to protect interests of the United States by requiring complete public disclosure by persons acting for or in interests of foreign principals where their activities are political in nature. *Attorney General v. Irish Northern Aid Committee*, D.C.N.Y.1972, 310 F.Supp. 1381, affirmed 465 F.2d 1405.

It cannot be seriously argued that sole or dominating purpose of this subchapter is to compel criminals to keep incriminating records to be used to convict record keepers in subsequent criminal trials, as purpose of this subchapter is to meet government's need for records necessary to enforce its national defense and foreign relations policies. *Id.*

The purpose of this subchapter is to require all persons who are in the United States for political propaganda purposes to register and supply specified information concerning their activities, employers and contracts in order to publicize the nature of subversive or other similar activities of such foreign propagandists. *U. S. v. Peace Information Center*, D.C.1951, 97 F.Supp. 255.

This subchapter was designed to bring about disclosure of authorship and source of that appearing in publications and other media of dissemination at instance of foreign governments or foreign factions or parties, as well as to prevent writings of a character seeking to establish a foreign system of government in the United States, or to secure group action of a nature foreign to United States institutions of government. *U. S. v. Kelly*, D.C.D.C.1943, 61 F.Supp. 362.

Congress in enacting this subchapter, requiring the agent of foreign principal who undertakes to disseminate foreign political propaganda in United States to register with the Secretary of State, did not intend to deprive citizens of United States of political information, even if such information should be propaganda

of foreign government or foreign principal, but Congress did intend to bring activities of persons engaged in disseminating foreign political propaganda out into the open and to make known the identity of any person engaged in such activities, the source of the propaganda and who is bearing the expense of its dissemination in the United States. *U. S. v. Anshagen*, D.C.D.C.1941, 39 F.Supp. 590.

3. Power of Congress

This subchapter founded on indisputable power of government to conduct its foreign relations and to provide for national defense and so falls within inherent regulatory power of Congress. *Attorney General v. Irish Northern Aid Committee*, D.C.N.Y.1972, 310 F.Supp. 1381, affirmed 465 F.2d 1405.

The subject matter of this subchapter affecting agents of foreign principals who carry on specified activities in the United States is within the power of Congress under U.S.C.A.Const. Art. 1, § 8, to legislate concerning the "national defense". *U. S. v. Peace Information Center*, D.C.D.C.1951, 97 F.Supp. 255.

The subject matter of this subchapter dealing with agents of foreign principals who carry on specified activities in the United States is within the field of external affairs of the United States and therefore within the inherent regulatory power of Congress. *Id.*

4. Agent

The requirement for registration under section 612 of this title is not limited to agencies created by an express contract, but true test is whether agency in fact exists. *U. S. v. German-American Vocational League*, C.C.A.N.J.1946, 153 F.2d 860, certiorari denied 66 S.Ct. 976, 977, 978, 323 U.S. 833, 534, 90 L.Ed. 1608, 1609, 1610.

In prosecution for conspiracy to violate section 612 of this title, evidence was sufficient to sustain determination that corporate defendant was agent for foreign principal within requirement of that section for registration. *Id.*

5. Domestic organization

Where there is covert of action among individuals for furthering interest of a foreign government, they constitute a "domestic organization" within meaning of this subchapter notwithstanding that they are organized by an agent of such government sent here to establish such organization. *U. S. v. Kelly*, D.C.D.C. 1943, 51 F.Supp. 362.

§ 612. Registration statement.**Filing: contents**

(a) No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement and supplements thereto as required by subsections (a) and (b) of this section or unless he is exempt from registration under the provisions of this subchapter. Except as hereinafter provided, every person who becomes an agent of a foreign principal shall, within ten days thereafter, file with the Attorney General, in duplicate, a registration statement, under oath on a form prescribed by the Attorney General. The obligation of an agent of a foreign principal to file a registration statement shall, after the tenth day of his becoming such agent, continue from day to day, and termination of such status shall not relieve such agent from his obligation to file a registration statement for the period during which he was an agent of a foreign principal. The registration statement shall include the following, which shall be regarded as material for the purposes of this subchapter:

(1) Registrant's name, principal business address, and all other business addresses in the United States or elsewhere, and all residence addresses, if any;

(2) Status of the registrant; if an individual, nationality; if a partnership, name, residence addresses, and nationality of each partner and a true and complete copy of its articles of copartnership; if an association, corporation, organization, or any other combination of individuals, the name, residence addresses, and nationality of each director and officer and of each person performing the functions of a director or officer and a true and complete copy of its charter, articles of incorporation, association, constitution, and bylaws, and amendments thereto; a copy of every other instrument or document and a statement of the terms and conditions of every oral agreement relating to its organization, powers, and purposes; and a statement of its ownership and control;

(3) A comprehensive statement of the nature of registrant's business; a complete list of registrant's employees and a statement of the nature of the work of each; the name and address of every foreign principal for whom the registrant is acting, assuming or purporting to act or has agreed to act; the character of the business or other activities of every such foreign principal, and, if any such foreign principal be other than a natural person, a statement of the ownership and control of each; and the extent, if any, to which each such foreign principal is supervised, directed, owned, controlled, financed, or subsidized, in whole or in part, by any government of a foreign country or foreign political party, or by any other foreign principal;

(4) Copies of each written agreement and the terms and conditions of each oral agreement, including all modifications of such agreements, or, where no contract exists, a full statement of all the circumstances, by reason of which the registrant is an agent of a foreign principal; a comprehensive statement of the nature and method of performance of each such contract, and of the existing and proposed activity or activities engaged in or to be engaged in by the registrant as agent of a foreign principal for each such foreign principal, including a detailed statement of any such activity which is a political activity;

(5) The nature and amount of contributions, income, money, or thing of value, if any, that the registrant has received within the preceding sixty days from each such foreign principal, either as compensation or for disbursement or otherwise, and the form and time of each such payment and from whom received;

(6) A detailed statement of every activity which the registrant is performing or is assuming or purporting or has agreed to perform for himself or any other person other than a foreign principal and which requires his registration hereunder, including a detailed statement of any such activity which is a political activity;

(7) The name, business, and residence addresses, and if an individual, the nationality, of any person other than a foreign principal for whom the registrant is acting, assuming or purporting to act or has agreed to act under such circumstances as require his registration hereunder; the extent to which each such person is supervised, directed, owned, controlled, financed, or subsidized, in whole or in part, by any government of a foreign country or foreign political party or by any other foreign principal; and the nature and amount of contributions, income, money, or thing of value, if any, that the registrant has received during the preceding sixty days from each such person in connection with any of the activities referred to in clause (6) of this subsection, either as compensation or for disbursement or otherwise, and the form and time of each such payment and from whom received;

(8) A detailed statement of the money and other things of value spent or disposed of by the registrant during the preceding sixty days in furtherance of or in connection with activities which require his registration hereunder and which have been undertaken by him either as an agent of a foreign principal or for himself or any other person or in connection with any activities relating to his becoming an agent of such principal, and a detailed statement of any contributions of money or other things of value made by him during the preceding sixty days (other than contributions the making of which is prohibited under the

terms of section 613 of Title 18) in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office;

(9) Copies of each written agreement and the terms and conditions of each oral agreement, including all modifications of such agreements, or, where no contract exists, a full statement of all the circumstances, by reason of which the registrant is performing or assuming or purporting or has agreed to perform for himself or for a foreign principal or for any person other than a foreign principal any activities which require his registration hereunder;

(10) Such other statements, information, or documents pertinent to the purposes of this subchapter as the Attorney General, having due regard for the national security and the public interest, may from time to time require;

(11) Such further statements and such further copies of documents as are necessary to make the statements made in the registration statement and supplements thereto, and the copies of documents furnished therewith, not misleading.

Supplements: filing period

(b) Every agent of a foreign principal who has filed a registration statement required by subsection (a) of this section shall, within thirty days after the expiration of each period of six months succeeding such filing, file with the Attorney General a supplement thereto under oath, on a form prescribed by the Attorney General, which shall set forth with respect to such preceding six months' period such facts as the Attorney General, having due regard for the national security and the public interest, may deem necessary to make the information required under this section accurate, complete, and current with respect to such period. In connection with the information furnished under clauses (3), (4), (6), and (9) of subsection (a) of this section, the registrant shall give notice to the Attorney General of any changes therein within ten days after such changes occur. If the Attorney General, having due regard for the national security and the public interest, determines that it is necessary to carry out the purposes of this subchapter, he may, in any particular case, require supplements to the registration statement to be filed at more frequent intervals in respect to all or particular items of information to be furnished.

Execution of statement under oath

(c) The registration statement and supplements thereto shall be executed under oath as follows: If the registrant is an individual, by him; if the registrant is a partnership, by the majority of the members thereof; if the registrant is a person other than an indi-

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vidual or a partnership, by a majority of the officers thereof or persons performing the functions of officers or by a majority of the board of directors thereof or persons performing the functions of directors, if any.

Filing of statement not deemed full compliance nor as preclusion
from prosecution

(d) The fact that a registration statement or supplement thereto has been filed shall not necessarily be deemed a full compliance with this subchapter and the regulations thereunder on the part of the registrant; nor shall it indicate that the Attorney General has in any way passed upon the merits of such registration statement or supplement thereto; nor shall it preclude prosecution, as provided for in this subchapter, for willful failure to file a registration statement or supplement thereto when due or for a willful false statement of a material fact therein or the willful omission of a material fact required to be stated therein or the willful omission of a material fact or copy of a material document necessary to make the statements made in a registration statement and supplements thereto, and the copies of documents furnished therewith, not misleading.

Incorporation of previous statement by reference

(e) If any agent of a foreign principal, required to register under the provisions of this subchapter, has previously thereto registered with the Attorney General under the provisions of section 2386 of Title 18, the Attorney General, in order to eliminate inappropriate duplication, may permit the incorporation by reference in the registration statement or supplements thereto filed hereunder of any information or documents previously filed by such agent of a foreign principal under the provisions of said section.

Exemption by Attorney General

(f) The Attorney General may, by regulation, provide for the exemption—

(1) from registration, or from the requirement of furnishing any of the information required by this section, of any person who is listed as a partner, officer, director, or employee in the registration statement filed by an agent of a foreign principal under this subchapter, and

(2) from the requirement of furnishing any of the information required by this section of any agent of a foreign principal,

where by reason of the nature of the functions or activities of such person the Attorney General, having due regard for the national security and the public interest, determines that such registration, or the furnishing of such information, as the case may be, is not necessary to carry out the purposes of this subchapter.

June 8, 1938, c. 327, § 2, 52 Stat. 632; Apr. 29, 1942, c. 263, § 1, 56 Stat. 251; Aug. 3, 1950, c. 524, § 1, 64 Stat. 399; July 4, 1966, Pub. L. 89-486, § 2, 80 Stat. 245.

¹ So in original. Probably should read "connection".

Historical Note

References in Text. Section 613 of Title 18, referred to in subsec. (a)(8), was repealed by Pub.L. 84-233, Title II, § 201 (a), May 11, 1976, 90 Stat. 496.

Codification. In subsec. (e), in the original, "section 2356 of Title 15" read "the Act of October 17, 1940 (54 Stat. 1201)", which had been classified to sections 14 to 17 of Title 18. "Section 2356 of Title 15" was substituted for "sections 14 to 17 of Title 18" on authority of Act June 23, 1948, c. 643, 62 Stat. 363, section 1 of which enacted Title 18, Crimes and Criminal Procedures.

Prior Provisions. Provisions on this subject were contained in sections 612 and 613 of this title prior to general amendment of Act June 8, 1938, by Act Apr. 29, 1942.

1966 Amendment. Subsec. (a). Pub.L. 89-486, § 2(1), deleted requirement for transmittal of registration statements by the Attorney General to the Secretary of State and provision declaring a failure of transmission not to be a bar to prosecutions, now covered in section 616(b) of this title.

Subsec. (a) (3). Pub.L. 89-486, § 2(2), struck out ", unless, and to the extent, this requirement is waived in writing by the Attorney General" following "statement of the nature of the work of each" and provided for a statement of the extent to which a foreign principal is supervised, directed, etc., by any other foreign principal.

Subsec. (a) (4). Pub.L. 89-486, § 2(3), inserted ", including a detailed statement of any such activity which is a political activity".

Subsec. (a) (6). Pub.L. 89-486, § 2(4), inserted ", including a detailed statement of any such activity which is a political activity".

Subsec. (a) (7). Pub.L. 89-486, § 2(5), required certain information pertaining to control and financial arrangements with respect to those persons, not them-

selves foreign principals, who are so related to a foreign principal that their agents when engaged in political activities in the interests of the principal are required to register.

Subsec. (a) (8). Pub.L. 89-486, § 2(6), added requirement that agent report the money or other things of value spent or disposed of in connection with his becoming the agent of his foreign principal and all political contributions made during the preceding sixty days, other than contributions made on behalf of their principals, such contributions being prohibited under section 613 of Title 18.

Subsec. (f). Pub.L. 89-486, § 2(7), added subsec. (f).

1950 Amendment. Subsec. (a). Act Aug. 3, 1950 made failure to register a continuing offense.

1942 Amendment. Act Apr. 29, 1942 amended section generally.

Effective Date of 1966 Amendment. Amendment by section 2 of Pub.L. 89-486 effective ninety days after July 4, 1966, see section 9 of Pub.L. 89-486, set out as a note under section 611 of this title.

Effective Date of 1942 Amendment. Amendment by Act Apr. 29, 1942 effective the sixtieth day after the date of its approval, except that prior to such sixtieth day the Attorney General may make, prescribe, amend, and rescind such rules, regulations, and forms as may be necessary to carry out the provisions of this subchapter, see section 3 of Act Apr. 29, 1942, set out as a note under section 611 of this title.

Effective Date. Section effective the ninetieth day after June 8, 1938, see section 7 of Act June 8, 1938, set out as a note under section 611 of this title.

Legislative History. For legislative history and purpose of Act Aug. 3, 1950, see 1950 U.S. Code Cong. Service, p. 2394. See also, Pub.L. 89-486, 1966 U.S. Code Cong. and Adm. News, p. 2397.

Cross References

Registration functions of Secretary of State transferred to Attorney General, see E.O. No. 9170, set out preceding section 611 of this title.

Code of Federal Regulations

Notification requirements, see 22 CFR 4.1 et seq.

Notes of Decisions

Constitutionality 1
 Construction with other laws 2
 Contents of statement 6
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 Purpose 3
 Standing to challenge constitutionality 7
 Time of filing statement 3

ated by an express contract, but true test is whether agency in fact exists. *U. S. v. German-American Vocational League*, C.C.A.N.J.1946, 153 F.2d 860, certiorari denied 66 S.Ct. 976, 977, 978, 329 U.S. 833, 534, 90 L.Ed. 1608, 1609, 1610.

1. Constitutionality

This section does not regulate expression of ideas and does not limit or interfere with freedom of speech or impose a burden on the exercise of the right of freedom of speech in violation of U.S.C.A. Const. Amend. I. *U. S. v. Peace Information Center*, D.C.D.C.1951, 97 F.Supp. 255.

3. Time of filing statement

This section requiring agent of foreign principal to register with 10 days after becoming such agent, means not later than 10 days after becoming such agent and imposes no prohibition against earlier registration. *U. S. v. Melekh*, D.C.III. 1961, 193 F.Supp. 584.

2. Construction with other laws

There is no inconsistency between section 951 of Title 18 making it criminal offense for one to act as agent of foreign government without prior notification of Secretary of State and this section. *U. S. v. Melekh*, D.C.III.1961, 193 F.Supp. 584.

6. Contents of statement

Issue whether attorneys retained by Republic of Cuba would, in registering under this subchapter, be required by registration forms to make public disclosure of private, personal and business affairs unconnected with representation of Cuba was not ripe for adjudication, where attorneys had made no attempt to determine which questions had to be answered and how much information had to be disclosed. *Rabinowitz v. Kennedy*, Dist.Col.1964, 84 S.Ct. 919, 370 U.S. 605, 11 L.Ed.2d 940.

4. Purpose

Congress in enacting this section did not intend to deprive citizens of United States of political information, even if such information should be propaganda of foreign government or foreign principal, but Congress did intend to bring activities of persons engaged in disseminating foreign political propaganda out into the open and to make known the identity of any person engaged in such activities, the source of the propaganda and who is bearing the expense of its dissemination in the United States. *U. S. v. Auhagen*, D.C.D.C.1941, 39 F.Supp. 20.

This subchapter, before its amendment in 1942, required, and authorized the Secretary of State to require by regulations, a statement of only those activities of registrants which were carried out in behalf of foreign principals. *Viereck v. U. S.*, 1943, 63 S.Ct. 561, 318 U.S. 236, 57 L.Ed. 734.

5. Persons required to file statement

Attorneys who engaged in general law practice and who had been retained by Republic of Cuba to represent Cuba and its governmental agencies in legal matters including litigation in United States were obligated to register under this subchapter. *Rabinowitz v. Kennedy*, Dist. Col.1964, 84 S.Ct. 919, 370 U.S. 605, 11 L.Ed.2d 94.

Under this subchapter, the Secretary of State has authority to require answers, under penal sanctions, to an item in the registration statement calling for a comprehensive statement of the nature of the registrant's business, at least as regards the registrant's activities as agent of a foreign principal. *Viereck v. U. S.*, 1944, 139 F.2d 847, 78 U.S.App.D.C. 272, certiorari denied 64 S.Ct. 787, 321 U.S. 704, 88 L.Ed. 1083.

The requirement for registration under this section is not limited to agencies cre-

This subchapter and the regulations adopted thereunder require the revelation of the details of the agreement with, and activities under, the political foreign principal-agent relationship. *Viereck v. U. S.*, 1942, 139 F.2d 943, 78 U.S.App.D.C.

202, reversed on other grounds 63 S.Ct. 501, 318 U.S. 230, 87 L.Ed. 734.

7. Standing to challenge constitutionality
One able to make timely registration with noncriminal consequences but fail-

ing to make required registration at any time is in no position to challenge constitutionality of this subchapter. U. S. v. Melekh, D.C.111.1961, 193 F.Supp. 294.

§ 613. Exemptions

The requirements of section 612(a) of this title shall not apply to the following agents of foreign principals:

Diplomatic or consular officers

(a) A duly accredited diplomatic or consular officer of a foreign government who is so recognized by the Department of State, while said officer is engaged exclusively in activities which are recognized by the Department of State as being within the scope of the functions of such officer;

Official of foreign government

(b) Any official of a foreign government, if such government is recognized by the United States, who is not a public-relations counsel, publicity agent, information-service employee, or a citizen of the United States, whose name and status and the character of whose duties as such official are of public record in the Department of State, while said official is engaged exclusively in activities which are recognized by the Department of State as being within the scope of the functions of such official;

Staff members of diplomatic or consular officers

(c) Any member of the staff of, or any person employed by, a duly accredited diplomatic or consular officer of a foreign government who is so recognized by the Department of State, other than a public-relations counsel, publicity agent, or information-service employee, whose name and status and the character of whose duties as such member or employee are of public record in the Department of State, while said member or employee is engaged exclusively in the performance of activities which are recognized by the Department of State as being within the scope of the functions of such member or employee;

Private and nonpolitical activities; solicitation of funds

(d) Any person engaging or agreeing to engage only (1) in private and nonpolitical activities in furtherance of the bona fide trade or commerce of such foreign principal; or (2) in other activities not serving predominantly a foreign interest; or (3) in the soliciting or collecting of funds and contributions within the United States to be used only for medical aid and assistance, or for food and clothing to relieve human suffering, if such solicitation or collection of funds and contributions is in accordance with and subject to the provisions

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of subchapter II of chapter 9 of this title, and such rules and regulations as may be prescribed thereunder;

Religious, scholastic, or scientific pursuits

(e) Any person engaging or agreeing to engage only in activities in furtherance of bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts;

Defense of foreign government vital to United States defense

(f) Any person, or employee of such person, whose foreign principal is a government of a foreign country the defense of which the President deems vital to the defense of the United States while, (1) such person or employee engages only in activities which are in furtherance of the policies, public interest, or national defense both of such government and of the Government of the United States, and are not intended to conflict with any of the domestic or foreign policies of the Government of the United States, (2) each communication or expression by such person or employee which he intends to, or has reason to believe will, be published, disseminated, or circulated among any section of the public, or portion thereof, within the United States, is a part of such activities and is believed by such person to be truthful and accurate and the identity of such person as an agent of such foreign principal is disclosed therein, and (3) such government of a foreign country furnishes to the Secretary of State for transmittal to, and retention for the duration of this subchapter by, the Attorney General such information as to the identity and activities of such person or employee at such times as the Attorney General may require. Upon notice to the Government of which such person is an agent or to such person or employee, the Attorney General, having due regard for the public interest and national defense, may, with the approval of the Secretary of State, and shall, at the request of the Secretary of State, terminate in whole or in part the exemption herein of any such person or employee;

Person qualified to practice law

(g) Any person qualified to practice law, insofar as he engages or agrees to engage in the legal representation of a disclosed foreign principal before any court of law or any agency of the Government of the United States: *Provided*, That for the purposes of this subsection legal representation does not include attempts to influence or persuade agency personnel or officials other than in the course of established agency proceedings, whether formal or informal.

June 8, 1938, c. 327, § 3, 52 Stat. 632; Aug. 7, 1939, c. 521, § 2, 53 Stat. 1245; Apr. 29, 1942, c. 263, § 1, 56 Stat. 254; Oct. 4, 1961, Pub.L. 87-366, § 2, 75 Stat. 784; July 4, 1966, Pub.L. 89-186, § 3, 80 Stat. 246.

Historical Note

Prior Provisions. Prior to general amendment of Act June 3, 1938, by Act Apr. 29, 1942, section related to additional registration statements after each six months period. Provisions on that subject were incorporated in section 612 of this title by 1942 amendment.

1966 Amendment. Subsec. (d), Pub.L. 89-480, § 2(a), designated existing provisions as cl. (1) and (3), deleted "financial or mercantile" preceding "activities" in cl. (1) and inserted the cl. (2) exemption of any person engaging or agreeing to engage in other activities not serving predominantly a foreign interest.

Subsec. (g), Pub.L. 89-480, § 2(b), added subsec. (k).

1961 Amendment. Subsec. (d), Pub.L. 87-368 substituted "private and nonpolitical financial or mercantile activities in furtherance" for "private, non-political, financial, mercantile, or other activities in furtherance".

1942 Amendment. Act Apr. 29, 1942 amended section generally.

1939 Amendment. Act Aug. 7, 1939 amended section generally.

Effective Date of 1966 Amendment. Amendment by section 3 of Pub.L. 89-480 effective ninety days after July 4, 1966, see section 9 of Pub.L. 89-480, set out as a note under section 611 of this title.

Effective Date of 1942 Amendment. Amendment by Act Apr. 29, 1942 effective the sixtieth day after the date of its approval, except that prior to such sixtieth day the Attorney General may make, prescribe, amend, and rescind such rules, regulations, and forms as may be necessary to carry out the provisions of this subchapter, see section 7 of Act Apr. 29, 1942, set out as a note under section 611 of this title.

Effective Date. Section effective the sixtieth day after June 3, 1938, see section 7 of Act June 3, 1938, set out as a note under section 611 of this title.

Legislative History. For legislative history and purpose of Pub.L. 87-368, see 1961 U.S. Code Cong. and Adm. News, p. 2213. See also, Pub.L. 89-480, 1966 U.S. Code Cong. and Adm. News, p. 2237.

Cross References

Registration functions of Secretary of State transferred to Attorney General, see Ex.Ord.No.3173, set out preceding section 611 of this title.

Notes of Decisions

Legal representatives 2
Private, nonpolitical, financial or mercantile activities 1

anyone engaging in private and nonpolitical, financial or mercantile activities in furtherance of foreign principal's trade or commerce. Id.

~~Private, nonpolitical, financial or mercantile activities~~

Attorney representing foreign government could not qualify for exemption under this section providing exemption for person engaged in private and nonpolitical financial or mercantile activities in furtherance of foreign principal's trade or commerce if any one of characteristics referred to in this section was missing. *Rabinowitz v. Kennedy*, Dist. Col. 1964, 84 S.Ct. 919, 376 U.S. 603, 11 L.Ed.2d 940.

Interest of a foreign government in litigation could be labeled "financial or mercantile" but could not be deemed only "private and nonpolitical" within this section exempting from registration

Phrase "financial or mercantile" activity in provision of this section exempting from registration persons engaging in private nonpolitical financial or mercantile activities in furtherance of foreign principal's trade or commerce was intended to describe conduct of ordinary private commercial character usually associated with the terms. Id.

Lawyer's work in litigation for a foreign government could not be characterized as only "financial or mercantile" activity, even though it could be regarded as "private and nonpolitical" activity, within this section exempting from registration anyone engaging in "private and nonpolitical, financial, or mercantile" activities in furtherance of trade or commerce of foreign principal. Id.

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If attorney engages in any activities in behalf of foreign principal which are not exempt from record keeping and disclosure requirements of this subchapter he must include in his registration statement under this subchapter a description of these otherwise exempt legal activities as well. Attorney General of U. S. v. Covington and Burling, D.C.D.C.1970, 411 F.Supp. 371, Injunction denied 430 F.Supp. 1117.

This section which exempts certain agents of foreign principals from disclosure and record keeping requirements insofar as agent is qualified to practice law and engages or agrees to engage in legal representation of foreign principal before any court of law or agency of government in United States does not in-

clude all communications that have been traditionally protected by attorney-client privilege, but includes only communications where legal advice of any kind is sought, whether made in contemplation of litigation or not. Id.

Attorney who represents foreign principal and who has registered as agent under this subchapter may validly claim attorney-client privilege to withhold from disclosure to delegates of Attorney General documents or portions thereof which are required to be kept under this subchapter. Id.

It is doubtful that one who is engaged in the legal representation of disclosed foreign agent before any court is required to register under this subchapter. Schonbrun v. Dreihand, D.C.N.Y.:1967, 263 F.Supp. 332.

§ 614. Filing and labeling of political propaganda

Copies to Attorney General; statement as to places, times, and extent of transmission

(a) Every person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter and who transmits or causes to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce any political propaganda for or in the interests of such foreign principal (i) in the form of prints, or (ii) in any other form which is reasonably adapted to being, or which he believes will be, or which he intends to be, disseminated or circulated among two or more persons shall, not later than forty-eight hours after the beginning of the transmittal thereof, file with the Attorney General two copies thereof and a statement, duly signed by or on behalf of such agent, setting forth full information as to the places, times, and extent of such transmittal.

Identification statement

(b) It shall be unlawful for any person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter to transmit or cause to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce any political propaganda for or in the interests of such foreign principal (i) in the form of prints, or (ii) in any other form which is reasonably adapted to being, or which he believes will be or which he intends to be, disseminated or circulated among two or more persons, unless such political propaganda is conspicuously marked at its beginning with, or prefaced or accompanied by, a true and accurate statement, in the language or languages used in such political propaganda, setting forth the relationship or connection between the person transmitting

RABINOWITZ vs. KENNEDY

11 L.Ed.2d 940
(1964)

"Foreign Agents Registration"

LABORERS vs. ...

11 ... 1944

Foreign Agents Registration

*[376 US 605]

*VICTOR RABINOWITZ et al., Petitioners,

v

ROBERT F. KENNEDY, Attorney General of the United States

376 US 605, 11 L ed 2d 940, 84 S Ct 919

[No. 237]

Argued March 2, 1964. Decided March 30, 1964.

SUMMARY

Attorneys who represented the Republic of Cuba in legal matters, including litigation, instituted an action against the Attorney General of the United States in the United States District Court for the District of Columbia, seeking a judgment declaring that their activities did not subject them to the requirements of registration under the amended Foreign Agents Registration Act (22 USC § 611). The District Court denied the Attorney General's motion for judgment on the pleadings, but certified to the Court of Appeals for the District of Columbia Circuit the question whether persons requested to register under the act may have their rights adjudicated by a declaratory judgment suit. The Court of Appeals held that the doctrine of sovereign immunity required that the case be dismissed as an unconsented suit against the United States. (115 App DC 210, 318 F2d 131.)

On certiorari, the Supreme Court of the United States affirmed the judgment of the Court of Appeals. In an opinion by GOLDBERG, J., expressing the unanimous view of the Court, it was held that the Foreign Agents Registration Act required registration by the attorneys, and that it was not necessary to consider the scope of the declaratory judgment remedy or the sovereign immunity doctrine.

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Sedition and Subversive Activities § 1
— attorney for foreign government — duty to register

Under the amended Foreign Agents Registration Act (22 USC § 611), which requires registration by a person acting as an attorney for a foreign principal, including a foreign country, and which exempts persons engaging only in private and non-political financial or mercantile activities in furtherance of the bona fide trade or commerce of such foreign principal, attorneys representing a

~~foreign government in legal matters,~~ including litigation, are not exempt and are required to register.

Sedition and Subversive Activities § 1
— registration of foreign agents
— exempted activities

2. Under the amended Foreign Agents Registration Act (22 USC § 611), which requires registration by a person acting as an attorney for a foreign principal, and which exempts persons "engaging or agreeing to engage only in private and nonpolitical financial or mercantile activities in

furtherance of the bona fide trade or commerce of such foreign principal," the terms "financial or mercantile" activity describe conduct of the ordinary private commercial character usually associated with those terms, and although the work of a lawyer in litigating for a foreign government might be regarded as "private and nonpolitical" activity, it cannot properly be characterized as only "financial or mercantile" activity, and although the interest of a foreign government in litigation might be labeled "financial or mercantile," it cannot be deemed only "private and nonpolitical."

furtherance of the bona fide trade or commerce of such foreign principal," if any one of the characteristics of "private and nonpolitical" activity or "financial or mercantile" activity is lacking.

Courts § 757 — question not ripe for adjudication

Sedition and Subversive Activities § 1 — attorney for foreign government — duty to register

3. An attorney representing a foreign government may not qualify for exemption from registering under the amended Foreign Agents Registration Act (22 USC § 611), which exempts persons "engaging or agreeing to engage only in private and nonpolitical financial or mercantile activities in

4. The issue whether attorneys representing a foreign government in legal matters, including litigation, may be required to answer all the questions in the forms for registration under the amended Foreign Agents Registration Act (22 USC § 611), is not ripe for adjudication where the government conceded that some of the questions were inapplicable and others could be satisfactorily answered in conclusory language or by disclosing only those facts bearing a reasonable relationship to the representation of the foreign principal, and where the attorneys made no attempt to determine which questions must be answered and how much information disclosed.

APPEARANCES OF COUNSEL

David Rein argued the cause for petitioners.
 Stephen J. Pollak argued the cause for respondent.
 Briefs of Counsel, p 1217, infra.

OPINION OF THE COURT

Mr. Justice Goldberg delivered the opinion of the Court.

Petitioners, attorneys engaged in the general practice of law, instituted this declaratory judgment action, 23 *USC § 2201, against respondent, the Attorney General of the United States, in the United States District Court for the District of Columbia. The complaint alleged that petitioners had been: "retained by the Government of the Republic of Cuba to represent in the United States the Republic of Cuba and its governmental agencies in legal matters, including litigation, involving the mercantile and financial interests of the Republic of

Cuba. . . . The retainer does not cover advice or representation involving public relations, propaganda, lobbying, or political or other non-legal matters, nor have the plaintiffs advised, represented, or acted on behalf of the Republic of Cuba in any such matters."

tion, 23 *USC § 2201, against respondent, the Attorney General of the United States, in the United States District Court for the District of Columbia. The complaint alleged that petitioners had been: "retained by the Government of the Republic of Cuba to represent in the United States the Republic of Cuba and its governmental agencies in legal matters, including litigation, involving the mercantile and financial interests of the Republic of

The complaint alleged further that respondent had "demanded that [petitioners] . . . register with the Attorney General under the provisions of the Foreign Agents Registration Act of 1938, as amended." The relief sought by petitioners included a "judgment declaring that their activities as legal representatives for the Republic of

Cuba do not subject them to the requirements of registration under the Foreign Agents Registration Act of 1938, as amended" 52 Stat 631, as amended, 22 USC § 611.

That Act requires the registration of "any person who acts or agrees to act . . . as . . . a public-relations counsel, publicity agent, information-service employee, servant, agent, representative, or attorney for a foreign principal" "Foreign principal" includes "a government of a foreign country and a foreign political party," as well as "a partnership, association, corporation, organization, or other combination of individuals organized under the laws of, or having its principal place of business in, a foreign country" The Act exempts from registration any "person engaging or agreeing to engage only

*(375 US 607)

"in private and nonpolitical financial or mercantile activities in furtherance of the bona fide trade or commerce of such foreign principal"

Respondent moved for judgment on the pleadings. The District Court denied the motion, but at the request of respondent and with the consent of petitioner, the court certified to the Court of Appeals the "controlling question of law, as to whether individuals requested to register under the Foreign Agents Registration Act of 1938, as amended, may have their rights adjudicated by a declaratory judgment suit"

The Court of Appeals for the District of Columbia, noting that petitioners did not challenge the constitutionality of the Foreign Agents

Registration Act, held, with one judge dissenting, that the doctrine of sovereign immunity required that the case be dismissed "as an unconsented suit against the United States." 115 US App DC 210, 212, 318 F2d 181, 193. We granted certiorari, 375 US 811, 11 L ed 2d 47, 84 S Ct 71.

We hold, for the reasons stated below, that the Foreign Agents Registration Act plainly and unquestionably requires petitioners to register. Since we conclude that the Court of Appeals was correct in ordering the case dismissed, but for reasons other than those relied upon in its opinion, we do not pass upon the reasoning by which that court arrived at its decision, nor do we have occasion to consider the scope of the declaratory judgment remedy or the sovereign immunity doctrine.¹

*(375 US 608)

"The Foreign Agents Registration Act was first enacted by Congress on June 8, 1938. It required agents of foreign principals to register with the Secretary of State. "[A]gent of a foreign principal" was defined as "any person who acts or engages or agrees to act as a public-relations counsel, publicity agent, or as agent, servant, representative, or attorney for a foreign principal" 52 Stat 631, 632. (Emphasis added.) "Foreign principal" was defined as "the government of a foreign country, a political party of a foreign country, a person domiciled abroad, or any foreign business, partnership, association, corporation, or political organization" Exempted from the definition of

1. See, e.g., Borchard, Declaratory Judgments (2d ed, 1941); Borchard, Challenging "Penal" Statutes by Declaratory Action, 52 Yale LJ 445 (1943); Davis, Sovereign Immunity in Suits Against Officers for Relief Other than Damages,

40 Cornell LQ 3 (1954); Davis, Suing the Government by Suing an Officer, 29 U of Chi L Rev 435 (1962); Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv L Rev 1 (1963).

376 US 605, 11 L ed 2d 910, 34 S Ct 919

"agent of a foreign principal" was "a person, other than a public-relations counsel, or publicity agent, performing *only private, non-political, financial, mercantile, or other activities* in furtherance of the bona fide trade or commerce of such foreign principal." 52 Stat 631, 632. (Emphasis added.) In 1961, the exemption section was amended to apply to persons "engaging or agreeing to engage *only in private and non-political financial or mercantile activities* in furtherance of the bona fide trade or commerce of such foreign principal" (Emphasis added.) 75 Stat 784. The Senate and House Reports accompanying this amendment state its purpose as follows:

"The so-called commercial exemption has proved to be ambiguous. During hearings held on HR 6317 in the 86th Congress, a bill identical to HR 470, a representative of the Department of Justice testified that the language contained in the exemption has led to confusion and un-

[376 US 609]

necessarily difficult *problems in the administration of the law. Argument has been made that if an agent of a foreign principal meets any one of the above-quoted conditions, as distinguished from meeting several or all of the requirements, it need not register. As rewritten, the section with its proposed changes and sentence structure makes it clear that for an agent to qualify for exemption from the obligation of registering, it must be engaged in activities which meet either of two sets of three requirements. *They must be private and nonpolitical and financial, or private and nonpolitical and mercantile. If any one of these characteristics is lacking, the agent*

2. This section had previously been amended in 1942 to cover any person "engaging or agreeing to engage only in private, nonpolitical, financial, mercantile,

cannot qualify for exemption and therefore must register under the act." (Emphasis added.) S Rep No. 1061, 87th Cong, 1st Sess, p. 2. See also HR Rep No. 246, 87th Cong., 1st Sess.

Petitioners here are attorneys who have been retained "to represent in the United States the Republic of Cuba and its governmental agencies in legal matters, including litigation" As an example of their "activities" pursuant to this retainer, petitioners cite their appearance before this Court in the recently decided case of Banco Nacional de Cuba v Sabbatino, 376 US 393, 11 L ed 2d 304, 34 S Ct 923.

Although the work of a lawyer in litigating for a foreign government might be regarded as "private and non-political" activity, it cannot properly be characterized as only "financial or mercantile" activity. It is clear from the statute and its history that "financial or mercantile" activity was intended to describe conduct of the ordinary private commercial character usually associated with those terms. See, e. g., S Rep No. 1783, 75th Cong, 3d Sess. Furthermore, although the interest of a government in litigation might be labeled "financial or mercantile," it cannot be deemed only "private and nonpolitical."

[376 US 610]

*Since an attorney may not qualify for exemption "[i]f any one of these characteristics is lacking." it would be impossible to conclude, under any construction of the statute, that petitioners are engaging "only in private and nonpolitical financial or mercantile activities."

or other activities in furtherance of the bona fide trade or commerce of such foreign principal" 56 Stat 254.

We conclude, therefore, that petitioners, attorneys representing a foreign government in legal matters including litigation, are not exempt from registering under the Foreign Agents Registration Act.

In support of their case, petitioners also claim that if they register they would be required in completing the registration forms to "make public disclosure not only of their relation with their foreign principal, but of numerous private, personal and business affairs unconnected with their representation of the Republic of Cuba." In concluding that petitioners must register, we do not suggest that they may be required to answer all the questions in the registration forms. The Government says that some of the questions are "clearly inapplicable" to petitioners, that others may satisfactorily be answered in conclusory language, and that others, while "framed in general terms," may satisfactorily be answered by disclosing only those facts which "bear a reasonable relationship to the representation of the foreign

principal." Under the rules established by the Department of Justice and printed on the forms themselves:

"If compliance with any requirement of the form appears in any particular case to be inappropriate or unduly burdensome, the Registrant may apply for a complete or partial waiver of the requirement." Compare, 28 CFR § 5.201. Since petitioners have made no attempt to determine which questions must be answered and

Headnote 4 how much information disclosed, this issue is
* (376 US 611)

not ripe for adjudication. *See, e. g., *Eccles v Peoples Bank*, 302 US 426, 92 L ed 784, 63 S Ct 641. See generally, Davis, *Ripeness of Governmental Action for Judicial Review* (pts 1-2), 63 *Harv L Rev* 1122, 1326 (1955).

For these reasons, petitioners' complaint should be dismissed, and, accordingly, the judgment of the Court of Appeals ordering dismissal of the complaint is affirmed.

It is so ordered.

TREASURY DELEGATION ORDER
NO. 91 (Rev.1)

INTERNAL REVENUE SERVICE
&
INTERNATIONAL DEVELOPMENT ASSOCIATION

INTERNATIONAL DEVELOPMENT ASSOCIATION

UNITED STATES CODES
22 U.S.C. 284 et seq.



Washington, D.C. 20530

Mr. Edward G. Novotny
917 Brookside
Cortez, Colorado 81321

MAY 22 1990

Dear Mr. Novotny:

This is in response to your letter of January 10, 1990 requesting information in connection with the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. 611, et seq. ("FARA" or "the Act").

A search of our indices revealed that neither the law firms nor the lawyers listed in your letter are currently registered pursuant to FARA or pursuant to 18 U.S.C. § 951.

Please note that neither the Internal Revenue Service nor any of its employees are considered to be a "foreign principal" or an "agent of a foreign principal" as those terms are defined in Section 611 of FARA. The term "foreign principal" (see Section 611 (b) of the Act) includes:

- (1) a government of a foreign country and a foreign political party;
- (2) a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and
- (3) a partnership association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

The term "agent of a foreign principal" (see Section 611(c) of the Act) means:

- (1) any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal

or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person-

(i) engages within the United States in political activities for or in the interests of such foreign principal;

(ii) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal;

(iii) within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interests of such foreign principal; or

(iv) within the United States represents the interests of such foreign principal before any agency or official of the Government of the United States; and

(2) any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1) of this subsection.

Enclosed, as you requested, is a sample set of forms required to be filed by foreign agents pursuant to FARA. If you have any questions please contact me.

Sincerely,

Joseph E. Clarkson

Joseph E. Clarkson, Chief
Registration Unit
Internal Security Section
Criminal Division

Enclosures

J. VAL KRUSE,
17 West Main Street
Cortez, Colo. 81321
Telephone: (303) 565-3436

BCGK 0643 PAGE 963

February 1, 1990

Fred T. Goldberg, Jr.
Commissioner of Internal Revenue
1111 Constitution Avenue, N. W.
Room 3000 I R
Washington, D. C. 20224

RE: LETTER
Dated Sept. 22, 1989

Dear Mr. Goldberg:

I am in receipt of a communication from you dated Sept. 22, 1989. I am hereby requesting the production of certain documents and things which by Law you are required to have in your possession, control, and or access to. Please forward the documents and things requested to the address given below, as soon as possible.

The documents requested must be certified by a qualified Agent of the Agency in which they are filed and kept as a matter of record.

- 1.) Your ~~State of~~ Commission, as properly required pursuant to the ordained Constitution of the Union of States, of the United States of America, Article VI, Clause 3.
- 2.) Your Delegated Authority pursuant to Treasury Delegation Orders.
- 3.) Your Registration Statement and Supplements thereto, as required under 22 U.S.C. 612.
- 4.) All Service Agreements described in paragraph IV, of the General Agreement between the Treasury Department and the Agency for International Development. (Treasury Delegation Order 91 (Rev.1))
- 5.) A complete certified copy of the General Agreement, as stated above in paragraph (4)
- 6.) A Certified copy of your Commission.

I am going to further have to apply to the Court of proper jurisdiction, for Injunctive or other proper relief to issue against you, your Agency, and Foreign Principal, due to the fact that there are certain erroneous and possibly fraudulent claims made through your Agency.

Until the proper documents and things are received at the address given below, I will assume that you are unauthorized to act. Please forward these immediately that this matter might be resolved in a Lawful manner.

Most Sincerely,

J. Val Kruse
J. Val Kruse
17 West Main St.
Cortez, Colorado 81321

No. 293267

RECEIPT FOR CERTIFIED MAIL
NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO Fred T. Goldberg Jr. IRS	
STREET AND NO. 1111 Const. Ave. NW 3000	
STATE AND ZIP CODE Washington, D.C. 20224	
POSTAGE	\$
CONSULT POSTMASTER FOR FEES	CERTIFIED FILE
	SPECIAL DELIVERY
	RESTRICTED DELIVERY
	OFFICIAL SERVICES
RETURN RECEIPT SERVICE	SHOW TO WHOM SENT AND DATE DELIVERED
	POSTAGE WILL BE PAID BY ADDRESSEE
	SHOW TO WHOM SENT AND ADDRESS OF DELIVERY WITH POSTAL INSPECTION
TOTAL POSTAGE AND FEES \$2.00	
POSTMARK MONTHS	

<input type="checkbox"/> REGISTERED MAIL (Complete Forms 1, 2, 3, and 4) <input type="checkbox"/> Add your address in the RETURN TO sender box reverse.	
<input type="checkbox"/> RETURN TO SENDER (Complete Form 380) The following services are provided at extra charge: <input type="checkbox"/> Show to whom sent and date delivered. <input type="checkbox"/> Show to whom sent and address of delivery. <input type="checkbox"/> RESTRICTED DELIVERY (See instructions) The restricted delivery fee is charged in addition to the normal postal fee.	
ARTICLE ADDRESS TO: Fred T. Goldberg, Jr. IRS 1111 Const. Ave. NW Room 3000-TR Washington, D.C. 20224	
<input type="checkbox"/> REGISTERED MAIL <input type="checkbox"/> CERTIFIED MAIL <input type="checkbox"/> SPECIAL DELIVERY	ARTICLE NUMBER 293267
SIGNATURE OF SENDER (Always obtain signature of addressee or agent) <input type="checkbox"/> Addressee <input type="checkbox"/> Authorized agent	
POSTAGE PAID BY ADDRESSEE \$2.00	

Internal Revenue Service

U.S. GOVERNMENT PRINTING OFFICE: 1987 O-484-000
Department of the Treasury

Washington, DC 20224

GCCK 0643 PAGE 0960

Mr. J. Val Kruse
17 West Main Street
Cortez, CO 81321

Person to Contact:
Mr. Porter
Telephone Number:
(202) 566-3359
Refer Reply to:
EX:D:F:2/90-F-524
Date:

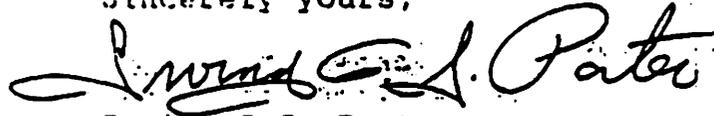
Dear Mr. Kruse:

This is in response to your Freedom of Information Act request of February 1, 1990, for Internal Revenue Service documents.

We are enclosing the following items requested in your letter: 1. Oath of Office, 2. Delegation Order 150-10 and 3. Registration Statement.

Items 4 and 5 were referred to the Department of the Treasury for direct response to you. We presume that item 6 is referring to item 3, therefore, we didn't furnish any documents.

Sincerely yours,



Irving C.J. Porter
Tax Law Specialist
FOI/Privacy Section

Enclosure

APPOINTMENT AFFIDAVITS

COMMISSIONER OF INTERNAL REVENUE

(Position to which appointed)

July 5, 1989

(Date of appointment)

DEPT. OF TREASURY

(Department or agency)

I.R.S.

(Bureau or division)

WASHINGTON, DC

(Place of employment)

I, FREDERICK T. GOLDBERG, JR., do solemnly swear (or affirm) that—

A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

C. AFFIDAVIT AS TO PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.


(Signature of appointee)

Subscribed and sworn (or affirmed) before me this 5th day of July A.D. 1989

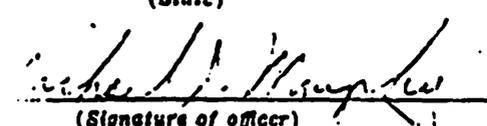
at WASHINGTON

(City)

DC

(State)

[SEAL.]


(Signature of officer)

Commission expires _____
(If by a Notary Public, the date of expiration
of his Commission should be shown)

Senior Deputy Commissioner
(Title)

NOTE.—The oath of office must be administered by a person specified in 5 U.S.C. 2903. The words "So help me God" in the oath and the word "swear" wherever it appears above should be stricken out when the appointee elects to affirm rather than swear to the affidavits; only these words may be stricken and only when the appointee elects to affirm the affidavits.



DEPARTMENT OF THE TREASURY ORDER

BOOK 0643 PAGE 961

DATE: April 22, 1982 .

NUMBER: 150-10

~~SUBJECT: Delegation--Responsibility for Internal Revenue Laws~~

By virtue of the authority vested in me as Secretary of the Treasury, including the authority in the Internal Revenue Code of 1954 and Reorganization Plan No. 26 of 1950, it is hereby ordered:

1. The Commissioner of Internal Revenue shall be responsible for the administration and enforcement of the Internal Revenue laws.
2. Commissioner Order No. 190 and General Counsel Order No. 4 state the powers delegated to the Chief Counsel for the Internal Revenue Service.
3. All outstanding orders and delegations of authority relating to the above are modified accordingly.

✓ This Order supersedes Treasury Department Order No. 150-37 dated March 17, 1955.

/s/ Donald T. Regan
Secretary of the Treasury

To the extent that the authority previously exercised consistent with this order may require ratification, it is hereby approved and ratified.

This Order supersedes Delegation Order No. 81 (Rev. 11), effective March 21, 1982; 81 (Rev. 11), Amend. 1 and 2, effective March 21, 1982; Amend. 5, effective June 15, 1984; and Amend. 6, effective December 1, 1987.

/s/ John L. Wedick, Jr.
Deputy Commissioner
(Planning and Resources)

Order No. 89 (Rev. 7)
Effective date: 10-31-87
Administrative Control of Documents and Material

1. The authority vested in the Commissioner of Internal Revenue by Treasury Directive 71-02, for the administrative control of information necessarily restricted for official purposes is hereby delegated as follows:

2. The Deputy Commissioner; Deputy Chief Counsel (Management & Operations); Associates Chief Counsel; Deputy Assistant Commissioners; Assistants to the Commissioner; Assistant to the Senior Deputy Commissioner; National Office Assistant Division Directors; Regional Inspectors; Regional Directors of Appeals; Assistant Regional Commissioners; District Directors; Service Center Directors; Director, Data Center; and Director, National Computer Center are authorized to approve the marking of the legend OFFICIAL USE ONLY on documents or materials, which require restriction to a lesser degree than those marked LIMITED OFFICIAL USE, but which may be made available only to authorized personnel. This authority may not be redelegated.

3. The authority previously delegated to the Deputy Commissioner to control documents and materials as LIMITED OFFICIAL USE is hereby rescinded.

4. The authority to decontrol documents or materials controlled under this Delegation Order may be exercised only by the official authorizing the original control, a successor in that capacity, or a supervisory official of either and may not be redelegated.

5. Delegation Order No. 89 (Rev. 6), effective March 7, 1983, is superseded.

/s/ Charles H. Brennan
Deputy Commissioner (Operations)

Order No. 90 (Rev. 1)
Effective date: 10-31-87
Approval of Standard Form 1151, Nonexpenditure Transfer Authorization

Pursuant to the authority vested in the Commissioner of Internal Revenue by Treasury Department Accounting Policy Circular No. 12, dated March 19, 1963, authority is hereby delegated to the Director, Finance Division, to approve Standard Form 1151, Nonexpenditure Transfer Authorization, for non-expenditure transfers from appropriated funds of the Internal Revenue Service.

This authority may not be redelegated. Delegation Order No. 90, effective April 26, 1963, is superseded.

/s/ John L. Wedick, Jr.
Deputy Commissioner
(Planning and Resources)

Order No. 91 (Rev. 1)
Effective date: 5-12-86
Service Agreement between the Internal Revenue Service and the Agency for International Development (AID)

Authority is hereby delegated to the Assistant Commissioner (International), to develop and enter into the Service Agreements described in paragraph IV, of the General Agreement between the Treasury Department and the Agency for International Development, dated February 14, 1966.

The authority delegated herein may be redelegated by the official specified in this order and may not be further redelegated.

This order supersedes Commissioner's Delegation Order No. 91, issued June 13, 1963.

/s/ James I. Owens
Deputy Commissioner

Order No. 92 (Rev. 9)
Effective date: February 3, 1989
Delegation of Authority in Training and Development Matters

The authority delegated to the Commissioner of Internal Revenue in Chapter 250, Treasury Personnel Manual, to administer and conduct training and development activities is hereby redelegated as follows:

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 86-565, see 1131.

**SUBCHAPTER XIII—INTERNATIONAL
DEVELOPMENT ASSOCIATION**

§ 284. ~~Acceptance of membership by United States in International Development Association~~

The President is hereby authorized to accept membership for the United States in the International Development Association (hereinafter referred to as the "Association"), provided for by the Articles of Agreement (hereinafter referred to as the "Articles") of the Association deposited in the archives of the International Bank for Reconstruction and Development.

Pub.L. 86-565, § 2, June 30, 1960, 74 Stat. 293.

Historical Note

Short Title. Section 1 of Pub.L. 86-565 provided that: "This Act [enacting this subchapter], may be cited as the 'International Development Association Act.'" 2583.

Legislative History. For legislative history and purpose of Pub.L. 86-565, see 1960 U.S.Code Cong. and Adm.News, p. 2583.

Cross References

Advancement of human rights through United States assistance policies with international financial institutions, see section 262d of this title.

Library References

International Law ⇨10.45.

C.J.S. International Law § 17.

§ 284a. ~~Governor, executive director, and alternates of Association~~

The Governor and Executive Director of the International Bank for Reconstruction and Development, and the alternate for each of them, appointed under section 286a of this title, shall serve as Governor, Executive Director and alternates, respectively, of the Association.

Pub.L. 86-565, § 3, June 30, 1960, 74 Stat. 293.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 86-565, see 2583.

Library References

United States ⇨35.

C.J.S. United States §§ 35, 37, 62 to 64.

22 § 284b INTERNATIONAL ORGANIZATIONS Ch. 7

§ 284b. National Advisory Council on International Monetary and Financial Problems; reports

The provisions of section 286b of this title, shall apply with respect to the Association to the same extent as with respect to the International Bank for Reconstruction and Development and the International Monetary Fund. Reports with respect to the Association under paragraphs (5) and (6) of subsection (b) of section 286b of this title, shall be included in the first report made thereunder after the establishment of the Association and in each succeeding report.

Pub.L. 86-565, § 4, June 30, 1960, 74 Stat. 294.

Historical Note

Delegation of Functions. Functions of the National Advisory Council on International Monetary and Financial Problems under this section delegated to the National Advisory Council on International Monetary and Financial Policies, see section 2(h) of Ex.Ord.No.11200, Feb. 14, 1966, 31 F.R. 2813, set out as a note under section 286b of this title.

Legislative History. For legislative history and purpose of Pub.L. 86-565, see 1960 U.S.Code Cong. and Adm.News, p. 2583.

Library References

United States ☞ 34.

C.J.S. United States § 125.

§ 284c. Congressional authorization needed for certain actions

Unless Congress by law authorizes such action, neither the President nor any person or agency shall, on behalf of the United States, (a) subscribe to additional funds under article III, section 1, of the articles; (b) accept any amendment under article IX of the articles; or (c) make a loan or provide other financing to the Association.

Pub.L. 86-565, § 5, June 30, 1960, 74 Stat. 294.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 86-565, see 1960 U.S.Code Cong. and Adm.News, p. 2583.

Library References

United States ☞ 22.

C.J.S. United States §§ 22, 23.

§ 284d. Federal Reserve banks as depositories

Any Federal Reserve bank which is requested to do so by the Association shall act as its depository or as its fiscal agent, and the Board of Governors of the Federal Reserve System shall supervise and direct the carrying out of these functions by the Federal Reserve banks.

Pub.L. 86-565, § 6, June 30, 1960, 74 Stat. 294.

Historical Note

Legislative History. For legislative history, 1960 U.S. Code Cong. and Adm. News, p. 2551, and purpose of Pub. L. 86-505, see 2551.

Library References

Banks and Banking → 350.

C.J.S. Banks and Banking § 809 et seq.

§ 284e. Payment of subscription to Association by United States

Authorization of appropriations for subscription

(a) There is hereby authorized to be appropriated, without fiscal year limitation, for the subscription of the United States to the Association, \$320,290,000.

Increase in Association resources; contribution; authorization of appropriations

(b) The United States Governor is hereby authorized (1) to vote for an increase in the resources of the Association and (2) to agree on behalf of the United States to contribute to the Association the sum of \$312 million, both as recommended by the Executive Directors in a report dated September 9, 1963, to the Board of Governors of the Association. There is hereby authorized to be appropriated out of funds supplied by the Nation's taxpayers or out of funds borrowed on their credit, without fiscal year limitation, \$312 million to provide the United States share of the increase in the resources of the Association.

Issuance of special notes

(c) For the purpose of keeping to a minimum the cost to the United States of participation in the Association, the Secretary of the Treasury is authorized and directed to issue special notes of the United States from time to time, at par, and to deliver such notes to the Association in exchange for dollars to the extent permitted by the articles. The special notes provided for in this subsection shall be issued under the authority and subject to the provisions of the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under that Act are extended to include the purposes for which special notes are authorized and directed to be issued under this subsection, but such notes shall bear no interest, shall be nonnegotiable, and shall be payable on demand of the Association. The face amount of special notes issued to the Association under the authority of this subsection and outstanding at any one time shall not exceed, in the aggregate, the amount actually paid to the Association under the articles.

22 § 284e INTERNATIONAL ORGANIZATIONS Ch. 7

Income covered into Treasury

(d) Any payment made to the United States by the Association as a distribution of net income shall be covered into the Treasury as a miscellaneous receipt.

Pub.L. 86-565, § 7, June 30, 1960, 74 Stat. 294; Pub.L. 88-310, §§ 1, 2, May 26, 1964, 78 Stat. 200.

Historical Note

References in Text. The Second Liberty Bond Act, as amended, referred to in subsec. (c), is Act Sept. 24, 1917, c. 50, 40 Stat. 234, as amended. For classification of this Act to the Code, see References in Text note set out under section 774 of Title 31, Money and Finance, and Tables volume.

1964 Amendment. Subsec. (b). Pub.L. 88-310, § 1, added subsec. (b). Former subsec. (b) redesignated (c).

Subsec. (c). Pub.L. 88-310, §§ 1, 2, redesignated former subsec. (b) as (c), and deleted ", after paying the requisite part of the subscription of the United States

in the Association required to be made under the articles," following "Secretary of the Treasury" in the first sentence and "of the subscription of the United States", following "amount" in the third sentence, respectively. Former subsec. (c) redesignated (d).

Subsec. (d). Pub.L. 88-310, § 1, redesignated former subsec. (c) as (d).

Legislative History. For legislative history and purpose of Pub.L. 86-565, see 1960 U.S.Code Cong. and Adm.News, p. 2583. See, also, Pub.L. 88-310, 1964 U.S. Code Cong. and Adm.News, p. 2214.

Library References

United States ← 31, 55, 80.

C.J.S. United States §§ 121, 123, 127.

~~§ 284e~~ Jurisdiction and venue of actions

For the purpose of any action which may be brought within the United States, its possessions, or the Commonwealth of Puerto Rico, by or against the Association in accordance with the articles, the Association shall be deemed to be an inhabitant of the Federal judicial district in which its principal office in the United States is located, and any such action at law or in equity to which the Association shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of any such action. When the Association is a defendant in any such action, it may, at any time before the trial thereof, remove such action from a State court into the district court of the United States for the proper district by following the procedure for removal of causes otherwise provided by law.

Pub.L. 86-565, § 8, June 30, 1960, 74 Stat. 294.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 86-565, see 1960 U.S.Code Cong. and Adm.News, p. 2583.

Cross References

Removal of cases from state to district courts, see section 1441 et seq. of Title 28, Judiciary and Judicial Procedure.

Federal Rules of Civil Procedure

One form of action, see rule 2, Title 28, Judiciary and Judicial Procedure.

Library References

Courts \hookrightarrow 274(14).

C.J.S. Federal Courts § 21.

West's Federal Forms

Jurisdiction and venue in district courts, matters pertaining to, see § 1000 et seq.

§ 284g. Status, privileges, and immunities of United States

The provisions of article VII, section 5(d), and article VIII sections 2 to 9, both inclusive, of the articles shall have full force and effect in the United States, its possessions, and the Commonwealth of Puerto Rico, upon acceptance of membership by the United States in, and the establishment of, the Association.

Pub.L. 36-565, § 9, June 30, 1960, 74 Stat. 295.

Historical Note

Legislative History. For legislative history, 1960 U.S.Code Cong. and Adm.News, p. 2531, and purpose of Pub.L. 86-565, see 2531.

Library References

International Law \hookrightarrow 10.10.

C.J.S. International Law § 17.

§ 284h. Increased United States participation in Association activities; authorization of appropriations

The United States Governor is hereby authorized (1) to vote in favor of the second replenishment resolutions providing for an increase in the resources of the Association, and (2) to agree on behalf of the United States to contribute to the Association the sum of \$480,000,000, as recommended by the Executive Directors in a report dated March 8, 1968, to the Board of Governors of the Association. There is hereby authorized to be appropriated, without fiscal year limitation, \$480,000,000 for payment by the Secretary of the Treasury of the United States share of the increase in the resources of the Association.

Pub.L. 86-565, § 10, as added Pub.L. 91-14, May 23, 1969, 83 Stat. 10.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 91-14, see 1969 U.S.Code Cong. and Adm.News, p. 992.

22 § 284i INTERNATIONAL ORGANIZATIONS Ch. 7

§ 284i. Authorization for payment of United States contribution; authorization of appropriations

The United States Governor is hereby authorized to agree on behalf of the United States to contribute to the Association three annual installments of \$320,000,000 each as recommended in the "Report of the Executive Directors to the Board of Governors on Additions to IDA Resources: Third Replenishment," dated July 21, 1970. There is hereby authorized to be appropriated, without fiscal year limitation, the amounts necessary for payment by the Secretary of the Treasury of three annual installments of \$320,000,000 each for the United States share of the increase in the resources of the Association.

Pub.L. 86-565, § 11, as added Pub.L. 92-247, § 1, Mar. 10, 1972, 86 Stat. 60.

Historical Note

Legislative History. For legislative 1972 U.S.Code Cong. and Adm.News, p. history and purpose of Pub.L. 92-247, see 3011.

§ 284j. Expropriation of United States property; loan restrictions

The President shall instruct the United States Executive Directors of the International Bank for Reconstruction and Development and the International Development Association to vote against any loan or other utilization of the funds of the Bank and the Association for the benefit of any country which has—

(1) nationalized or expropriated or seized ownership or control of property owned by any United States citizen or by any corporation, partnership, or association not less than 50 per centum of which is beneficially owned by United States citizens;

(2) taken steps to repudiate or nullify existing contracts or agreements with any United States citizen or any corporation, partnership, or association not less than 50 per centum of which is beneficially owned by United States citizens; or

(3) imposed or enforced discriminatory taxes or other exactions, or restrictive maintenance or operational conditions, or has taken other actions, which have the effect of nationalizing, expropriating, or otherwise seizing ownership or control of property so owned;

unless the President determines that (A) an arrangement for prompt, adequate, and effective compensation has been made, (B) the parties have submitted the dispute to arbitration under the rules of the Convention for the Settlement of Investment Disputes, or (C) good faith negotiations are in progress aimed at providing prompt, adequate,

and effective compensation under the applicable principles of international law.

Pub.L. 86-565, § 12, as added Pub.L. 92-247, § 1, Mar. 10, 1972, 86 Stat. 60.

Historical Note

Legislative History. For legislative 1972 U.S.Code Cong. and Adm.News, p. history and purpose of Pub.L. 92-247, see 2011.

Library References

International Law 10.45.

C.J.S. International Law § 17.

~~§ 2841. Illegal drug traffic; loan restrictions~~

The Secretary of the Treasury shall instruct the United States Executive Directors of the International Bank for Reconstruction and Development and the International Development Association to vote against any loan or other utilization of the funds of the Bank and the Association for the benefit of any country with respect to which the President has made a determination, and so notified the Secretary of the Treasury, that the government of such country has failed to take adequate steps to prevent narcotic drugs and other controlled substances (as defined by the Comprehensive Drug Abuse Prevention and Control Act of 1970) produced or processed, in whole or in part, in such country, or transported through such country, from being sold illegally within the jurisdiction of such country to United States Government personnel or their dependents, or from entering the United States unlawfully. Such instruction shall continue in effect until the President determines, and so notifies the Secretary of the Treasury, that the government of such country has taken adequate steps to prevent such sale or entry of narcotic drugs and other controlled substances.

Pub.L. 86-565, § 13, as added Pub.L. 92-247, § 2, Mar. 10, 1972, 86 Stat. 61.

Historical Note

References in Text. The Comprehensive Drug Abuse Prevention and Control Act of 1970, referred to in text, is Pub.L. 91-512, Oct. 27, 1970, 84 Stat. 1270, as amended, which is classified principally to chapter 13 (section 801 et seq.) of Title 21, Food and Drugs. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables volume.

Legislative History. For legislative history and purpose of Pub.L. 92-247, see 1972 U.S.Code Cong. and Adm.News, p. 2011.

§ 2841. Authorization for payment of United States contribution; authorization of appropriations

(a) The United States Governor is hereby authorized to agree on behalf of the United States to pay to the Association four annual in-

22 § 284l INTERNATIONAL ORGANIZATIONS Ch. 7

installments of \$375,000,000 each as the United States contribution to the Fourth Replenishment of the Resources of the Association.

(b) In order to pay for the United States contribution, there is hereby authorized to be appropriated without fiscal year limitation four annual installments of \$375,000,000 each for payment by the Secretary of the Treasury.

Pub.L. 86-565, § 14, as added Pub.L. 93-373, § 1, Aug. 14, 1974, 88 Stat. 445.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93-373, see 1974 U.S.Code Cong. and Adm.News, p. 4030.

§ 284m. Repealed. Pub.L. 95-118, Title VII, § 702, Oct. 3, 1977, 91 Stat. 1070

Historical Note

Section, Pub.L. 86-565, § 15, as added Pub.L. 93-373, § 3, Aug. 14, 1974, 88 Stat. 445, set forth provisions relating to United States participation in loans by the International Development Association to any country developing any nuclear explosive device. See section 202d of this title. Effective Date of Repeal. Section repealed effective Oct. 3, 1977, see section 1001 of Pub.L. 95-118, set out as a note under section 202i of this title.

§ 284n. Additional authorization for payment of United States contribution; authorization of appropriations

(a) The United States Governor is hereby authorized to agree on behalf of the United States to pay to the Association \$2,400,000,000 as the United States contribution to the fifth replenishment of the Resources of the Association: *Provided, however,* That any commitment to make such contributions shall be made subject to obtaining the necessary appropriations.

(b) In order to pay for the United States contribution provided for in this section, there are hereby authorized to be appropriated, without fiscal year limitation, \$2,400,000,000 for payment by the Secretary of the Treasury.

Pub.L. 86-565, § 16, as added Pub.L. 95-118, Title IV, § 401, Oct. 3, 1977, 91 Stat. 1068.

Historical Note

Effective Date. Section effective Oct. 3, 1977, except that no funds authorized to be appropriated by this section may be available for use or obligation prior to Oct. 1, 1977, see section 1001 of Pub.L. 95-118, set out as a note under section 202i of this title. Legislative History. For legislative history and purpose of Pub.L. 95-118, see 1977 U.S.Code Cong. and Adm.News, p. 2670.

NOTES ON

JURISDICTION

DIRECT TAXES UNDER
ASIAN DEVELOPMENT BANK
(22 U.S.C. 285)

"PERSON" - "FOREIGN PRINCIPAL" - "FOREIGN AGENT"
(22 U.S.C. 611)

ETC.

INTERNATIONAL ORGANIZATIONS

- Title 22, United States Codes Annotated -

APPROPRIATIONS FOR CONTRIBUTIONS TO INTERNATIONAL FINANCIAL INSTITUTIONS - 22 U.S.C. 262c (b).

I.) INSTITUTE OF INTER-AMERICAN AFFAIRS

A.) Created: Act of August 5, 1947, c. 498, 61 Stat. 780

Obsolete

Transferred to:

II.) FOREIGN OPERATIONS ADMINISTRATION

A.) Created: Reorg. Plan No. 7, August 1, 1953, 18 F.R. 4541, 67 Stat. 639, Title 5 - Government Organizations & Employees.

B.) Abolished: Ex. Order 10610, May 9, 1955, 20 F.R. 3179

Transferred to:

III.) DEPARTMENT OF STATE

Under

IV.) INTERNATIONAL COOPERATION ADMINISTRATION

A.) P.L. 87-195, Sept. 4, 1961, 75 Stat. 424

Transferred to: (by, P.L. 87-195, Sec. 621 (b), (e)) codified 22 U.S.C. 2381

V.) AGENCY FOR INTERNATIONAL DEVELOPMENT - 22 U.S.C. 281

A.) Created: Presidential Letter, Sept. 30, 1961 & Ex. Order 10973, Nov. 3, 1961, 26 F.R. 10469, Sec. 102. (22 U.S.C.A. 286b, pg. 206)

B.) National Advisory Counsel On International Monetary And Financial Policies - Ex Order 10973:

Organization:

- 1.) Chairman of Council - Secretary of Treasury
- 2.) Deputy Chairman - Assistant to President for Economic Affairs
- 3.) Secretary Of State
- 4.) Secretary of Commerce
- 5.) Chairman of the Board of Governors of the Federal Reserve
- 6.) President of the Export Import Bank of the United States (Washington D.C.)

C.) Fiscal & Depository Agency - Federal Reserve

VI.) INTERNATIONAL FINANCE CORPORATION - 22 U.S.C. 282

A.) Created: Ex. Order No. 11269, February 14, 1966, 31 F.R. 2813

B.) Organization:

- 1.) Governor, Executive Director and alternates, same as 22 U.S.C. 286(b) - I.M.F.

C.) Fiscal and Depository Agency - Federal Reserve - 282(d)

D.) Subscribed to "Corporation", and "shall be treated as public-debt transactions." 22 U.S.C. 282e

E.) Jurisdiction - 22 U.S.C. 282f - Dist., principal office

VII.) INTER-AMERICAN DEVELOPMENT BANK - 22 U.S.C. 283

A.) Created: Public Law 86-147, August 7, 1959, 73 Stat. 299. (Sec. 1 "This Act ...amending sec. 24 of Title 12, Banks and Banking)

B.) Organization: 22 U.S.C. 283a

- 1.) Governor of the Bank, P.L. 91-599, Ch. 2, § 21(b), Dec. 30, 1970, 84 Stat: 1658.
- 2.) Executive Director - same as above. 1970 U.S. Code Cong. and Adm. News, p. 5286.

283a(c) - "No person shall be entitled to receive any salary or other compensation from the United States for services as a governor, alternate governor, or executive director."

C.) Depository and Fiscal agent - Federal Reserve
- 283d

D.) Subscription to Bank - 283e, 283j, 283k, l, m, n, o, p, Audit 283j-1, P.L. 90-88, § 1, Sept. 22, 1967, 81 Stat. 227.

E.) Jurisdiction and venue of actions - 283f.

VIII. INTERNATIONAL DEVELOPMENT ASSOCIATION - 22 U.S.C. 284

A.) Created: Public Law 86-565, June 30, 1960, 74 Stat. 293

B.) Organization: 22 U.S.C. 284a

1.) The Governor - Secretary of Treasury

2.) The Executive Director & Alternates - same as the International Bank for Reconstruction and Development.

C.) Depository and Fiscal agent - Federal Reserve
- 284d

D.) Subscription to Association - 284e

E.) Jurisdiction and Venue - 284f

IX.) ASIAN DEVELOPMENT BANK - 22 U.S.C. 285

A.) Created: Public Law 89-369, March 16, 1966, 80 Stat. 71

B.) Organization: 22 U.S.C. 285a (P.L. 89-369, § 3)

1.) Governor of the Bank - Secretary of Treasury

2.) Alternate -

3.) Director of the Bank -

Section (b) - No person shall be entitled to receive any salary or other compensation from

the United States for services as a Governor or Alternate Governor...."

- C.) Depository & Fiscal agent - Federal Reserve - 285d
- D.) Subscription & Appropriation (20,000 shares of capital stock) - 285e
- E.) Jurisdiction - 285f - ("including those courts enumerated in section 460 of Title 28 shall have original jurisdiction ")
- F.) Direct Taxation - 285g ("that the United States retains for itself and its political subdivisions the right to tax salaries and emoluments paid by the Bank to its citizens or nationals.")

X. INTERNATIONAL MONETARY FUND AND BANK FOR RECONSTRUCTION AND DEVELOPMENT - 22 U.S.C. 286

- A.) Created: Final Act of the United Nations Monetary and Financial Conference, July 22, 1944 - Act of July 31, 1945, c. 339, § 2, 59 Sta. 512.

(Note: 22 U.S.C.A. 286, pg. 202, Historical Note, Short Title: "Short Title. Section 1 of Act of July 31, 1945, provided: 'This Act [enacting this subchapter and amending section 822a of Title 31, Money and Finance] may be cited as the Bretton Woods Agreements Act'.")

- B.) Organization: 22 U.S.C. 286a

- 1.) Governor of Fund and Governor of the Bank - Secretary of Treasury.
- 2.) Executive Director of the Fund and the Bank - same as "Agency For International Development"
- 3.) Alternates - same as "Agency For International Development"

(Note: 22 U.S.C.286a (d)(1) - not compensated by United States)

- C.) Depository & Fiscal agent - Federal Reserve - 286d
- D.) Jurisdiction - 285g

XI. UNITED NATIONS - 22 U.S.C. 287

- A.) Created: "Establishment of Permanent Headquarters in New York, Agreement between the United Nations and United States". Joint Resolution, August 4, 1947, c. 482, 61 Stat. 756, provided:

"Whereas the Charter of the United Nations was signed on behalf of the United States on June 26, 1945, and was ratified on August 8, 1945, by the President of the United States, by and with the advice and consent of the Senate, and the instrument of ratification of the said Charter was deposited on August 8, 1945.

"Whereas the said Charter of the United Nations came into force with respect to the United States on October 24, 1945...."

(See: 22 U.S.C.A. 287, pg. 238)

- B.) Organization: 22 U.S.C. 287.

Includes Ambassador Extraordinary and Plenipotentiary.

- C.) SEAT OF UNITED NATIONS - NEW YORK CITY - "Agreement Between The United Nations And The United States Of America Regarding The Headquarters Of The United Nations." (See: 22 U.S.C.A. 287, pg. 239 - 247; also note, that the rules, regulations, transactions etc. of the United Nations supersede the ordained Constitution and Laws of the United States of America, and the sovereign States of the Union. Section 7, paragraph (d), and Sections 8 and 21)

- D.) 287d Use Of Armed Force; Limitations.
(Use of U.S. Military by Foreign Countries and Powers)

- E.) 287e Appropriations. (Taxation to support)

- F.) 287j Participation In Borrowing - ("including a vigorous program for collection of delinquencies on annual assessments of nations and maintenance of such annual assessments on a current basis")

- G.) 287m Acceptance of membership by U.S.

XII. PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS
22 U.S.C. 288

Numerous other International Organizations, Associations, Corporations etc., exist and are Chartered under the Foreign Governmental body, known as the United Nations.

United Nations Educational, Scientific, and Cultural Organizations (UNESCO), 22 U.S.C. 287m; International Refugee Organization, 22 U.S.C. 289; World Health Organization, 22 U.S.C. 290a; Inter-American Foundation, 22 U.S.C. 290f, African Development Fund, 22 U.S.C. 290g; Caribbean Development Bank, 22 U.S.C. 283u, and 283v. (Bahamas and Guyana), etc. etc.

ed States is located, and any such action to which the Bank shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States, including the courts enumerated in section 460 of Title 28, shall have original jurisdiction of any such action. When the Bank is a defendant in any action in a State court, it may, at any time before the trial thereof, remove such action into the district court of the United States for the proper district by following the procedure for removal of causes otherwise provided by law.

Pub.L. 89-369, § 8, Mar. 16, 1966, 80 Stat. 72.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 89-369, see 1966 U.S. Code Cong. and Adm. News, p. 2030.

Cross References

Removal of cases from state to district courts, see section 1441 et seq. of Title 28, Judiciary and Judicial Procedure.

Federal Rules of Civil Procedure

One form of action, see rule 2, Title 28, Judiciary and Judicial Procedure.

Library References

Federal Courts ⇨ 74.
Removal of Cases ⇨ 44.

C.J.S. Federal Civil Procedure § 484.
C.J.S. Removal of Causes § 160 et seq.

West's Federal Forms

Jurisdiction and venue in district courts, matters pertaining to, see § 1000 et seq.

285g Status, immunities, and privileges

The agreement, and particularly articles 49 through 56, shall have full force and effect in the United States, its territories and possessions, and the ~~Commonwealth of Puerto Rico~~, upon acceptance of membership by the United States in, and the establishment of, the Bank. The President, at the time of deposit of the instrument of acceptance of membership by the United States in the Bank, shall also deposit a declaration that the United States retains for itself and its political subdivisions the right to tax salaries and emoluments paid by the Bank to its citizens or nationals.

Pub.L. 89-369, § 9, Mar. 16, 1966, 80 Stat. 72.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 89-369, see 1966 U.S. Code Cong. and Adm. News, p. 2030.

Library References

International Law ⇨ 10.45.

C.J.S. International Law § 17.

(b) In order to pay for the increase in the United States subscription to the Bank provided for in this section, there are hereby authorized to be appropriated without fiscal year limitation \$814,286,250 for payment by the Secretary of the Treasury.

Pub.L. 89-369, § 22, as added Pub.L. 95-118, Title V, § 501, Oct. 3, 1977, 91 Stat. 1068.

Historical Note

Effective Date. Section effective Oct. 3, 1977, except that no funds authorized to be appropriated by this section may be available for use or obligation prior to Oct. 1, 1977, see section 1001 of Pub.L. 95-118, set out as a note under section 2321 of this title.

Legislative History. For legislative history and purpose of Pub.L. 95-118, see 1977 U.S.Code Cong. and Adm.News, p. 2070.

§ 285t. Additional contribution to special funds; authorization of appropriations

(a) The United States Governor of the Bank is hereby authorized to contribute on behalf of the United States \$180,000,000 to the Asian Development Fund, a special fund of the Bank: *Provided, however,* That any commitment to make such contribution shall be made subject to obtaining the necessary appropriations.

(b) In order to pay for the United States contribution to the Asian Development Fund provided for in this section, there are hereby authorized to be appropriated without fiscal year limitation \$180,000,000 for payment by the Secretary of the Treasury.

Pub.L. 89-369, § 23, as added Pub.L. 95-118, Title V, § 501, Oct. 3, 1977, 91 Stat. 1069.

Historical Note

Effective Date. Section effective Oct. 3, 1977, except that no funds authorized to be appropriated by this section may be available for use or obligation prior to Oct. 1, 1977, see section 1001 of Pub.L. 95-118, set out as a note under section 2321 of this title.

Legislative History. For legislative history and purpose of Pub.L. 95-118, see 1977 U.S.Code Cong. and Adm.News, p. 2070.

**SUBCHAPTER XV—INTERNATIONAL MONETARY FUND
AND BANK FOR RECONSTRUCTION AND
DEVELOPMENT**

§ 286. Acceptance of membership by United States in International Monetary Fund

The President is hereby authorized to accept membership for the United States in the International Monetary Fund (hereinafter referred to as the "Fund"), and in the International Bank for Recon-

struction and Development (hereinafter referred to as the "Bank"), provided for by the Articles of Agreement of the Fund and the Articles of Agreement of the Bank as set forth in the Final Act of the ~~United Nations Monetary and Financial Conference~~ dated July 22, 1944, and deposited in the archives of the Department of State. July 31, 1945, c. 339, § 2, 59 Stat. 512.

Historical Note

Short Title. Section 1 of Act July 31, 1945, provided: "This Act (enacting this subchapter and amending section 522a of Title 31, Money and Finance) may be cited as the 'Bretton Woods Agreements Act'."

Par Value Modification. For Congressional direction that the Secretary of the Treasury maintain the value in terms of gold of the holdings in United States

dollars of the International Monetary Fund and of the International Bank for Reconstruction and Development following the establishment of a par value of the dollar at \$35 for a fine troy ounce of gold pursuant to the Par Value Modification Act and for the authorization of the appropriations necessary to provide such maintenance of value, see section 449a of Title 31, Money and Finance.

Cross References

Advancement of human rights through United States assistance policies with international financial institutions, see section 202d of this title.
Increase in lending authority of Export-Import Bank of United States, see section 825 et seq. of Title 12, Banks and Banking.
United States membership in United Nations Food and Agriculture Organization, see section 273 et seq. of this title.

Library References

International Law ◊10.45.

C.J.S. International Law § 17.

~~§ 286a~~ Appointments

Governors and executive directors; term of office

(a) The President, by and with the advice and consent of the Senate, shall appoint a ~~governor of the Fund~~ who shall also serve as a ~~governor of the Bank~~ and an executive director of the Fund and an executive director of the Bank. The executive directors so appointed shall also serve as provisional executive directors of the Fund and the Bank for the purposes of the respective Articles of Agreement. The term of office for the governor of the Fund and of the Bank shall be five years. The term of office for the executive directors shall be two years, but the executive directors shall remain in office until their successors have been appointed.

Alternates; term of office

(b) The President, by and with the advice and consent of the Senate, shall appoint an alternate for the governor of the Fund and an alternate for the governor of the Bank. The President, by and with the advice and consent of the Senate, shall appoint an alternate for each of the executive directors. The alternate for each executive director shall be appointed from among individuals recommended to

Library References

United States ⇐22.

C.J.S. United States §§ 22, 25.

§ 286d. Federal Reserve banks as depositories

Any Federal Reserve bank which is requested to do so by the Fund or the Bank shall act as its depository or as its fiscal agent, and the Board of Governors of the Federal Reserve System shall supervise and direct the carrying out of these functions by the Federal Reserve banks.

July 31, 1945, c. 339, § 6, 59 Stat. 514.

Library References

Banks and Banking ⇐320.

C.J.S. Banks and Banking § 509 et seq.

§ 286e. Payment of subscriptions to Fund and Bank by United States; issuance of special notes; income covered into Treasury

The Secretary of the Treasury is authorized to pay the balance of the subscription of the United States to the Fund not provided for in section 322a of Title 31 and to pay the subscription of the United States to the Bank from time to time when payments are required to be made to the Bank. For the purpose of making these payments, the Secretary of the Treasury is authorized to use as a public-debt transaction \$3,675,000,000 of the proceeds of any securities hereafter issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under that Act are extended to include such purpose. Payment under this paragraph of the subscription of the United States to the Fund or the Bank and repayments thereof shall be treated as public-debt transactions of the United States.

For the purpose of keeping to a minimum the cost to the United States of participation in the Fund and the Bank, the Secretary of the Treasury, after paying the subscription of the United States to the Fund, and any part of the subscription of the United States to the Bank required to be made under article II, section 7(i), of the Articles of Agreement of the Bank, is authorized and directed to issue special notes of the United States from time to time at par and to deliver such notes to the Fund and the Bank in exchange for dollars to the extent permitted by the respective Articles of Agreement. The special notes provided for in this paragraph shall be issued under the authority and subject to the provisions of the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under that Act are extended to include the purposes for which special notes are authorized and directed to be issued under

otherwise than in the course of official duty, any information obtained under this section, or to use any such information for his personal benefit. Whoever violates any of the provisions of this subsection shall, upon conviction, be fined not more than \$5,000, or imprisoned for not more than five years, or both.

Definition of person

(d) The term "person" as used in this section means an individual, partnership, corporation or association.

July 31, 1945, c. 339, § 8, 59 Stat. 515.

EXECUTIVE ORDER NO. 10033

Feb. 3, 1949, 14 F.R. 561, as amended by Ex.Ord.No.11269, Feb. 14, 1966, 31 F.R. 2313; Ex.Ord.No.12013, Oct. 7, 1977, 42 F.R. 34931

REGULATIONS GOVERNING THE PROVIDING OF STATISTICAL INFORMATION TO INTERGOVERNMENTAL ORGANIZATIONS

Section 1. Except as provided in section 2 hereof, the Secretary of Commerce, hereinafter referred to as the Secretary, (a) shall determine, with the concurrence of the Secretary of State, what statistical information shall be provided in response to official requests received by the United States Government from any intergovernmental organization of which this country is a member, and (b) shall determine which Federal executive agency or agencies shall prepare the statistical information thus to be provided. The statistical information so prepared shall be transmitted to the requesting intergovernmental organization through established channels by the Secretary of State or by any Federal executive agency now or hereafter authorized by the Secretary of State to transmit such information.

Sec. 2. (a). The National Advisory Council on International Monetary and Financial Policies, hereinafter referred to as the National Advisory Council, shall determine, after consultation with the Secretary, what information is essential in order that the United States Government may comply with official requests for information received from the International Monetary Fund or the International Bank for Reconstruction and Development.

(b) The Secretary shall determine which Federal executive agency or agencies shall collect or make available information found essential under section 2(a) hereof.

(c) In the collection of information pursuant to a determination made by the Secretary under section 2(b) hereof in response to a request under article VIII,

section 3 of the Articles of Agreement of the International Monetary Fund, the authority conferred on the President by section 3 of the Bretton Woods Agreements Act [this section] to require any person to furnish such information, by subpoena or otherwise, may be exercised by each of the following-named agencies:

Department of Agriculture
 Department of Commerce
 Department of the Interior
 Department of Labor
 Department of the Treasury
 Board of Governors of the Federal Reserve System
 Federal Communications Commission
 Federal Deposit Insurance Corporation
 Federal Power Commission [now Secretary of Energy]
 Federal Trade Commission
 Interstate Commerce Commission
 Securities and Exchange Commission
 United States Maritime Commission [now Federal Maritime Commission]
 United States Tariff Commission [now United States International Trade Commission]

(d) The information collected or made available under section 2 of this order shall be submitted to the National Advisory Council for review and for presentation to the said Fund or Bank.

(e) As used in this order, the word "person" means an individual, partnership, corporation, or association.

Sec. 3. The Secretary's determination of any matter under section 1 or section 2(b) of this order shall be made after consulting appropriate Federal executive agencies and giving due consideration to

any responsibility now exercised by any of them in relation to an inter-governmental organization.

Sec. 4. This order shall not be construed to authorize the Secretary or the National Advisory Council to provide, or to require any Federal executive agency to provide, to an intergovernmental organization (a) information during any period of time when the agency having primary responsibility for security of the specified information declares that it must be withheld from the intergovernmental organization in the interest of military security, or (b) information which any Federal executive agency is required by law to maintain on a confidential basis.

Sec. 5. The Secretary and the National Advisory Council are authorized to prescribe such regulations as may be necessary to carry out their respective responsibilities under this order.

Sec. 6. To the extent that this order conflicts with any previous Executive order, the provisions of this order shall control.

Sec. 7. The performance of the functions vested in the Secretary by this Order shall be subject to any authority or responsibility vested in the Director of the Office of Management and Budget, including Chapter 35 of Title 44 of the United States Code (the Federal Reports Act) [section 3501 et seq. of Title 44, Public Printing and Documents].

Cross References

Felony as offense punishable by imprisonment for term exceeding one year, see section 1 of Title 18, Crimes and Criminal Procedure.
Punishment for contempt, see section 402 of Title 18.

Federal Rules of Civil Procedure

Subpoena, see rule 45, Title 28, Judiciary and Judicial Procedure.

Library References

International Law \approx 10.45.
United States \approx 40. 32.

C.J.S. International Law § 17.
C.J.S. United States §§ 33 to 40, 60, 61.

West's Federal Forms

Administrative subpoenas, enforcement of, see § 6004 et seq.
Contempt proceedings, see § 7531 et seq.
Production of documents, etc., see § 3551 et seq.
Sentence and fine, see § 7531 et seq.
Subpoena of witnesses, see § 3581 et seq.

Code of Federal Regulations

Forms, see 31 CFR 121.10 et seq.
Reporting requirements, see 15 CFR 802.1 et seq., 803.1 et seq., 805.1 et seq., 31 CFR 121.1 et seq.

286g. Jurisdiction and venue of actions

For the purpose of any action which may be brought within the United States or its Territories or possessions by or against the Fund or the Bank in accordance with the Articles of Agreement of the Fund or the Articles of Agreement of the Bank, the Fund or the Bank, as the case may be, shall be deemed to be an inhabitant of the Federal judicial district in which its principal office in the United States is located, and any such action at law or in equity to which either the Fund or the Bank shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of any such action.

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When either the Fund or the Bank is a defendant in any such action, it may, at any time before the trial thereof, remove such action from a State court into the district court of the United States for the proper district by following the procedure for removal of causes otherwise provided by law.

July 31, 1945, c. 339, § 10, 59 Stat. 516.

Cross References

Removal of cases from state to district courts, see section 1441 et seq. of Title 28, Judiciary and Judicial Procedure.

Federal Rules of Civil Procedure

One form of action, see rule 2, Title 28, Judiciary and Judicial Procedure.

Library References

Federal Courts ↔74.
Removal of Cases ↔44.

C.J.S. Federal Civil Procedure § 484.
C.J.S. Removal of Causes § 139 et seq.

West's Federal Forms

Jurisdiction and venue in district courts, matters pertaining to, see § 1000 et seq.

§ 286h. Status, privileges, and immunities of United States

The provisions of article IX, sections 2 to 9, both inclusive, and the first sentence of article VIII, section 2(b), of the Articles of Agreement of the Fund, and the provisions of article VI, section 5(i), and article VII, sections 2 to 9, both inclusive, of the Articles of Agreement of the Bank, shall have full force and effect in the United States and its Territories and possessions upon acceptance of membership by the United States in, and the establishment of, the Fund and the Bank, respectively.

July 31, 1945, c. 339, § 11, 58 Stat. 516.

Library References.

International Law ↔10.40.

C.J.S. International Law § 17.

§ 286i. Stabilization loans by Bank; amendment to Articles of Agreement

The governor and executive director of the Bank appointed by the United States are directed to obtain promptly an official interpretation by the Bank as to its authority to make or guarantee loans for programs of economic reconstruction and the reconstruction of monetary systems, including long-term stabilization loans. If the Bank does not interpret its powers to include the making or guaranteeing of such loans, the governor of the Bank representing the United States is directed to propose promptly and support an amendment to the Articles of Agreement for the purpose of explicitly authorizing the Bank, after consultation with the Fund, to make or guarantee

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 663 (R.S. § 5279). Last sentence of said section 663, relating to rescue of such fugitive, was omitted as covered by section 752 of this title, the punishment provision of which is based on later statutes. (See reviser's note under that section.)

Minor changes were made in phraseology.

§ 3195. Payment of fees and costs

All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.

All witness fees and costs of every nature in cases of international extradition, including the fees of the magistrate, shall be certified by the judge or magistrate before whom the hearing shall take place to the Secretary of State of the United States, and the same shall be paid out of appropriations to defray the expenses of the judiciary or the Department of Justice as the case may be.

The Attorney General shall certify to the Secretary of State the amounts to be paid to the United States on account of said fees and costs in extradition cases by the foreign government requesting the extradition, and the Secretary of State shall cause said amounts to be collected and transmitted to the Attorney General for deposit in the Treasury of the United States.

(June 25, 1948, ch. 645, 62 Stat. 825; Oct. 17, 1968, Pub. L. 90-578, title III, § 301(a)(3), 82 Stat. 1115.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 662, 662c, 662d, 668 (R.S. § 5278; Aug. 3, 1882, ch. 378, § 4, 22 Stat. 216; June 28, 1902, ch. 1301, § 1, 32 Stat. 475; Mar. 22, 1934, ch. 73, §§ 2, 3, 48 Stat. 455).

First paragraph of this section consolidates provisions as to costs and expenses from said sections 662, 662c, and 662d.

Minor changes were made in phraseology and surplage was omitted.

Remaining provisions of said sections 662, 662c, and 662d of title 18, U.S.C., 1940 ed., are incorporated in sections 752, 3182, 3183, and 3187 of this title.

The words "or the Department of Justice as the case may be" were added at the end of the second paragraph in conformity with the appropriation acts of recent years. See for example act July 5, 1946, ch. 541, title II, 60 Stat. 460.

AMENDMENTS

1968—Pub. L. 90-578 substituted "magistrate" for "commissioner" in two instances.

EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90-578 effective Oct. 17, 1968, except when a later effective date is applicable, which is the earlier of a date when implementation of amendment by appointment of magistrates and assumption of office takes place or third anniversary of enactment of Pub. L. 90-578 on Oct. 17, 1968, see section 403 of Pub. L. 90-578, set out as an Effective Date of 1968 Amendment note under section 631 of Title 28, Judiciary and Judicial Procedure.

CANAL ZONE

Applicability of section to Canal Zone, see section 14 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 14, 4114 of this title.

CHAPTER 211—JURISDICTION AND VENUE

Sec.	
3231.	District courts.
3232.	District of offense—Rule.
3233.	Transfer within district—Rule.
3234.	Change of venue to another district—Rule.
3235.	Venue in capital cases.
3236.	Murder or manslaughter.
3237.	Offenses begun in one district and completed in another.
3238.	Offenses not committed in any district.
3239.	Threatening communications.
3240.	Creation of new district or division.
3241.	Jurisdiction of offenses under certain sections.
3242.	Indians committing certain offenses; acts on reservations.
3243.	Jurisdiction of State of Kansas over offenses committed by or against Indians on Indian reservations.
3244.	Jurisdiction of proceedings relating to transferred offenders.

AMENDMENTS

1978—Pub. L. 95-598, title III, § 314(j)(2), Nov. 6, 1978, 92 Stat. 2678, added item 3244.

§ 3231. District courts

~~The district courts of the United States shall have original jurisdiction exclusive of the courts of the States, of all offenses against the laws of the United States.~~

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

(June 25, 1948, ch. 645, 62 Stat. 826.)

HISTORICAL AND REVISION NOTES

Based on section 588d of title 12, U.S.C., 1940 ed., Banks and Banking; title 18, U.S.C., 1940 ed., §§ 546, 547 (Mar. 4, 1909, ch. 321, §§ 326, 340, 35 Stat. 1151, 1153; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; May 18, 1934, ch. 304, § 4, 48 Stat. 783).

This section was formed by combining sections 546 and 547 of title 18, U.S.C., 1940 ed., with section 588d of title 12, U.S.C., Banks and Banking, with no change of substance.

The language of said section 588d of title 12, U.S.C., 1940 ed., which related to bank robbery, or killing or kidnapping as an incident thereto (see section 2113, of this title), and which read "Jurisdiction over any offense defined by sections 588b and 588c of this title shall not be reserved exclusively to courts of the United States" was omitted as adequately covered by this section.

SENATE REVISION AMENDMENT

The text of this section was changed by Senate amendment. See Senate Report No. 1620, amendment No. 10, 80th Cong.

CROSS REFERENCES

Civil jurisdiction of Federal courts, see section 1331 et seq. of Title 28, Judiciary and Judicial Procedure.

Consular courts, jurisdiction and procedure, see section 141 et seq. of Title 22, Foreign Relations and Intercourse.

Exclusive jurisdiction of Federal courts, see sections 1251, 1333, 1334, 1338, 1351, 1355, 1356 of Title 28, Judiciary and Judicial Procedure.

JURISDICTION AND VENUE

22 U.S.C. 286g.

For the purpose of any action which may be brought within the United States or its Territories or possessions by or against the Fund or the Bank in accordance with the Articles of Agreement of the Fund or the Articles of Agreement of the Bank, the Fund or the Bank, as the case may be, shall be deemed to be an inhabitant of the Federal judicial district in which its principal office in the United States is located, and any such action at law or in equity to which either the Fund or the Bank shall be a party shall be deemed to arise under the laws of the United States, and the district court of the United States shall have original jurisdiction of any such action. When the Fund or the Bank is a defendant in any such action, it may, at any time before the trial thereof, remove such action from a State court into the district court of the United States for the proper district by following the procedure for removal of causes otherwise provided by law.

22 U.S.C. 286d. Federal Reserve Banks As Depositories:

Any Federal Reserve Bank which is requested to do so by the Fund or the Bank shall act as its depository or as its fiscal agent, and the Board of Governors of the Federal Reserve System shall supervise and direct the carrying out of these functions by the Federal Reserve banks.

22 U.S.C. 285g. Status, Immunities and Privileges:

The agreement, and particularly articles 49 through 56, shall have full force and effect in the United States, its Territories and possessions, and the Commonwealth of Puerto Rico, upon acceptance of membership by the United States in, and the establishment of, the Bank. The President at the time of deposit of the instrument of acceptance of membership by the United States in the Bank, shall also deposit a declaration that the United States retains for itself and its political subdivisions the right to tax salaries and emoluments paid by the bank to its citizens or nationals.

22 U.S.C. 611. Definitions

As used in and for the purposes of this subchapter -

(a) The term "person" includes an individual, partnership, associations, corporation, organization, or any other combination of individuals;

(b) The term "foreign principal" includes -

(1) a government of a foreign country and a foreign political party:

(2) a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and

(3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

(c), Except as provided in subsection (d) of this section, the term "agent of a foreign principal" means -

(1) any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person -

(i) engages within the United States in political activities for or in the interest of such foreign principal;

(ii) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal;

(iii) within the United States solicits, collects, disburses or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or

(iv) within the United States represents the interests of such foreign principal before any agency or official of the Government of the United States; and

(2) any person who agrees, consents, assumes or purports to act as, or who holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1) of this section.

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Written By Carl Grosses

ORGANIZATIONAL STRUCTURE OF THE I.R.S.

Between 1916 and 1938, Congress adopted virtually every two years federal income tax acts. On February 10, 1939, the various tax acts of Congress were consolidated into one title known as the 1939 Internal Revenue Code; see 53 Stat., part 1. At the time of the adoption of the 1939 Code, authority to enforce the tax laws codified in the 1939 Code was vested in the Secretary of the Treasury, and he thereafter delegated enforcement authority to the Commissioner of Internal Revenue.

The assumption that the 1939 Internal Revenue Code was repealed by the adoption on August 17, 1954 of the 1954 Internal Revenue Code is incorrect. Subsequent to 1954, Congress enacted legislation amending various provisions of the 1939 Code; see for example, Act of January 23, 1956, 70 Stat. 9, ch. 17, P.L. 398; Act of February 15, 1956, 70 Stat. 15, ch. 36, P.L. 406; Act of September 2, 1958, 72 Stat. 1606, P.L. 85-866, at pages 1663, 1666, 1667, 1670, 1673 and 1675; Act of September 16, 1959, 73 Stat. 563, P.L. 86-280; Act of October 15, 1962, 76 Stat. 960, P.L. 87-834, at page 1067; Act of October 23, 1962, 76 Stat. 1158, P.L. 87-670, at pages 1159 and 1160; Act of September 2, 1964, 78 Stat. 854, P.L. 88-570; Act of January 12, 1971, 84 Stat. 2063, P.L. 91-679, at page 2064; and Act of July 1, 1971, 85 Stat. 97, P.L. 92-41, at page 99. In addition to these legislative acts, the Secretary of the Treasury and the Commissioner of Internal Revenue were busy amending regulations applicable to the 1939 Code as late as 1970; see, for example, the appropriate parts of Cumulative Bulletins

1960-2, and 1970-2. The reason why the 1939 Code is still valid today arises from the fact that Puerto Rico still uses it.

In 1950, as a part of a Congressionally approved effort to reorganize and streamline various departments of the Executive branch, the President adopted Reorganization Plan No. 26 of 1950, which applied to the Department of the Treasury; see 15 Fed. Reg. 4935, 64 Stat. 1280, codified in the annotations to 5 U.S.C., section 903. The operative provisions of this plan were as follows:

"Sec. 1. Transfer of functions to the Secretary.

"(a) [T]here are hereby transferred to the Secretary of the Treasury all functions of all other officers of the Department of the Treasury and all functions of all agencies and employees of such Department.

"Sec. 2. Performance of functions of Secretary.

The Secretary of the Treasury may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of the Treasury of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan."

The legal consequence of the 1950 Plan No. 26 was to divest the Commissioner of Internal Revenue of all authority to enforce the 1939 Internal Revenue Code and reconstitute the same in the hands of the Secretary. Thereafter, for the Commissioner to enforce any internal revenue laws, it was necessary for the Secretary of the Treasury to delegate enforcement authority to the Commissioner. This is admitted to be the case in section 11(16)1.1 of the current I.R.S. Manual 1100, which section reads as follows:

"Reorganization Plan No. 26 of 1950 transferred to the Secretary of the Treasury all functions of all other officers of the Department of the Treasury and all

functions of all agencies and employees of the Department. There were some exceptions, but none insofar as the Internal Revenue Service and its officers and employees were concerned. Subsequently, all new revenue functions have been vested in the Secretary. By means of a series of Treasury Department Orders and by Regulations, the Secretary has delegated most of the revenue functions and authorities to the Commissioner of Internal Revenue."

Analysis of the Federal Register from 1950 to 1987 reveals that, solely in reference to the federal income tax, the Secretary of the Treasury has delegated very little enforcement authority to the Commissioner. Treasury Department Order No. 150-42, dated July 27, 1956, 21 Fed. Reg. 5852, delegated the following authority to the Commissioner:

"The Commissioner shall, to the extent of authority otherwise vested in him, provide for the administration of the United States internal revenue laws in the Panama Canal Zone, Puerto Rico, and the Virgin Islands."

And some 30 years later on February 27, 1986, the Secretary delegated the additional following authority in Treasury Department Order No. 150-01, as found in 51 Fed. Reg. 9571:

"6. U.S. Territories and Insular Possessions. The Commissioner shall, to the extent of authority otherwise vested in him, provide for the administration of the United States internal revenue laws in the U.S. territories and insular possessions and other authorized areas of the world."

Effective on December 1, 1956, the Commissioner of Internal Revenue published a "Statement of Organization and Functions" which summarized the organizational structure of the Internal Revenue Service; see 21 Fed. Reg. 10418, 1957-1 Cum. Bull. 679. In this 1956 version of the I.R.S. Manual 1100, the National Office of the I.R.S. was described as follows:

"1113.2 Basic organization. -- The principal offices which form the National Office are: the Office of the Commissioner; the Office of the Assistant Commissioner (Operations); the Office of the Assistant Commissioner (Technical); the Office of the Assistant Commissioner (Inspection); and the Office of the Chief Counsel."

Of these various offices within the National Office, only the Assistant Commissioner (Operations) is important insofar as enforcement of federal tax laws is concerned. The 1956 Manual 1100 described the functions of "Operations" in the following fashion:

"1113.5 Office of the Assistant Commissioner (Operations). -- The Assistant Commissioner (Operations) acts as the principal assistant to the Commissioner in planning, managing, coordinating, and directing the operations programs of the Service. These include the collection of taxes, the audit and investigation of returns, criminal fraud and enrollment investigations, the administrative system of tax appeals, the administration of laws relating to alcohol, alcoholic beverages, tobacco and firearms, and the administration of U.S. internal revenue laws in all areas outside of the continental United States and the Territories of Alaska and Hawaii."

This office had several divisions which were the Alcohol and Tobacco Tax Division, Appellate Division, Audit Division, Collection Division and Intelligence Division, but none of these concerned enforcement of the federal income tax. The only division of "Operations" which did concern enforcement of the federal income tax was the International Operations Division, and this manual described the functions of "International" as follows:

"International Operations Division. -- The International Operations Division administers the internal revenue laws (except those relating to alcohol, tobacco and firearms) in all areas of the world outside the continental United States except Alaska and the Territory of Hawaii. This includes the initiation and development of policies and programs designed to establish and maintain satisfactory levels of voluntary tax compliance among United States taxpayers abroad."

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The branches within this division were solely concerned with the application of the federal income tax to "nonresidents, whether citizens or aliens."

Effective on July 10, 1961, the Commissioner published a subsequent "Statement of Organization and Functions"; see 26 Fed. Reg. 6372, 1961-2 Cum. Bull. 483. This 1961 version of the I.R.S. Manual 1100 revealed the same internal structure of the I.R.S. as existed prior to that time, the only exception merely being the expansion created by new branches and divisions. This manual described the National Office as follows:

"1113.2 Basic organization. -- The principal offices which form the National Office are: The Office of the Commissioner; the Office of the Assistant Commissioner (Administration); the Office of the Assistant Commissioner (Inspection); the Office of the Assistant Commissioner (Operations); the Office of the Assistant Commissioner (Planning and Research); the Office of the Assistant Commissioner (Technical); the Office of the Chief Counsel; and the Director of Practice."

Like the predecessor manual, the most significant office of the National Office was the Office of Assistant Commissioner (Operations), whose functions were described as follows:

"1113.6 Office of the Assistant Commissioner (Operations). -- The Assistant Commissioner (Operations) is the principal assistant to the Commissioner on all matters pertaining to the operations programs of the Service and in providing effective functional supervision of operations activities in the field. These include the collection of taxes, the audit and investigation of returns, criminal fraud investigations, the administrative system of tax appeals, the administration of laws relating to alcohol, alcoholic beverages, tobacco and firearms, and the implementation and operation of the IRS Automatic Data Processing System and for providing data processing services. The Assistant Commissioner (Operations) directs, coordinates and evaluates the work of the Operations Divisions of the National Office (Alcohol and Tobacco Tax, Appellate, Audit, Automatic

Data Processing, Collection, and Intelligence) and the Office of International Operations."

Again, excluding those divisions dealing with the enforcement of taxes other than the federal income tax, only the Office of International Operations is left for consideration. The functions of this office were described as follows:

"1113.67 Office of International Operations. -- Director of International Operations. -- Has primary responsibility for the administration of the Internal Revenue laws in all areas of the world, outside the United States; and coordinates for the Service all foreign investigations and requests for information from foreign countries or U.S. possessions."

And the Collection Division within "International Operations" had the following duties:

"1113.674 Collection Division. -- Receives all tax returns and related work items accruing from the International Program; processes alien returns, returns of citizens residing abroad, Puerto Rican and Virgin Island returns, returns of certain foreign corporations and the withholding returns filed by agents making income payments to foreign addresses; ... collects delinquent accounts of taxpayers residing abroad; develops procedures relating to the collection of delinquent tax from citizens abroad and non-resident aliens"

Within a few months after the adoption of the 1961 "Statement of Organization", Treasury Department Order 150-56, dated September 15, 1961, was issued and the "office designated as Assistant Commissioner (Operations)" was changed to "Assistant Commissioner (Compliance)"; see 26 Fed. Reg. 8953, 1961-2 Cum. Bull. 544.

Effective on July 22, 1965, another "Statement of Organization and Functions" was adopted by the Commissioner; see 30 Fed. Reg. 9368, 1965-2 Cum. Bull. 863. This 1965 edition of I.R.S. Manual 1100 manifested the same underlying structure as revealed in

previous versions. The offices within the National Office were as follows:

"1113.2 Basic Organization.

The principal offices which form the National Office are: The Office of the Commissioner; the Office of the Assistant Commissioner (Administration); the Office of the Assistant Commissioner (Compliance); the Office of the Assistant Commissioner (Data Processing); the Office of the Assistant Commissioner (Inspection); the Office of the Assistant Commissioner (Planning and Research); the Office of the Assistant Commissioner (Technical); and the Office of the Chief Counsel."

Once again, excluding those offices having no functions regarding enforcement of federal taxes, the only office which did enforce such taxes was the Office of the Assistant Commissioner (Compliance). This office's functions were described in this manual as follows:

"1113.5 Office of Assistant Commissioner (Compliance).

The Assistant Commissioner (Compliance) is the principal assistant to the Commissioner on all matters pertaining to the compliance and appellate programs of the Service, in encouraging and achieving the highest possible degree of voluntary compliance by taxpayers, and in providing effective functional supervision of those activities in the field. These include collection of delinquent accounts, obtaining of delinquent returns, audit and investigation of returns, criminal fraud investigations, the administrative system of tax appeals, and administration of laws relating to alcohol, alcoholic beverages, tobacco and firearms. The Assistant Commissioner (Compliance) directs, coordinates, and evaluates the work of the Alcohol and Tobacco Tax Division, the Appellate Division, the Audit Division, the Collection Division, the Intelligence Division, and the Office of International Operations."

When those divisions within "Compliance" that perform no functions regarding enforcement of the federal income tax are excluded, only

the Office of International Operations is left, and its duties were as follows:

"1113.56 Office of International Operations -- Director of International Operations.

The mission of the Office of International Operations is to encourage and achieve the highest possible degree of voluntary compliance with the Internal Revenue Code and related statutes on the part of citizen taxpayers residing or doing business abroad, foreign taxpayers deriving income from sources within the United States, and taxpayers who are required to withhold tax on certain payments to nonresident aliens and foreign corporations. The Office of International Operations accomplishes this mission by: Administering and enforcing the provisions of the Internal Revenue Code and related statutes (except those relating to alcohol, tobacco, narcotics, and firearms taxes) in all areas of the world outside the United States; administering the provisions of tax conventions with foreign governments concerning the exchange of information, reciprocity in tax collection, consideration and processing of claims alleging double taxation, preparation and issuance of determination letters, and all other provisions of tax conventions except those relating to the preparation of regulations and the preparation and issuance of rulings concerning the interpretation or application of tax conventions; administering the provisions of law relating to withholding of tax on certain payments to nonresident aliens and foreign corporations; and coordinating for the Service all foreign tax investigations and requests for information (other than those relating to regulations or ruling or in the area of general assistance in the field of tax administration) from foreign countries and U.S. possessions."

Less than two (2) years latter on January 20, 1967, the Commissioner adopted another "Statement of Organization and Functions"; see 32 Fed. Reg. 727, 1967-1 Cum. Bull. 435. Here, the National Office was described as follows:

"1113.2 Basic Organization. -- The principal offices which form the National Office are: The Office of the Commissioner; the Office of the Assistant Commissioner (Administration); the Office of the Assistant Commissioner (Compliance); the Office of the Assistant Commissioner (Data Processing); the Office of the

Assistant Commissioner (Inspection); the Office of the Assistant Commissioner (Planning and Research); the Office of the Assistant Commissioner (Technical); and the Office of the Chief Counsel."

Following the pattern of the past, the Office of the Assistant Commissioner (Compliance) was the office charged with the actual duty of enforcing and collecting federal taxes. This Manual 1100 described the duties of "Compliance" as follows:

"1113.5 Office of the Assistant Commissioner (Compliance). -- The Assistant Commissioner (Compliance) is the principal assistant to the Commissioner on all matters pertaining to the compliance and appellate programs of the Service, in encouraging and achieving the highest possible degree of voluntary compliance by taxpayers, and in providing effective functional supervision of those activities in the field. These include collection of delinquent accounts, obtaining of delinquent returns, audit and investigation of returns, criminal fraud investigations, the administrative system of tax appeals, and administration of laws relating to alcohol, alcoholic beverages, tobacco and firearms. The Assistant Commissioner (Compliance) directs, coordinates and evaluates the work of the Alcohol and Tobacco Tax Division, the Appellate Division, the Audit Division, the Collection Division, the Intelligence Division and the Office of International Operations."

And, within "Compliance," it was "International Operations" which enforced the income tax. The duties of the office were described in this manual as follows:

"1113.56 Office of International Operations. -- Director of International Operations. -- The Office of International Operations administers the Internal Revenue laws and related statutes (except those relating to alcohol, tobacco, narcotics, and firearms) as they relate to citizen taxpayers residing or doing business abroad, foreign taxpayers deriving income from sources within the United States, and taxpayers who are required to withhold tax on income flowing abroad to nonresident aliens and foreign corporations; acts as staff advisor to the Assistant Commissioner (Compliance) in the international area on all compliance functions, and as the international specialist provides assistance and guidance to the Compliance Divisions and makes recommendations on

all aspects of international enforcement program to the Assistant Commissioner (Compliance) and the Division Directors concerned; administers the operating provisions of tax conventions and performs and coordinates for the Service all foreign investigations and requests for information (other than those relating to rulings, regulations or assistance in field of foreign tax administration) from foreign countries and U.S. possessions."

A little over two (2) years later, on January 23, 1969, another "Statement of Organization and Functions" was adopted; see 34 Fed. Reg. 1657, 1969-1 Cum. Bull. 403. The same structure of the I.R.S. was continued in this statement, and the National Office's structure, the Office of the Assistant Commissioner (Compliance), and Office of International Operations were described as follows:

(a) National Office:

"1113.2 Basic Organization.

The principal offices which form the National Office are: The Office of the Commissioner; the Office of the Assistant Commissioner (Administration); the Office of the Assistant Commissioner (Compliance); the Office of the Assistant Commissioner (Data Processing); the Office of the Assistant Commissioner (Inspection); the Office of the Assistant Commissioner (Planning and Research); the Office of the Assistant Commissioner (Technical); and the Office of the Chief Counsel."

(b) "Compliance":

"1113.5 Office of the Assistant Commissioner (Compliance).

The Assistant Commissioner (Compliance) is the principal assistant to the Commissioner on all matters pertaining to the compliance and appellate programs of the Service, in encouraging and achieving the highest possible degree of voluntary compliance by taxpayers, and in providing effective functional supervision of those activities in the field. These include collection of delinquent accounts; obtaining of delinquent returns; audit and investigation of returns; criminal fraud investigations;

the administrative system of tax appeals; administration of laws relating to alcohol, alcoholic beverages, tobacco and firearms; and the receipt and processing of wagering, narcotics, alcohol and tobacco tax, and firearms returns and applications. The Assistant Commissioner (Compliance) directs, coordinates and evaluates the work of the Alcohol, Tobacco and Firearms Division, the Appellate Division, the Audit Division, the Collection Division, the Intelligence Division and the Office of International Operations.

(c) International Operations:

"1113.56 Office of International Operations. -- Director of International Operations. The Office of International Operations administers the Internal Revenue laws and related statutes (except those relating to alcohol, tobacco, narcotics, and firearms) as they relate to citizen taxpayers residing or doing business abroad, foreign taxpayers deriving income from sources within the United States, and taxpayers who are required to withhold tax on income flowing abroad to nonresident aliens and foreign corporations; acts as staff advisor to the Assistant Commissioner (Compliance) in the international area on all compliance functions, and as the international specialist provides assistance and guidance to the Compliance Divisions and makes recommendations on all aspects of international enforcement program to the Assistant Commissioner (Compliance) and the Division Directors concerned; acts as competent authority in administering the operating provisions of tax conventions; performs and coordinates for the Service all foreign investigations and requests for information (other than those relating to rulings, regulations, or assistance in the field of foreign tax administration) from foreign countries and U.S. possessions."

Then again less than a year later on January 20, 1970, a revised "Statement of Organization and Functions" was published by the Commissioner; see 35 Fed. Reg. 2417, 1970-1 Cum. Bull. 442. The same structure of the I.R.S. was continued herein, and the composition of the National Office, the duties of the Office of Assistant Commissioner (Compliance), and Office of International Operations were described therein as follows:

(a) National Office:

"1113.2 Basic Organization.

The principal offices which form the National Office are: The Office of the Commissioner; the Office of the Assistant Commissioner (Administration); the Office of the Assistant Commissioner (Compliance); the Office of the Assistant Commissioner (Data Processing); the Office of the Assistant Commissioner (Inspection); the Office of the Assistant Commissioner (Planning and Research); the Office of the Assistant Commissioner (Technical); and the Office of the Chief Counsel."

(b) Office of Assistant Commissioner (Compliance):

"1113.5 Office of the Assistant Commissioner (Compliance)

The Assistant Commissioner (Compliance) is the principal assistant to the Commissioner on all matters pertaining to the compliance and appellate programs of the Service, in encouraging and achieving the highest possible degree of voluntary compliance by taxpayers, and in providing effective functional supervision of those activities in the field. These include collection of delinquent accounts; obtaining of delinquent returns; audit and investigation of returns; criminal fraud investigations; the administrative system of tax appeals; administration of laws relating to alcohol, alcoholic beverages, tobacco and firearms; and the receipt and processing of wagering, narcotics, alcohol and tobacco tax, and firearms returns and applications. The Assistant Commissioner (Compliance) directs, coordinates and evaluates the work of the Alcohol, Tobacco and Firearms Division, the Appellate Division, the Audit Division, the Collection Division, the Intelligence Division and the Office of International Operations.

(c) Office of International Operations:

"1113.56 Office of International Operations. -- Director of International Operations.

The Office of International Operations administers the Internal Revenue laws and related statutes (except those relating to alcohol, tobacco, narcotics, and firearms) as they relate to citizen taxpayers residing or doing business abroad, foreign taxpayers deriving income from sources within the United States, and taxpayers who are required to withhold tax on income flowing abroad to nonresident aliens and foreign corporations; acts as staff advisor to the Assistant Commissioner (Compliance) in the international area on all compliance functions,

and as the international specialist provides assistance and guidance to the Compliance Divisions and makes recommendations on all aspects of international enforcement program to the Assistant Commissioner (Compliance) and the Division Directors concerned; acts as competent authority in administering the operating provisions of tax conventions; performs and coordinates for the Service all foreign investigations and requests for information (other than those relating to rulings, regulations or assistance in the field of foreign tax administration) from foreign countries and United States possessions."

On January 11, 1971, the Commissioner published another I.R.S. Manual 1100, "Statement of Organization and Functions"; see 36 Fed. Reg. 849, 1971-1 Cum. Bull. 698. While subsidiary offices, branches and divisions were added to the structure of the I.R.S., the basic organizational design continued. The same three offices mentioned above were described as follows in this manual:

(a) National Office:

"1113.2 Basic Organization

The principal offices which form the National Office are: The Office of the Commissioner; the Office of the Assistant Commissioner (Administration); the Office of the Assistant Commissioner (Compliance); the Office of the Assistant Commissioner (Data Processing); the Office of the Assistant Commissioner (Inspection); the Office of the Assistant Commissioner (Planning and Research); the Office of the Assistant Commissioner (Technical); and the Office of the Chief Counsel."

(b) Office of Assistant Commissioner (Compliance):

"1113.5 Office of the Assistant Commissioner (Compliance)

The Assistant Commissioner (Compliance) is the principal assistant to the Commissioner on all matters pertaining to the compliance and appellate programs of the Service, in encouraging and achieving the highest possible degree of voluntary compliance by taxpayers, and in providing effective functional supervision of those activities in the field. These include collection of delinquent accounts; obtaining of delinquent returns; audit and

investigation of returns; criminal fraud investigations; the administrative system of tax appeals; administration of laws relating to alcohol, alcoholic beverages, tobacco and firearms; and the receipt and processing of wagering, narcotics, alcohol and tobacco tax, and firearms returns and applications. The Assistant Commissioner (Compliance) directs, coordinates and evaluates the work of the Alcohol, Tobacco and Firearms Division, the Appellate Division, the Audit Division, the Collection Division, the Intelligence Division and the Office of International Operations.

(c) Office of International Operations:

"1113.56 Office of International Operations. -- Director of International Operations.

The Office of International Operations administers the Internal Revenue laws and related statutes (except those relating to alcohol, tobacco, narcotics, and firearms) as they relate to citizen taxpayers residing or doing business abroad, foreign taxpayers deriving income from sources within the United States, and taxpayers who are required to withhold tax on income flowing abroad to nonresident aliens and foreign corporations; acts as staff advisor to the Assistant Commissioner (Compliance) in the international area on all compliance functions, and as the international specialist provides assistance and guidance to the Compliance Divisions and makes recommendations on all aspects of the international enforcement program to the Assistant Commissioner (Compliance) and the Division Directors concerned; acts as competent authority in administering the operating provisions of tax conventions; performs and coordinates for the Service all foreign investigations and requests for information (other than those relating to rulings, regulations or assistance in the field of foreign tax administration) from foreign countries and United States possessions."

On June 6, 1972, the Acting Secretary of the Treasury, via Treasury Department Order No. 221, created the Bureau of Alcohol, Tobacco and Firearms and transferred from the I.R.S. to the Bureau the functions of enforcement for the laws relating to alcohol, tobacco, firearms and explosives; see 37 Fed. Reg. 11696, 1972-1 Cum. Bull. 777.

On September 27, 1972, a revised "Statement of Organization and Functions" was published by the Commissioner; see 37 Fed. Reg. 20960, 1972-2 Cum. Bull. 836. Here, the descriptions of the composition of the National Office and of the duties of both the Office of Assistant Commissioner (Compliance) and Office of International Operations were given as follows:

(a) National Office:

"1113.2 Basic Organization

The principal offices which form the National Office are: The Office of the Commissioner; the Office of the Assistant Commissioner (Administration); the Office of the Assistant Commissioner (Compliance); the Office of the Assistant Commissioner (Accounts, Collection, and Taxpayer Service); the Office of the Assistant Commissioner (Inspection); the Office of the Assistant Commissioner (Planning and Research); the Office of the Assistant Commissioner (Technical); the Office of the Assistant Commissioner (Stabilization); and the Office of the Chief Counsel."

(b) "Compliance":

"1113.5 Office of the Assistant Commissioner (Compliance)

The Assistant Commissioner (Compliance) is the principal assistant to the Commissioner on all matters pertaining to the compliance and appellate programs of the Service, in encouraging and achieving the highest possible degree of voluntary compliance by taxpayers, and in providing effective functional supervision of those activities in the field. These include audit and investigation of returns; criminal fraud investigations; the administrative system of tax appeals; administration of laws relating to alcohol, alcoholic beverages, tobacco, firearms, and explosives; and the receipt and processing of wagering, narcotics, alcohol and tobacco tax, and firearms returns and applications. Through the Disclosure Staff, in the immediate Office of the Assistant Commissioner administers the disclosure provisions of the law and regulations concerning inspection of returns and other matters of official record; administers the Freedom of Information Act and regulations; administers the regulations governing

testimony of Service employees in nontax matters; administers the tax check program involving high level Federal employees; and certifies documents under the Treasury Department seal, furnishing copies where appropriate. The Assistant Commissioner (Compliance) directs, coordinates and evaluates the work of the Appellate Division, the Audit Division, the Intelligence Division, and the Office of International Operations."

(c) International Operations:

"1113.56 Office of International Operations. -- Director of International Operations.

The Office of International Operations administers the Internal Revenue laws and related statutes (except those relating to alcohol, tobacco, narcotics and firearms) as they relate to citizen taxpayers residing or doing business abroad, foreign taxpayers deriving income from sources within the United States, and taxpayers who are required to withhold tax on income flowing abroad to nonresident aliens and foreign corporations; acts as staff advisor to the Assistant Commissioner (Compliance) in the international area on all compliance functions, and as the international specialist provides assistance and guidance to the Compliance Divisions and makes recommendations on all aspects of the international enforcement program to the Assistant Commissioner (Compliance) and the Division Directors concerned; acts as competent authority in administering the operation provisions of tax conventions; performs and coordinates for the Service all foreign investigations and requests for information (other than those relating to rulings, regulations or assistance in the field of foreign tax administration) from foreign countries and United States possessions."

The last fully complete "Statement of Organization and Functions" was published by the Commissioner on March 25, 1974; see 39 Fed. Reg. 11572, 1974-1 Cum. Bull. 440. This Manual 1100 described the structure of the National Office, and the duties of the Office of Assistant Commissioner (Compliance) and Office of International Operations as follows:

(a) National Office:

"1113.2 Basic Organization

The principal offices which form the National Office are: The Office of the Commissioner; the Office of the Assistant Commissioner (Administration); the Office of the Assistant Commissioner (Compliance); the Office of the Assistant Commissioner (Accounts, Collection, and Taxpayer Service); the Office of the Assistant Commissioner (Inspection); the Office of the Assistant Commissioner (Planning and Research); the Office of the Assistant Commissioner (Technical); the Office of the Assistant Commissioner (Stabilization); and the Office of the Chief Counsel."

(b) "Compliance":

"1113.5 Office of the Assistant Commissioner (Compliance)

The Assistant Commissioner (Compliance) is the principal assistant to the Commissioner on all matters pertaining to the compliance and appellate programs of the Service, in encouraging and achieving the highest possible degree of voluntary compliance by taxpayers, and in providing effective functional supervision of those activities in the field. These include audit and investigation of returns; criminal fraud investigations; the administrative system of tax appeals; administration of laws relating to alcohol, alcoholic beverages, tobacco, firearms, and explosives; and the receipt and processing of wagering, narcotics, alcohol and tobacco tax, and firearms returns and applications. Through the Disclosure Staff, in the immediate Office of the Assistant Commissioner, administers the disclosure provisions of the law and regulations concerning inspection of returns and other matters of official record; administers the Freedom of Information Act and regulations; administers the regulations governing testimony of Service employees in nontax matters; administers the tax check program involving high level Federal employees; and certifies documents under the Treasury Department seal, furnishing copies where appropriate. The Assistant Commissioner (Compliance) directs, coordinates and evaluates the work of the Appellate Division, the Audit Division, the Intelligence Division, and the Office of International Operations."

(c) International Operations:

"1113.56 Office of International Operations. -- Director of International Operations

The Office of International Operations administers the Internal Revenue laws and related statutes (except those

relating to alcohol, tobacco, narcotics and firearms) as they relate to citizen taxpayers residing or doing business abroad, foreign taxpayers deriving income from sources within the United States, and taxpayers who are required to withhold tax on income flowing abroad to nonresident aliens and foreign corporations; acts as staff advisor to the Assistant Commissioner (Compliance) in the international area on all compliance functions, and as the international specialist provides assistance and guidance to the Compliance Divisions and makes recommendations on all aspects of the international enforcement program to the Assistant Commissioner (Compliance) and the Division Directors concerned; acts as competent authority in administering the operating provisions of tax conventions; performs and coordinates for the Service all foreign investigations and requests for information (other than those relating to rulings, regulations or assistance in the field of foreign tax administration) from foreign countries and United States possessions."

Publication of complete I.R.S. Manuals 1100 ceased after 1974, and since that time the organizational changes of the I.R.S. have been piecemeal and occasional. Today, the current Manual 1100, describes the National Office's structure as follows:

"1112.22 (7-6-83)
Basic Organization

(1) The principal offices which form the National Office are (see Exhibit 1110-1):

- (a) the Office of the Commissioner
 - 1 Office of the Associate Commissioner (Operations)
 - a Office of the Assistant Commissioner (Employee Plans and Exempt Organizations)
 - b Office of the Assistant Commissioner (Criminal Investigation)
 - c Office of the Assistant Commissioner (Examination)
 - d Office of the Assistant Commissioner (Collection)
 - 2 Office of the Associate Commissioner (Policy and Management)
 - a Office of the Assistant Commissioner (Support and Services)
 - b Office of the Assistant Commissioner (Human Resources)

- c Office of the Assistant Commissioner
(Planning, Finance and Research)
- 3 Office of the Associate Commissioner (Data
Processing)
 - a Office of the Assistant Commissioner
(Computer Services)
 - b Office of the Assistant Commissioner
(Returns and Information Processing)
- 4 Office of the Assistant Commissioner
(Inspection)
- 5 Office of the Chief Counsel"

The name of the Office of Assistant Commissioner (Compliance) has been changed to the Office of the Associate Commissioner (Operations), and today the duties of that Office encompass the following:

"1131 (7-6-83)
Associate Commissioner (Operations)

(1) The Associate Commissioner (Operations) is the principal advisor to the Commissioner on policy matters affecting Employee Plans and Exempt Organizations, Criminal Investigations, Collection, and Examination, and 2 members of the Policy and Strategic Planning Council that develops all tax administration policy and leads the strategic planning process to determine the future directions of the Service. In this role he/she is the spokesperson on the Council for the operating functions which are: collection of delinquent accounts and investigation of delinquent returns; investigation of criminal fraud involving any internal revenue laws (except those involving alcohol, tobacco, or firearms); examination of tax returns (except those involving alcohol, tobacco, or firearms); and, approval and subsequent examination of Employee Plans and Exempt Organizations.

(2) The Associate Commissioner (Operations), on behalf of the Commissioner and the Council, gives policy guidance to the Assistant Commissioners who report to him/her and is involved in all major operational problems and issues. Further, the Associate Commissioner (Operations) assists and holds the Assistant Commissioners accountable for the efficient and effective discharge of their missions. (See Exhibit 1130-1).

(3) The Associate Commissioner (Operations) represents the Service to the Department of Treasury, Office of

Management and Budget, Congress, and the public on matters within his/her functional area and, as directed by the Commissioner, represents the Service on major cross-functional issues. Further, he/she discusses or explains the Service's policy and long-term plans.

(4) The Commissioner has delegated to the Associate Commissioner (Operations) the broad authority to act as 'competent or taxation authority' under the tax treaties between the United States and certain foreign governments. He/she has the authority to administer all functions derived from the treaty operating provisions except as delegated to other Service functions. Also, the Associate Commissioner (Operations) is delegated the authority to interpret and apply the tax treaties but, in these matters, may act only within the concurrence of the Associate Chief Counsel (Technical)."

And of course, the Office of International Operations has been renamed the Office of the Assistant Commissioner (International), and the duties of the office are as follows:

"1132.1 (1-6-87)

Assistant Commissioner (International)

(1) The Assistant Commissioner (International) is the principal official responsible for international tax administration matters and, as delegated, serves as the Competent or Taxation Authority in administering and applying the operating provisions of tax conventions of the United States. Assists in the development of tax conventions and exchange of information agreements. Provides technical assistance to modernize and strengthen the tax administration systems of foreign, state, and territorial governments, in line with the foreign policy of the United States and its commitments to state government and international organizations in tax administration enhancement activities. Represents the Commissioner in relationships with the Congress, the Department of Treasury, other federal agencies, foreign governments, foreign tax authorities, and international tax organizations. Administers the internal revenue laws and related statutes as they relate to U.S. citizens residing abroad, corporations and businesses whose books and records are maintained outside the U.S., and non-resident aliens deriving income from sources within the United States.

(2) The Assistant Commissioner (International) on behalf of the Associate Commissioner (Operations) gives policy guidance and operational directions to the Directors (Office of Compliance), (Office of Support and Management), (Office of Foreign Programs), (Office of Tax Treaty and Technical Services) and (Office of Tax Administration Advisory Services)".

MESSAGES AND PAPERS
OF THE PRESIDENTS

by
JAMES D. RICHARDSON

published by
BUREAU OF NATIONAL LITERATURE AND ART
(1910 Edition)

BANKS

Banks - A bank is an institution for receiving and lending money. The banking institutions of the United States may be classed as National and State banks, private banks or bankers, savings banks, and loan and trust companies. In 1781 the Congress of the Confederation chartered the Bank of North America with a capital of \$400,000, with a view to providing through its notes a circulating medium for the country. Doubts as to the power of the Congress caused the bank to be rechartered by Pennsylvania in 1782. By 1791 two more banks had been established, one in New York, the other in Boston. In that year Congress established the Bank of the United States. The charter authorized an existence of 20 years and a capital of \$10,000,000, one-fifth to be supplied by the United States. In 1811 Congress refused to renew the charter. During the War of 1812 only State banks existed, and these largely increased in number. In 1816 the second United States Bank was chartered to run 20 years, with a capital of \$35,000,000, of which the Federal Government subscribed one-fifth. The bank was to have custody of public funds, and 5 of its 25 directors were to be appointed by the United States. Congress passed an act renewing the charter in 1832, but President Jackson vetoed it (1139). After a Presidential election in which his fight with the bank was made an issue President Jackson ordered the public funds to be removed from the Bank of the United States and placed in States Banks (1224). In 1836 the bank's charter expired. In 1841 President Tyler vetoed 2 bills to revive it (1916, 1921). In 1846 the Independent Treasury system was established, providing that all public funds of the United States should be received and paid out without the intervention of the bank. Between 1836 and 1863 only State banks existed. Feb. 25, 1863, the national bank act was passed. This act proving defective, it was superseded by the act of June 3, 1864, which forms the basis of the present system. (Index - page 57)

Bank of United States vs. Planter's Bank of Georgia. - A suit brought by the Bank of the United States for the payment of a promissory note which had been endorsed to it by the Planters; Bank of Georgia. The State of Georgia had stock in this bank. The action was brought against the Planters' Bank and also the State. The Supreme Court in 1824 decided that if a State became a party to a banking or a commercial enterprise the State could be sued in the course of the business, on the principle that when a government becomes a partner in any trading company it divests itself, so far as concerns the transaction of that company, of its sovereign character and takes that of a private citizen. The State, said the court through Chief Justice Marshall, is not a party - that is an entire party - in the cause. It was also held that the circuit court had jurisdiction in such matters.

June 2, 1864

. look into this act
38 Congress Session I

Chap 104108 1864

p. 99

OSBORN vs. BANK OF THE UNITED STATES

6 L.Ed. (9 Wheat) 204
(1824)

"Banks - Corporations - Individual"
(Character Of The Party & Action)

Longest Standing Case in the History

OSBORN vs. BANK OF THE UNITED STATES

6 L.Ed. (2d) 204
(1964)

"BANKS - Corporations - Individual"
SECTION OF THE STATUTE & NOTES

adjusted than for the mere purpose of making rests, we are of opinion that payments ought to be applied to extinguish the debts according to the priority of time; so that the credits are to be deemed payments pro tanto of the debts antecedently due.

Upon the whole, it is the opinion of the court, that for the error of the District Court, on the question of laches, the judgment ought to be reversed, and a venire facias de novo awarded, with directions, also, to allow the parties liberty to amend their pleadings.

[Constitutional Law. Chancery.]

OSBORN et al., Appellants,

THE PRESIDENT, Directors and Company of the Bank of the United States, Respondents.

The act of incorporation of the Bank of the United States gives the circuit courts of the United States jurisdiction of suits by and against the bank.

This provision in the charter is warranted by the 8d article of the constitution, which declares, that "the judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

It is unnecessary for an attorney or solicitor, who prosecutes a suit for the Bank of the United States, or other corporation, to produce a warrant of attorney under the corporate seal.

Whatever authority may be necessary for an attorney or solicitor to appear for a natural or artificial person, it is not a ground of reversal [330*] for error, in an appellate court, that such authority does not appear on the face of the record. It is a formal defect, which is cured by the statute of Jefferson, and the 2d section of the Judiciary act of 1789, ch. 20.

In general, the answer of one defendant in equity cannot be read in evidence against another. But where one defendant succeeds to another, so that the right of the one devolves on the other, and they become privies in estate, the rule does not apply.

Where the defendant is restrained by an injunction, from using money in his possession, interest will not be decreed against him.

An injunction will be granted to prevent the franchise of a corporation from being destroyed, as well as to restrain a party from violating it, by attempting to participate in its exclusive privileges.

In general, an injunction will not be allowed, nor a decree rendered, against an agent, where the principal is not made a party to the suit. But if the principal be not himself subject to the jurisdiction of the court (as in the case of a sovereign state), the rule may be dispensed with.

A court of equity will interpose by injunction to prevent the transfer of a specific thing, which, if transferred, will be irretrievably lost to the owner, such as negotiable securities and stocks.

The circuit courts of the United States have jurisdiction of a bill brought by the Bank of the United States, for the purpose of protecting the bank in the exercise of its franchises, which are threatened to be invaded, under the unconstitutional laws of a state; and, as the state itself cannot,

NOTE.—As to power of the United States to create a bank, see 4 L. ed. U. S. 579.

As to when the answer of a defendant in equity is evidence for or against himself or a co-defendant, see notes to 4 L. ed. U. S. 266; 5 L. ed. U. S. 203.

State taxation of national banks, see note to 45 L. ed. U. S. 737.

according to the 11th amendment of the constitution, be made a party defendant to the suit. It may be maintained against the officers and agents of the state, who are intrusted with the execution of such laws.

A state cannot tax the Bank of the United States; and any attempt, on the part of its agents and officers, to enforce the collection of such tax against the property of the bank, may be restrained by injunction from the Circuit Court.

APPEAL from the Circuit Court of Ohio.

The bill filed in this cause, was exhibited in the court below, at September term, 1819, in the name of the respondents, and signed by solicitors of the court, praying an injunction to restrain Ralph Osborn, auditor of the state of Ohio, from proceeding against the [*740 complainants, under an act of the legislature of that state, passed February the 5th, 1819, entitled, "An act to levy and collect a tax from all banks, and individuals, and companies, and associations of individuals, that may transact banking business in this state, without being allowed to do so by the laws thereof." This act, after reciting that the Bank of the United States pursued its operations contrary to a law of the state, enacted, that if, after the 1st day of the following September, the said bank, or any other, should continue to transact business in the state, it should be liable to an annual tax of \$50,000 on each office of discount and deposit. And that on the 15th day of September, the auditor should charge such tax to the bank, and should make out his warrant, under his seal of office, directed to any person, commanding him to collect the said tax, who should enter the banking-house, and demand the same, and if payment should not be made, should levy the amount on the money or other goods of the bank, the money to be retained, and the goods to be sold, as if taken on a *fi. fa.* If no effects should be found in the banking room, the person having the warrant was authorized to go into every room, vault, etc., and to open every chest, etc., in search of what might satisfy his warrant.

The bill, after reciting this act, stated that Ralph Osborn is the auditor, and gives out, etc., that he will execute the said act. It was exhibited in open court, on the 14th of September, and, notice of the application having been given to the defendant, Osborn, [*741 an order was made, awarding the injunction on the execution of bonds and security in the sum of \$100,000; after which, a subpoena was issued, on which the order that had been made for the injunction was indorsed by the solicitors for the plaintiffs; and a memorandum, that bond with security had been given by the plaintiffs, was indorsed by the clerk; and a power to James M'Dowell to serve the same, was indorsed by the marshal. It appeared, from the affidavit of M'Dowell, that both the subpoena and indorsement were served on R. Osborn, early in the morning of the 15th. On the 15th of the same month of September, a writ of injunction was issued on the same bill, which was served on R. Osborn and on John L. Harper. The affidavit of M'Dowell stated that he served the writ on Harper, while on his way to Columbus with the money and funds on which the same was to operate, as he under-

stood; and that the writ was served on Osborn before Harper reached Columbus.

In September, 1820, leave was given to file a supplemental and amended bill, and to make new parties.

The amended bill charges, that subsequent to the service of the subpoena and injunction, to wit, on the 17th of September, 1819, J. L. Harper, who was employed by Osborn to collect the tax, and well knew that an injunction had been allowed, proceeded by violence to the office of the bank at Chillicothe, and took therefrom \$100,000, in specie and bank notes, belonging to, or in deposit with, the plaintiffs. [742] That this money was delivered to H. M. Curry, who was then treasurer of the state, or to the defendant, Osborn, both of whom had notice of the illegal seizure, and paid no consideration for the amount, but received it to keep it on safe deposit. That Curry did keep the same until he delivered it over to one S. Sullivan, his successor as treasurer. That neither Curry nor Sullivan held the said money in their character as treasurer, but as individuals. The bill prays, that the said H. M. Curry, late treasurer, S. Sullivan, the present treasurer, and R. Osborn, in their official and private characters, and the said J. L. Harper, may be made defendants; that they may make discovery, and may be enjoined from using or paying away the coin or notes taken from the bank, may be decreed to restore the same, and may be enjoined from proceeding further under the said act.

The defendant, Curry, filed his answer, admitting that the defendant, Harper, delivered to him, about the 20th of September, 1819, the sum of \$95,000, which, he was informed and believed, was a tax levied of the branch bank of the United States. He passed this sum to the credit of the state, as revenue; but, in fact, kept it separate from other moneys, until January or February, 1820, when the moneys in the treasury were seized upon by a committee of the House of Representatives; soon after which he resigned his office, and the moneys and bank notes, in the bill mentioned, still separate from other moneys in the treasury, came to the hands of S. Sullivan, the [743] present treasurer, who gave a receipt for the same.

The defendant, Sullivan, failing to answer, an attachment for contempt was issued, on which he was taken into custody. He then filed his answer, and was discharged.

This answer denies all personal knowledge of the levying, collecting, and paying over the money in the bill mentioned. It admits that he was appointed treasurer, as successor to Curry, on the 17th of February, 1820, and that he entered the treasury on the 23rd, and began an examination of the funds, among which he found the sum of \$95,000, which he understood was the same that is charged in the bill; but this was not a fact within his own knowledge. He gave a receipt as treasurer, and the money has remained in his hands, as treasurer, and not otherwise. The sum of \$95,000 remains untouched, out of respect to an injunction said to have been allowed by the Circuit Court, on a bill since dismissed. He admits the sum in his hands to correspond with the description in the bill, so far, as that description goes, and
6 L. ed.

annexes to his answer a description of the residue. He has no private individual interest in the money, and holds it only as state treasurer; admits notice, from general report, and from the late treasurer, that the said sum of \$95,000 was levied as a tax from the bank, and that the bank alleged it to be illegal and void.

The cause came on to be heard upon these answers, and upon the decrees nisi, against Osborn and Harper, and the court pronounced a decree directing them to restore to [744] the bank the sum of \$100,000, with interest on \$19,530, the amount of specie in the hands of Sullivan. The cause was then brought, by appeal, to this court.

Mr. Hammond, for the appellants, contended, that the decree was erroneous, for the following reasons:

1. Because no authority is shown in the records, from the bank, authorizing the institution or prosecution of the suit.

2. Because, as against the defendant, Sullivan, there are neither proofs nor admissions sufficient to sustain the decree.

3. Because, upon equitable principles, the case made in the bill does not warrant a decree against either Osborn or Harper, for the amount of coin and notes in the bill specified to have passed through their hands.

4. Because the defendants are decreed to pay interest upon the coin, when it was not in the power of Osborn or Harper, and was stayed in the hands of Sullivan by injunction.

5. Because the case made in the bill does not warrant the interference of a court of chancery by injunction or otherwise.

6. Because, if any case is made in the bill, proper for the interference of a court of chancery, it is against the state of Ohio, in which case the Circuit Court could not exercise jurisdiction.

7. Because the decree assumes that the Bank of the United States is not subject to the taxing power of the state of Ohio, and [745] decides that the law of Ohio, the execution of which is enjoined, is unconstitutional.

~~Authority must be shown for~~ the institution of every legal proceeding. This principle is peculiarly applicable to the suits brought in the name of corporations; because such a body must always appear by attorney, either to institute or defend a legal proceeding. It cannot appear in person, and it can only constitute an attorney by written power, under its common seal. This doctrine is not impugned by the decision of this court in the case of *The Bank of Columbia v. Patterson*.¹ The old doctrine, that a corporation could not contract or promise, except by writing, under its common seal, is overruled in that case; and it was adjudged that a contract made by a committee duly authorized for that purpose, binds the corporation. It seems, also, to be intimated that a corporation may, by resolution or other act, not under their common seal, duly appoint and authorize an agent, whose contracts would bind them; and the case of *Rex v. Bigg*² is referred to as authority. But, upon looking into that case, it will be found, that the principle is merely laid down by counsel

1.—1 Cranch. 299.

2.—3 P. Wms. 419.

arguendo; and the counsel, by whom it is advanced, add, "But in case of anything of consequence, or the employing anyone to act in their behalf, in a matter which is not an ordinary 746") service, a corporation "aggregate cannot do that without deed." Now, what can be of more consequence, than such a suit as this, commenced in effect, against a sovereign state, by this corporation? In *Fleckner v. The Bank of the United States*,¹ the court has gone no farther than to determine that the board of directors may, by resolution, authorize their cashier to transfer bills or notes, the property of the bank, and need not make a power under seal for that purpose. This is a very different matter from authority to prosecute such a suit as the present. It falls within the scope of the ordinary official duties of the cashier. But even admitting that any express authority from the bank, whether under the common seal or not, would have been sufficient in the present case, it is indispensable that such authority should be produced and filed. This has not been done, and therefore it must be concluded that the suit is wholly unauthorized by the corporation, in whose name it has been commenced.

2. The answer of the defendant, Sullivan, contains no admission that the notes and coin were the property of the plaintiff, or that the injunction was violated in taking them from their possession. In *Hills v. Binney*² the bill was filed by the creditor against an administrator, who, by his answer, stated, that he believed the debt was due. Mr. Fonblanque, for the plaintiff, expressed a doubt whether there 747") was a sufficient foundation for a "decree. Lord Eldon inclined to think it sufficient; but Mr. Richards, as amicus curiæ, suggesting that it was doubtful, Mr. Fonblanque consented to exhibit an interrogatory. The admission there was much stronger than any in the answer of the defendant, Sullivan. He has nowhere said, that he believes the notes and coin to be the property of the plaintiffs; on the contrary, he avers that, personally, he knew nothing about the collection of the tax, except from general report, and the information of the late treasurer. No proof whatever, of general report, or of the declarations of the late treasurer, would be sufficient to establish any fact. Sullivan's admission of this general report, and of this information, gives it no higher character than it would be entitled to upon being proved. The admission does not support the decree, and there is no other proof in the case.

3. The decree against the defendants, Osborn and Harper, so far as it requires them to pay the amount of the coin and notes specified in the bill, to the plaintiffs, is erroneous, because the bill shows that the same were not in the possession of those defendants. The foundation upon which a court of equity proceeds, is to redress the party under its protection, not to punish the wrong-doers. When punishment is the object, process for contempt is resorted to. Equity will look at the situation of all the parties, and will distinguish among the defendants, who can, and who cannot, comply with such decree as, upon equitable principles, must be pronounced. A plaintiff in

equity cannot "fasten upon the specific [*718 subject for which he sues, and obtain an order retaining it in the hands of one defendant, subject to a final decree, and obtain a decree for restitution against other defendants, who, by his own showing, have not the subject in their power. Admitting that it was necessary to make all concerned in the transaction defendants, in order to ascertain who had possession of the subject, yet when that fact was ascertained, no decree (except as to costs) could be pronounced against those who were not in possession of it, and who claimed no interest in it. Where a party acts under an authority which he supposes valid, but which the court adjudge to be void, he is not to be regarded as a principal wrong-doer, further than the purposes necessarily require. In a court of equity, he is equitably, not vindictively, responsible.

4. Under the circumstances of the case, the defendants ought not to be chargeable with interest upon the coin in question. It may be admitted, that, in general, where a defendant has wrongfully possessed himself of the plaintiff's money, and thus deprived him of the use of it, equity may compel him to account for interest. But here the injunction forbidding the use of the coin was obtained at the plaintiff's request. Its effect and operation were, to place it in the custody of the law. The defendants could not use it, and, consequently, cannot be charged with interest.

5. No case is made out in the original bill, warranting the interposition of a court of equity by injunction. The injunction, if sustained at all, "must be upon one of two [*740 principles; either that it was necessary to secure to the bank the enjoyment of a franchise or exclusive privilege, or to protect it from an irreparable mischief.

All the cases where injunctions have been granted, to protect parties in the enjoyment of a franchise, proceed upon the principle that the injury was consequential, not direct, and that it would be difficult, if not impossible, to estimate the damages. Thus, the proprietor of a machine, for which a patent has been granted, or of a book for which a copy-right has been obtained, may have an injunction to prevent others from using the machine, or vending the book. So, also, the proprietor of a toll-bridge or a turnpike-road, may have an injunction to prevent others from constructing and using a bridge or road, where it would be contrary to the terms of the plaintiff's grant. But in all these cases, the injunction is granted upon the principle that the act complained of is not only unlawful, and, therefore, unjustifiable, but that it is, in addition to its illegality, of a character for which compensation cannot be made in damages. But no case can be found of an injunction granted to protect the proprietor in the instances mentioned, against the commission of a mere trespass, where the party could have redress in damages, and where the trespass would not interfere with the franchise, further than every wrong interferes with the right of the individual upon whom it is inflicted. Wherever an injunction is granted for the protection of a franchise, the case must show that the party has the sole and exclusive "right to do the act, or transact the [*750 business, which he seeks to inhibit the defendant from performing. Thus, an injunction has

1.—8 Wheat. 410. 333.

2.—6 Vea. Jun. 133.

been allowed to the East India Company, to prevent an interference with the trade exclusively secured to them by their charter.' But would an injunction be granted against seizing, by violence, the goods they may import, or doing injury to their ships when in port? So, a person entitled to an exclusive right of ferry, has been allowed an injunction to prevent ferrying by others.' But it does not follow that an injunction would be allowed, to prevent an injury which the proprietor might apprehend to his boats, or their tackle, or to the landing place. Here the original bill does not present a case for an injunction to secure the enjoyment of a franchise upon these principles. It seeks to be protected against an injury amounting to a trespass, and nothing more. The bill claims that it is one of the corporate franchises of the bank, to establish offices of discount and deposit, and transact banking business, anywhere, according to the discretion of the directors. But it is only when the franchise confers a sole and exclusive right, that the jurisdiction of a court of equity attaches, and it then attaches only so as to prevent others from invading that right, by attempting an actual participation in its use and enjoyment. It cannot be pretended that the charter of the bank confers upon it any exclusive right to exercise the trade of banking. It cannot, therefore, come into a court of chancery to seek protection against any person for violating an exclusive franchise. If it be said that the privilege of exemption from state taxation is one of this nature, the answer is, that this privilege operates, not against individuals, but against the power authorized to lay and collect taxes. It does not operate against any individual, who is invested with no power of taxation, but who commits a trespass under color of levying a tax.

Nor can the injunction be supported upon the ground that the case presented required this extraordinary interference of the court, to protect the bank against irreparable mischief. It is but recently that injunctions have been issued to restrain the commission of an act amounting to trespass only. Lord Hardwicke says, "every common trespass is not a foundation for an injunction in this court." Lord Kenyon, M. R., asserts, that "a court of chancery will not interfere, when the matter is merely in damages." And Lord Eldon says: "I remember when, in a case of trespass, unless it grew into a nuisance, an injunction would have been refused." The first reported case of an injunction in trespass, is that of *Mitchel v. Dorra*, where the defendant had begun to dig coal in his own ground, and worked into that of the plaintiff. Lord Eldon said, "That is trespass, not waste. But I will grant [752] the injunction upon the authority of a case before Lord Thurlow." This last case was where the landlord owned two adjacent closes, and demised one. The tenant commenced mining for coal in the demised close,

and continued to mine until he entered the close not demised. Lord Thurlow, after great hesitation, granted the injunction, upon the ground, as Lord Eldon himself asserts, of the irreparable ruin of the property as a mine, and it being a species of trade; and upon the principle of the court enjoining in matters of trespass, where irreparable damage is the consequence.' The next case was that of *Hanson v. Gardiner*, where an injunction was granted upon the application of a person claiming in different rights, one of which was as lord of the manor, under the statute of Merton, against trespass by the commoners, and, upon bearing, the injunction was dissolved. An application was afterwards made by the devisees of an equity of redemption, in receipt of the rents, for an injunction against the mortgagee, claiming, as heir, to restrain him from cutting timber; but it was refused.' An injunction was subsequently granted, at the application of the landlord, to restrain a person charged to be in collusion with the tenant, from cutting or removing timber, or committing any other waste. Lord Eldon puts this upon the ground that it partakes more of 'waste than in gen- [*753] eral cases, and says, he will not be bound as to what is to be done upon a mere trespass; though, he adds, that it is strange if there cannot be an injunction in that case, to prevent irreparable mischief. The next case of an injunction in trespass, is *Crochford v. Alexander*." The plaintiff contracted to sell an estate to the defendant, who got possession from the tenant, and began to cut timber. The injunction was allowed; but the Lord Chancellor says: "I will grant this protection against cutting timber, until the power of the court to grant the injunction against trespass shall be fully discussed." It is singular, that in this case Lord Eldon should again state the case decided by Lord Thurlow, respecting the mines; and add, that Lord Thurlow considered it trespass, not waste, and refused the injunction. The injunction is justified by analogy; and reference is made to *Robinson v. Byron*," which, upon examination, will be found not to be a case of trespass, but one where the defendant, having a command of the water, was about so to use it, within his own premises, as to throw it out and deluge the plaintiff; it was destruction. In *Thomas v. Oakley*," the plaintiff was seized in fee of an estate, in which there was a stone quarry, and the defendant held a contiguous estate, with a right to enter the quarry and take stone for a special purpose, but was taking it for other purposes. The coun- [*754] sel insisted that it was the course of modern authority, to afford assistance in cases of coal mines, timber, etc., to prevent irremediable mischief and injury, which damages could not compensate. Lord Eldon held, that upon the decisions which had taken place, the bill must be sustained. He refers to the first case decided by Lord Thurlow, and his hesitation, and adds, "But I take it that Lord Thurlow changed his opinion upon that; holding, that if

1.—1 Ves. 127.
2.—1 Ves. 476.
3.—3 Atk. 21.
4.—2 Bro. C. C. 65.
5.—7 Ves. Jun. 307.
6.—6 Ves. Jun. 147.
6 L. ed.

7.—7 Ves. Jun. 307.
8.—7 Ves. Jun. 303.
9.—*Smith v. Collyer*, 8 Ves. 59.
10.—15 Ves. 137.
11.—1 Bro. C. C. 553.
12.—15 Ves. 183; see also *Kinder v. Jones*, 17 Ves. 110, and *Earl Cowper v. Baker*, Id. 127.

the defendant was taking the substance of the inheritance, the liberty of bringing an action was not all the relief to which, in equity, he was entitled. The interference of the court is to prevent your removing that which is his estate. If this protection would be granted in the case of timber, coals, and lead ore, why is it not equally to be applied to a quarry?"

There is no analogy between these cases and the present. No estate of a stable and permanent character is to be injured. The naked suggestion in the bill is, that the plaintiffs verily believe that the defendant threatens to do an act amounting to a mere trespass. Lord Eldon says: "I never would grant an injunction, upon an affidavit stating that the deponent verily believes the defendant is about to cut timber." Some act must be done, moving towards the commission of wrong; such as sending a surveyor to mark trees. None of the cases stand upon a mere *quia timet*. But 755] here, not even a belief that the defendant meant to commit the trespass is asserted. regard the case as against Osborn only and individually; separate him from the state tax, and from his office as auditor; and whether the bill is brought to protect a franchise or prevent a trespass, it cannot be maintained.

6. But, in fact, the bill is against the state, and as such, the Circuit Court has no jurisdiction of it. In this bill, all the component parts of a case against the state, are set out in their regular and proper order: the privilege; the measures set on foot to invade it; their unjust and oppressive character, and the prayer for relief against them. There is no allegation against any individual; no relief is prayed against any person in his private and individual character. The acts complained of are the acts of the legislature; the party charged with aggression on the plaintiff's right is the legislature; the relief prayed is against the acts of the legislature; the state is the sole party in interest. It is true, process is not prayed or awarded against the state; but the bill is substantially the same as it would have been, had the plaintiffs intended to make the state a formal party by process. In all ordinary cases, if the court sees from the face of the bill that the actual and principal party in interest is not before them, it will either dismiss the bill or stay the proceedings until proper parties are made. A decree, vitally affecting the interests of a principal, will never be pronounced, where his agent is the only party to the bill. In 756] *Vernon v. Blackerly*, "the suit was brought against the defendant, treasurer of the commissioners for building fifty new churches, to compel the payment of moneys claimed to be due from the commissioners. Lord Hardwicke dismissed the bill, saying, "it would be absurd that a bill should lie against a person who is only an officer, and subordinate to others, and has no discretionary power. It is absurd to make a party who acts ministerially, the sole party."

If, then, the state be the only party interested, and if the bill, in its terms, and in its effect, operates solely upon the state, the state ought to be made a party. If the Circuit Court can-

- 1.—*Fitches v. Lance*, 7 Ves. 417.
- 2.—*Jackson v. Cator*, 5 Ves. 630.
- 3.—2 *Atk* 144.

not exercise jurisdiction where the state is a party direct, it ought not, it cannot, be permitted to obtain that jurisdiction, by an indirect mode of proceeding. This would be to disregard the substance of things, and found a jurisdiction upon arbitrary definition.

We maintain that the state of Ohio is, in fact, the sole defendant in this cause; and that the jurisdiction of the Circuit Court is excluded, (1) by the constitution of the United States; (2) by the judiciary act.

We contend, further, that if the subject-matter in controversy between the actual parties to this cause presents a case within the jurisdiction of the federal judiciary, that jurisdiction is vested exclusively in the Supreme Court, both by the constitution and by the judiciary act.

The constitution, after defining the cases in which the federal judiciary shall take cognizance, declares, that "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction."

According to the interpretation given to the constitution by this court, in *Cohens v. Virginia*, a state may be made a party, before the federal courts, wherever the case arises under the constitution, or a law of the United States; or where the controversy is between two states, or one state and a foreign state.

In this case, the controversy arises under the constitution of the United States, or under the act of incorporation, or under both. It is a case of original jurisdiction; and by the express letter of the constitution, the Supreme Court alone are authorized to take jurisdiction.

In *Marbury v. Madison*, this court decided that it was not competent for Congress to invest the Supreme Court with original jurisdiction, in any other cases than those described in the constitution. It is supposed that the principle of this decision, and the reasoning of the court in support of it, both conduce to the conclusion, that where original jurisdiction is given by the constitution to the Supreme Court,

~~Congress cannot distribute any part of such original jurisdiction to any inferior federal tribunal.~~

It would hardly seem rational to decide that the framers of the constitution inserted this clause for no other purpose but that of limiting the power of Congress, as to [758] the cases in which they should give the Supreme Court original jurisdiction. There could have been no just ground for apprehending, that the national legislature would impose original jurisdiction upon the Supreme Court to a mischievous extent. Considering the character of the parties between whom the constitution invests the Supreme Court with this jurisdiction, it is a much more rational inference that it was intended to prevent Congress from subjecting them to the power of any inferior tribunal. "If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the Supreme Court should take original jurisdiction, in cases which might be supposed to affect them," the same solicitude would seem to require an interpretation, by which the original jurisdiction of

- 4.—6 *Wheat*, Rep. 373.
- 5.—1 *Craesb*, 174.

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other courts should be excluded. If Congress be at liberty to give original jurisdiction to inferior courts, where the constitution has given it to the Supreme Court, it will be the easiest thing in nature to defeat that object, which the solicitude of the convention intended to secure. If these terms do not operate exclusively upon Congress, they cannot operate exclusively upon the state; so that the exemption of foreign ministers from liability in state tribunals, is not secured by the constitution, but depends upon an act of Congress, and may be put an end to whenever the national legislature choose.

In the case of *Cohens v. Virginia*, it is said, that "when the constitution declares the jurisdiction, in cases where a state shall be a party, 739") to be "original, and in all cases arising under the constitution or a law, to be appellate, the conclusion seems irresistible, that its framers designed to include in the first-class, these cases in which jurisdiction is given, because a state is a party; and to include in the second, those in which jurisdiction is given, because the case arises under the constitution, or a law."

~~It is allowed, that it may be conceded, that~~ where the case is of such a nature as to admit of its originating in the Supreme Court, it ought to originate there;" though it be immediately afterwards asked, "can it be affirmed that a state might not sue a citizen of another state in the Circuit Court?" From the whole, this final conclusion is deduced: "The original jurisdiction of the Supreme Court, in cases where a state is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised, in consequence of the character of the party; and an original suit might be instituted in any of the federal courts, not to those cases in which an original suit might not be instituted in a federal court."

The result of this reasoning seems to be, that where the jurisdiction of the Federal Court attaches, in consequence of the character of the party, in that case no original suit can be brought against a state, except in the Supreme 760") Court. But if a "state become liable to an action, in a case arising under the constitution, or a law of the United States, then any of the federal courts may entertain jurisdiction.

We cannot think that the court meant to assert this position, or that if they did, they will adhere to it. No good reason can be perceived for sustaining a distinction of this kind. The policy which exempts the states from the jurisdiction of inferior courts, is the same in both cases; and the terms of the constitution comprehend the one class of cases as well as the other. The words, "all cases," embrace as fully a case against a state, arising under the constitution, or a law, as they do a case between two states, or between a state and a foreign state. The same terms are used in defining the extent of the judicial power in the first class of cases described, and the court thus speak of their effect: "This clause extends the jurisdiction of the court to all cases described, without making in its terms any exception

whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article." The same may be said, with equal force, of the terms, when employed to define the original jurisdiction of the Supreme Court. The true reading and understanding are, "in all cases affecting ambassadors, other public ministers, and consuls, and in all those in which a state shall be a party, the Supreme Court shall have original jurisdiction." If there be any exception, by which a state can be sued in an original suit before an inferior federal tribunal, such "exception must be implied [*761] against the express words of the article, and can only be sustained upon the spirit and true meaning of the constitution; which spirit and true meaning must be so apparent as to overrule the words which its framers have employed."

~~There is no difficulty in giving full force and effect to the constitutional distribution of jurisdiction, as we interpret it, without touching the appellate jurisdiction asserted in the case of *Cohens v. Virginia*. By that case, it is settled, that the judicial power of the United States extends to a class of cases which cannot originate in any federal tribunal, and that this jurisdiction must, of necessity, be appellate. The distribution of jurisdiction must be interpreted as if the judicial power was extended by the letter of the constitution, to this class of cases, in express terms. The first member of the sentence must be understood as applicable only to cases in which original jurisdiction is vested in the federal judiciary. The second, to every description of appellate jurisdiction, whether it arise under the constitution, or be created by law. Thus, if a case arise under the constitution, or a law of the Union, in which an original suit may be sued against a state, the constitution requires such suit to be brought in the Supreme Court. If a state be plaintiff or defendant in a state court, and a question arise under the constitution, or a law of the Union, and a case be made at the trial, upon which the federal judicial power attaches, the constitution authorizes the Supreme Court to exercise appellate jurisdiction. There is no occasion to [*762] confound the two classes of cases, or to bring the two kinds of jurisdiction into collision. The appellate jurisdiction of the Supreme Court may consistently be extended to the proper class of cases where a state is a party, without so interpreting the constitution as to subject the states to original actions in the inferior national tribunals.~~

But whatever may be the correct interpretation of the constitution upon this point, it has long been settled, that the circuit courts can exercise no jurisdiction but what is conferred upon them by law. The judiciary act does not vest them with jurisdiction where a state is a party. On the contrary, in a case like the present, it vests exclusive jurisdiction in the Supreme Court.

The judiciary act of 1789, c. 20, sec. 13, provides, that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except also between a state and citizens of other states or aliens; in which latter case, it shall have

don't bother
suing in an
inferior tribunal

1.—6 Wheat. Rep. 393.

2.—Id. 395.

3.—Id. 396.

~~original but not exclusive jurisdiction~~ This act, which distributes and defines the jurisdiction of the different federal courts, does not, in terms, vest the Circuit Court with jurisdiction in any case arising under the constitution or the laws of the United States. And in *M'Intire v. Wood*,¹ this court decided, that this portion of federal jurisdiction could not be exercised by the circuit courts, unless expressly conferred "by law. Neither does this act give jurisdiction to the Circuit Court, in any case where a state is a party; but, on the contrary, all the original jurisdiction that is given to the federal judiciary, where a state is a party, is vested in the Supreme Court, and, with certain exceptions, in that court exclusively. The case before the court comes not within any of the exceptions; so that if it be a case of federal jurisprudence, it is exclusively vested in the Supreme Court.

~~Should the state sue in the circuit court, and an attempt be made to sustain the case and the jurisdiction against the individuals, upon the ground of necessity, lest there should be a failure of justice, it may be answered: First, that the reasons which exempt the state from direct responsibility, operate at least equally strong to exempt her from indirect responsibility. No necessity can warrant a judicial tribunal in disregarding the maxim, that that which cannot legally be directly done, cannot rightfully be effected by indirection.~~

A second, and a more decisive answer, may be given: the supposed necessity does not exist. The case arises under the constitution and the charter. A suit direct against the states may be prosecuted in the federal courts. The constitution has made the state amenable to justice before the Supreme Court of the nation. The national legislature have provided that this jurisdiction shall be exclusive. It cannot be defeated or evaded by the selection of improper parties, in subversion of established practice, and of correct and well-settled principles. The bill might have been filed in the Supreme Court; the injunction might have been allowed by a judge of that court in vacation; the whole case might have been proceeded in as the framers of the constitution intended. The high and solemn measure of citing a sovereign state before a court of judicature, to defend its attributes of sovereignty, and the exercise of its power, ought not to be permitted to any authority but the highest tribunal of the nation. I say nothing of consequences; I look only to what is fit and proper in itself, adapted to the nature of man, to the organization of government, and consistent with the plain letter of the constitution.

If this were not the case, if the constitution had conferred jurisdiction, but Congress had omitted to make provision for exercising it by the Supreme Court, in an original form, still no necessity can justify an evasive assumption of it by any tribunal, much less by one to which the constitution never intended to intrust it. The bank must take the consequences, as in the case of other men who transact business, where Congress have failed to make provision for vesting in the courts all the jurisdiction conferred by the constitution.

In the case of *M'Intire v. Wood*, before cited, this court said: "When questions arise under the constitution of the United States, in the state courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the Supreme Court; and this provision the legislature has thought sufficient, at present, for all the political purposes to be answered by 'the clause of the constitution which relates to the subject.'" It must remain sufficient until the law is changed, whatever inconvenience may result to individuals.

If, then, the case made in the bill be, in fact, a case against the state, in which the state is the sole party interested, and the defendants only ministerial agents, then the decree is erroneous, (1) Because the proper parties are not before the court; (2) Because the Circuit Court cannot, under either the constitution or laws or Congress, exercise jurisdiction over the proper party; (3) Because both the constitution and laws vests exclusive jurisdiction of the case made in the Supreme Court.

7. The last and the most important point in the case remains yet to be considered. It is, that the decree assumes that the Bank of the United States is not subject to the taxing power of the state of Ohio, and decides that the law of Ohio, the execution of which is enjoined, is unconstitutional.

Upon this point, we ask the court to reconsider so much of their opinion in the case of *McCulloch v. Maryland*, as decides that the states have no rightful power to tax the Bank of the United States.

The question, whether the Bank of the United States, as now constituted, is exempt by the constitution of the Union, from the taxing power of the state, depends upon the nature and character of the institution. If it stands upon the same foundation with the mint and the post-office; if its business can justly be assimilated to the process and proceedings of the federal courts, we admit, without hesitation, that it is entitled to the exemption it claims. The states cannot tax the offices, establishments, and operations, of the national government. It is not the argument of the opinion, in *McCulloch v. Maryland*, but the premises upon which that argument is founded, that we ask the court now to re-examine and reconsider.

Banking is, in its nature, a private trade; and is a business in which individuals may at all times engage, unless the municipal law forbid it. Where this is not the case, it is competent for individuals to contract together, and create capital to be employed in lending money, and buying and selling coins, bullion, promissory notes, and bills of exchange. No law is necessary to authorize a contract between individuals for concentrating capital to be thus employed; nor does the business itself depend upon any special laws for its creation or existence. An association thus formed, may take to themselves a name, and may establish rules and regulations to govern them in the transaction of their business, and to determine their relative rights and duties among themselves. The general law not only recognizes the obligation of this contract between the parties; it recognizes also the capacity of the association thus formed, to make contracts is

the name they have assumed, and the right of the individuals, as joint partners, or one party, to enforce those contracts. The whole is a private concern; the capital is private property; the business a private and individual [767] trade; the convenience and profit of private men the end and object. Such is the true character of a bank, constituted by individual stockholders. Its rights and privileges, its liabilities and disabilities, are all the rights, privileges, liabilities and disabilities of private persons.

~~Is the individuals thus associated apply for~~ and obtain, from the legislative power of the country, a special law, creating them a corporation, what change does it effect in their condition? A better answer cannot be given than that contained in the definition of a corporation by this court: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, ~~individuality~~ properties by which a perpetual succession of many persons are considered as the same, and may act as a ~~single~~ ~~entity~~. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances, for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men with these qualities and capacities, that corporations were invented and are in use."

[768] "If the character of a corporation, as here defined, be regarded in granting a charter to a banking company in the case stated, the change effected in the condition of a company by the charter, can be easily and readily comprehended. It relates to their character, not to their rights. It would not change the nature of their business, but would afford facility in transacting it. It would confer upon the whole one individual character, comprising, for particular purposes, the capacities of an individual; but it would exempt them from liabilities, only so far as an express exemption was stipulated or granted. ~~By the charter, they would be constituted an invisible, intangible, and artificial being, capable of perpetual existence, and of acting as an individual~~ in the management of their appropriate affairs. But this would operate only to change the form, it would not alter the substance of things. These would still consist of the individuals that composed the association, and of the business in which they were engaged.

This was distinctly decided in the case of The United States Bank v. Deveaux.¹ In that case it was contended, that the character of the individuals was completely merged in the charter of incorporation. But this court adjudged otherwise; they determined that they

could look behind the charter, and notice the character of individuals; and the cases and the principles upon which this decision is founded, also establish, that courts may look [769] beyond the charter for all substantial and beneficial purposes.

When individuals, associated to carry on the trade of banking, apply to the legislature of the country for an act of incorporation, they found their application upon some benefit to be derived to the public from conferring upon them the character they ask. This public benefit may consist of the facilities afforded to the state, in the management of its fiscal concerns; or it may consist in the convenience to the community in the transaction of mercantile and other money affairs. It may arise from the payment of annual revenue, or a stipulated sum, into the public treasury. If the benefit to the public be considered a sufficient compensation for the faculty conferred, the corporation is created. But from this fact, in the language of this court, "nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created."

If, then, a banking association be formed, the capital collected, the mode of transacting the business settled, and the whole concern regulated and established, before any application be made for a charter, it is clear that the mere fact of enacting a law, creating the association a corporation, could not change its character.

~~It was a company of individuals, conducting a private trade before it was incorporated, and it retained the same character afterwards.~~ The charter was granted to give facility to the individuals in the management of their private affairs; not that, in virtue of that charter, they might share in the civil government of the country. For special purposes, it constituted them an immortal being; but of this being it has been correctly said, that "its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person."

If in fact the incorporation be obtained before the association is formed, does it vary the principle? It is supposed and insisted that it does not. If the corporation be originated for the management of an individual concern; if it be based upon contract between individuals; if its great end and principal object be private trade and private profit, its character must be the same, whether the trade commenced precedent or subsequent to the incorporation; whether the individuals solicited the charter, or the legislature invited the individuals. The character of the association must be ascertained by the same rules, and it must be subject to the same legal consequences.

~~We may suppose, then, that individuals resident in every part of the Union, and in foreign countries, have associated for the purpose of establishing a bank, with a capital of \$23,000,000;~~

1.—Dartmouth College v. Woodward, 4 Wheat. Rep. 634.

2.—5 Cranch, 84.
6 L. ed.

3.—Dartmouth College v. Woodward, 4 Wheat. Rep. 635.

4.—4 Wheat. Rep. 656.

that they have actually collected this capital [771] together in the city of Philadelphia, and no law prohibiting such a measure has commenced. Finding sufficient employment for their capital at that place, they establish a banking-house in New York, one in Boston, and one in Baltimore, where they carry on a profitable business. It is perfectly well known that this may be done in no state but Pennsylvania by individuals. But it is equally clear, that the capital thus employed, and the business thus transacted, must be subject to the regulations of the respective states, and that the parties must be subject to all the inconveniences and embarrassments resulting from the death of its members, and from the transfers of its shares and interests; from the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for transferring their property, as well as the still greater inconvenience of pursuing its rights and enforcing its contracts in courts of justice.

Deriving great advantage from its trade, anxious to extend it into other states, and to be relieved from the embarrassments incident to a joint stock company not incorporated, the corporation apply to the Congress of the United States for an act of incorporation. But this Congress cannot confer, unless the association can be employed by the national government in the execution of some of the powers with which it is invested by the constitution. All the powers of the government must be carried into operation by individual agency, either through the medium of public officers, or contracts made with individuals. Can any public [772] office be created, or does one exist, the performance of which may, with propriety, be assigned to this association, when incorporated? If such office exist, or can be created, then the company may be incorporated, that they may be appointed to execute such office. Is there any portion of the public business performed by individuals upon contracts, that this association could be employed to perform, with greater advantage and more safety to the public, than an individual contractor? If there be an employment of this nature, then may this company be incorporated to undertake it.

There is an employment of this nature. Nothing can be more essential to the fiscal concerns of the nation, than an agent of undoubted integrity and established credit, with whom the public moneys can, at all times, be safely deposited. Nothing can be of more importance to a government than that there should be some capitalist in the country, who possesses the means of making advances of money to the government upon any exigency, and who is under a legal obligation to make such advances. For these purposes the association would be an agent peculiarly suitable and appropriate. There are also other minor employments, such as the transmission of the revenue from one place to another, for the performance of which this company would be a most safe and certain agent. As, then, this association may be thus connected with the public interest; and made useful and advantageous to the government, by conferring a charter upon them, the power of securing to the nation these benefits, advantages, and con-

veniences, results to the national legislature. A just construction of their constitutional powers, invests them with authority to incorporate a banking company, upon the basis of contracting with the institution thus created, for the performance of certain public employments, beneficial to the nation, and necessary to be performed by some one.

The mere creation of a corporation does not confer political power or political character. So this court decided in *Dartmouth College v. Woodward*, already referred to. If I may be allowed to paraphrase the language of the Chief Justice, I would say, a bank incorporated, is no more a state instrument than a natural person performing the same business would be. If, then, a natural person, engaged in the trade of banking, should contract with the government to receive the public money upon deposit, to transmit it from place to place, without charging for commission or difference of exchange, and to perform, when called upon, the duties of commissioner of loans, would not thereby become a public officer, how is it that this artificial being, created by law for the purpose of being employed by the government for the same purpose, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? because the government has given it power to take and hold property in a particular form, and to employ that property for particular purposes, and in the disposition of it to use a particular name? because the government has sold it a privilege for a large sum of money, and has [773] bargained with it to do certain things; is it, therefore, a part of the very government with which the contract is made?

If the bank be constituted a public office, by the connection between it and the government, it cannot be the mere legal franchise in which the office is vested; the individual stockholders must be the officers. Their character is not merged in the charter. This is the strong point of the *Mayor and Commonalty v. Wood*, upon which this court ground their decision in the *Bank v. Devaux*, and from which they say that cause could not be distinguished. Thus, aliens may become public officers, and public duties are confided to those who owe no allegiance to the government, and who are even beyond its territorial limits.

With the privileges and perquisites of office, all individuals holding offices ought to be subject to the disabilities of office. But if the bank be a public office, and the individual stockholders public officers, this principle does not have a fair and just operation. The disabilities of office do not attach to the stockholders; for we find them everywhere holding public offices, even in the national legislature, from which, if they be public officers, they are excluded by the constitution in express terms.

If the bank be a public institution of such character as to be justly assimilated to the mint and the postoffice, then its charter may be amended, altered, or even abolished, at the discretion of the national legislature. All public offices are created purely for public [775] purposes, and may, at any time, be modified in such manner as the public interest may require. Public corporations partake of the

same character. So it is distinctly adjudged in *Dartmouth College v. Woodward*. In this point, each judge who delivered an opinion concurred. By one of the judges it is said, that "public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties; and in many respects they are so, although they involve some private interests; but, strictly speaking, public corporations are such only as are founded by the government for public purposes, where the public interest belongs to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. For instance, a bank, created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So, a hospital created and endowed by the government for general charity. But a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private; as much 770" "so, indeed, as if the franchises were vested in a single person."

This court adopt this reasoning of one of themselves, the point is decided. The act of incorporation, in the case supposed, does neither create a public office nor a public corporation. The association, notwithstanding their charter, remain a private association, the proprietors and conductors of a private trade, bound by contract, for a consideration paid, to perform certain employments for the government.

The qualities and capacities which are ordinarily conferred upon a private corporation, have already been stated. These Congress must have power to confer, for they cannot create a corporation unless they can confer the qualities and capacities requisite to its constitution. It must be remembered, that this power in the national legislature, to create a private corporation, is not a general, but a special power, limited to cases where the corporation, when created, may be employed by the government as an appropriate agent in the transaction of public affairs. It is not essential to the creation or existence of a corporation, that any common or extraordinary privilege or exemption should be conferred upon it. It is, therefore, beyond question, that the admitted power of creating, in its strict and proper sense, does not include or imply a power to exercise discretion in conferring privileges. If this be attempted, it is open 777" "for inquiry, whether such privilege be compatible with the constitution.

Before the act of incorporation, the association, we have supposed, was necessarily subject to the law of the state in which it transacted business; that law, whatever it might

be, entered into and operated upon all their contracts. By that law, their property was protected, and for that protection the property was subject to equal ratable taxation. The ordinary qualities and capacities conferred upon a corporation, would not place the protection of the property under a different law, nor exempt it from bearing its proportion of legal burthens. To effect this, an extraordinary provision must be inserted in the charter. This kind of immunity is not incident to a corporation; the power to create one does not include the power to confer such immunity upon it. It is not essential to its creation or existence, and is not, therefore within the sphere of national legislation.

A state is invested with constitutional power to levy a tax upon stamps, and may extend its operation to all the dealings of individuals. It cannot subject the transactions of the national government to the payment of such tax, because the operations of that government are national, and not subject to the power of any of its parts. If the nation borrow money it is competent for the nation to decide upon the evidence to be given of the debt. It would be absurd to subject this national measure to the municipal regulations of one of its parts, and thus permit a part to assess a tax upon the whole. But if the national government incorporate a company of private bankers, [778] who, before they received their charter, were subject to the payment of this tax, their subsequent exemption from it would not seem to be a necessary consequence, unless they were constituted a public institution. If they remained mere private dealers, with only increased facilities, and a new faculty conferred upon them, it would seem a rational inference, that their private duties and liabilities also remained. Supposing them to remain a private corporation of trade, the tax collected from them would be abstracted, not from the national treasury, but from the pockets of private men. The supposition that this tax is incompatible with the capacity to trade, conferred in the charter, proceeds upon the hypothesis that that capacity partakes of the character of the government that confers it, and is, therefore, supreme. Unquestionably such would be the fact, if the bank were a public corporation; if it were created by the government for its own uses; and if the stock were exclusively owned by the government. But if it remain a private corporation, then the capacity given in the charter ought to be regarded as that which is adapted to the character of the party receiving it; a capacity properly appertaining to private individuals, which necessarily imports, that it is to be enjoyed like other individual rights, subject to the municipal law.

A stamp duty is one mode of collecting revenue from individuals engaged in private trade, but it is not the only mode. The principle which exempts the Bank of the United States from the payment of a stamp duty im- [779] posed by a state, is supposed to exempt it from the payment of any tax assessed by state authority. It is deemed an incident attached to the charter, because that charter is conferred by the supreme authority. It is said, that if any other than the supreme authority that confers the faculty is permitted to tax the trade

or business to be carried on under it, the faculty itself may be rendered useless, and the object of granting it entirely defeated. The power to confer the faculty, and the power to tax the business, if vested in different hands, are thus held to be incompatible, and from this incompatibility the exemption is deemed a necessary incident to the charter, because, without it, it cannot exist. For we must here repeat, that this court have said that a corporation "possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."

This position involves several inquiries, which may be embraced in an examination of the reasons assigned for considering this exemption as an incident attached to the charter, and in an investigation of the powers of Congress to confer this exemption, in express terms, if it cannot be sustained as incidental to the very existence of the bank.

The fact that a private corporation, created by the sovereign or supreme power, is not therefore, clothed with any portion of the political character or political power of its creator, is asserted by the concurring opinions of the judges of this court, and is established by its judgment in the case of *Dartmouth College v. Woodward*. That an exemption from taxation for public purposes, by an inferior legislative power, is not incident to a corporation created by the supreme power, is a just inference from the doctrines laid down in the case just cited, and from the whole history of private corporations, down to the decision of this court in *McCulloch v. Maryland*.

The power of assessing taxes is always a legislative power; but in our government, and in that of England, from which many of our institutions, and most of our principles of jurisprudence are derived, this power is exercised by other authorities than the national and state legislatures. Counties, cities, towns, boroughs and townships have bodies of magistracy authorized to assess taxes for various specific purposes. We have the high authority of Lord Coke himself, that the justices of a city, shire, or riding, in England, might assess a tax upon the property of a corporation, for the repair of bridges.¹ And in *The King v. Gardner*,² it was decided by the Court of King's Bench, that a corporation was subject to be assessed for poor rates, even as a corporation. In these cases, it was not pretended that exemption from taxation was an incident to the corporation.

[731*] "If a state legislature incorporate a company to construct a turnpike road, such charter would be predicated upon the advantage the community would derive from the road; yet no man would suppose that the horses, cattle, carriages and other implements employed and used by the company would be exempt from county levies, poor rates and other burthens to which the other property of the individuals was subject. And if a general tax upon business or income was assessed, it would not be pretended that the amount re-

ceived for tolls would be exempt from this tax, upon the ground that a right to have the corporate property and corporate business exempt from taxation, was an incident of the charter. This argument is applicable to every species of individual business conducted by private corporations. If exemption from any particular tax be claimed, it is founded upon a privilege specifically granted in the charter; it is not claimed as an incident to the grant.

It is not uncommon, that almost every species of business carried on within the boundaries of a city, is subject to be taxed by the city magistracy, for city purposes. Should this general authority to tax extend to bankers, money-lenders, brokers and others trading in money, notes, stocks, bills of exchange, etc., would the mere fact, that the sovereign authority granted to the individual or individuals carrying on any one of these employments, a corporate character, operate to exempt such individual or individuals from the payment of a city tax, to which he was liable before the corporate character was bestowed upon him?

*Private corporations, emanating from [732 state authority, and ultimately connected with the private and public welfare, are numerous in all our commercial cities. Such are fire and marine insurance companies. Are these regarded as exempt from taxes assessed by the city magistrates? Have they ever claimed such exemption? Has it ever been conceded to them? In all the cases put, it is evident that the body of inferior magistracy, authorized to levy a tax, if they be not limited as to the amount, which is frequently not the case, may assess upon the corporation an amount which their business could not pay, and thus defeat the object for which the charter was obtained. That such exemption, as an incident of their charter, has never been claimed by such corporations, is strong proof that it was not supposed to exist.

It may be said, that the inferior magistracy and the corporations, in the cases supposed both derive their authority from the same source, and that it is competent for the authority that created both, so to regulate and control their operations as to prevent one from being destroyed by the other. This may be granted, without affecting the argument. If the exemption be incident to the corporation, regulations are unnecessary. The power of the national legislature to confer this exemption, upon a corporation created by it, in express terms, is one thing; that it exists as an incident to the charter, without any express provision, is a very different proposition.

It is distinctly admitted, in the case of *McCulloch v. Maryland*, that the real property of the bank may be taxed, and that [733 the stock held by residents of the state may be taxed. But it is asserted that the operations of the bank are exempt, because they are the means of the national government; and it is only by the total exemption of the operations of the bank from the taxing power of the states, that our institutions can be relieved from the absurdity of a power, in one government, to pull down what another may build up, and a right in one government to destroy what there is a right in another to preserve.

Wheat. 9.

1.—1 Wheat. Rep. 656.

2.—2 Inst. 637, 700.

3.—Cowp. 534.

But if the real property of the bank and its stock may be taxed, it is as completely within the power of the states to destroy it by taxation, as it is by taxing its operations. The states may tax the stock owned by its citizens, so high as to compel them to retain it at a loss. Every state in the Union, by adopting this course, may paralyze the operations of the bank, as effectually as in any other mode. If the states act in concert, there is an end of the bank; and that which the national government have built up, is prostrated by the states. The concession, then, that the exemption is qualified, admits the very mischief which is set up to prevent. Whatever misapprehension may have prevailed with respect to the operations of the bank, it certainly never can be asserted that the individual stock of the members, or the real estate of the company, are the means of the government, and, as such, exempt from taxation. And while these are subject to taxation by the states, it would seem difficult to sustain the position upon which the operations of the bank are held to be exempt.

We can well understand how an absolute exemption may be a consequence of the character of the corporation established. Certainly it would be an incident of this bank, were it established solely for public use, and were the stock wholly owned by the nation. But a qualified exemption must, in its very nature, depend upon a specific provision. It is so connected with considerations of policy, and interwoven with the exercise of discretion, that it cannot be conceived how it is to exist otherwise than by special creation or enactment.

No such exemption, either general or qualified, has heretofore been regarded as an incident to the creation of a private corporation. On the contrary, every corporate privilege beyond the creation of individuality of character and of capacity, has been founded upon special grant. In the case of *Head v. The Providence Insurance Company*,¹ this court declared, that a private company, "in its corporate capacity, is the mere creature of the act to which it owes its existence. It may correctly be said to be precisely what the incorporating act has made it, and to be capable of exerting its faculties only in the manner in which that act authorizes." And this principle has been recognized in every case where the rights, privileges and powers of a corporation have been considered, except in respect to the bank.

* If we examine the claim of this particular corporation, to attach to itself this exemption, as incident to its charter, upon what ground is it to be distinguished from private corporations generally? It is said, that it is an instrument employed by the national government in the execution of its powers, and for that reason cannot be taxed; that, in this particular, it is distinguishable from all other corporations.

In what sense is it an instrument of the government? and in what character is it employed as such? Do the government employ the faculty, the legal franchise, or do they employ the individuals upon whom it is conferred? and what is the nature of that employment? Does it resemble the post-office, or the mint, or the custom-house, or the process of the federal courts?

¹—2 Cranch, 107.
6 L. ed.

The postoffice is established by the general government. It is a public institution. The persons who perform its duties are public officers. No individual has, or can acquire, any property in it. For all the services performed, a compensation is paid out of the national treasury; and all the money received upon account of its operations, is public property. Surely there is no similitude between this institution and an association who trade upon their own capital, for their own profit, and who have paid the government a million and a half of dollars for a legal character and name, in which to conduct their trade.

Again, the business conducted through the agency of the post-office is not in its nature a private business. It is of a public character, and the charge of it is expressly conferred upon Congress by the constitution. The business is created by law, and is annihilated when the law is repealed. But the trade of banking is strictly a private concern. It exists and can be carried on without the aid of the national legislature. Nay, it is only under very special circumstances that the national legislature can so far interfere with it as to facilitate its operations.

The postoffice executes the various duties assigned to it, by means of subordinate agents. The mails are opened and closed by persons invested with the character of public officers. But they are transported by individuals employed for that purpose, in their individual character, which employment is created by and founded in contract. To such contractors no official character is attached. These contractors supply horses, carriages, and whatever else is necessary for the transportation of the mails, upon their own account. The whole is engaged in the public service. The contractor, his horses, his carriage, his driver, are all in public employ. But this does not change their character. All that was private property before the contract was made, and before they were engaged in public employ, remain private property still. The horses and the carriages are liable to be taxed as other property, for every purpose for which property of the same character is taxed in the place where they are employed. The reason is plain; the contractor is employing his own means to promote his own private profit, and the tax collected is from the individual, though assessed upon the means he uses to perform the public service. ~~To tax the transportation of the mails, as such, would be taxing the operations of the government, which could not be allowed.~~ But to tax the means by which this transportation is effected, so far as these means are private property, is allowable; because it abstracts nothing from the government; and because, the fact that an individual employs his private means in the service of the government, attaches to them no immunity whatever.

It is only in this character that the bank is in public employ. The business it transacts for the government originates in contract. It receives the public treasure upon deposit, and pays it out upon the checks of the proper officer. This is an individual business, transacted for the government precisely as if it were an individual concern. It receives the cash of individuals upon deposit in the same manner,

and in the same manner pays it out. It is one department of its trade, by which it makes individual profit. Any private person, or moneyed corporation, may be employed to do the same thing; and as to that, would be in the employment of the government; would be an instrument used by the government; a means of executing its powers. Yet it has never been supposed that such employment constituted a public office, or that the person employed was thereby invested with official character. All these contracts are made with a view to the profitable employment of individual exertion, and are performed by individual means, in the private personal character of the contractor. [795*] They are, of course, subject to the municipal law; by it they must be protected and enforced, and, therefore, cannot be exempt from taxation.

The carriages and horses of the contractor for transporting the mail, is a stronger case than that of the bank. The transportation of the mail is the principal object for which the team and vehicle are engaged; the business of carrying passengers and baggage is merely incidental. Public service is the first great object; its employment as a means of traveling, by individuals, is but secondary. But in the case of the bank, the private trade of the company is the great object of pursuit, and the end of their exertions; the public business is subordinate and incidental, and is, in reality, a very essential means of promoting that private gain, which is the principal, if not the sole object of the corporation.

Again, in the case of the mail, the contractor receives a stipulated sum, as a compensation for his services. He takes upon himself a burthensome and hazardous employment. But the bank, on the contrary, receive a privilege, a substantial pecuniary advantage, resulting necessarily in the augmentation of the private individual wealth of the stockholders; of this advantage they are the purchasers, not for the public account, but for private use.

The post-office, as such, that is, the mere legal entity created by the law, cannot be taxed, because it is a public institution. The moneys received for postage cannot be taxed, because they are public property. This immunity [799*] attaches to their public character. But the building in which the post-office is kept is a proper subject of taxation, because it is private property; and the fact that it is an instrument used or employed by the government, in the execution of its powers, attaches to it no immunity.

The mint, the custom-house, the process of the federal court, bear still less analogy to the bank than the postoffice. They partake less of the character of private business. The functions they perform are more palpably of a public nature, requiring the personal agency of individuals, rather than the employment of private property in their performance; especially the papers of the custom-house, and the proceedings of the federal courts. However much individuals may be interested, in the existence and the preservation of these documents, yet they are not, in their nature, subjects in which a right of property can be acquired. If it ever could have been supposed that these were subjects of taxation by the States, the argument of

the opinion in the case of *McCulloch v. Maryland* demonstrates the absurdity of such supposition. Because to all these institutions exemption from state taxation is attached, as an incident essential to their very existence, it does not follow that the same exemption attaches to the bank, unless its character, end and object are the same. It seems to us impossible that this can be maintained. If it cannot, what is there peculiar to the constitution of this corporation, that should attach to its charter an exemption not incident to other corporations? Surely some foundation for this very extraordinary character, unknown to other [790 establishments of the same nature, ought to be made out by those who claim it.

I am aware, that an indefinite, indistinct, confused idea exists, by which the charter, and the private trade, and the stockholders, and the government, are combined together, and the whole made to produce a something which cannot well be defined, but which is called a public institution. This might produce some legal effect, if we were compelled to contemplate this something only as a creation of the national government, by the name of the bank of the United States. If its legal envelope, and legal name, constituted its whole character, or if these could be used so as to shut out all further inquiry into that character, its claim to the incidents and immunities of a public institution might rest upon some sort of foundation. But this misconception of its character vanishes, when we are permitted to examine all its constituent parts. We have seen that the persons who compose it are not public officers; that the business it pursues is not a public business, and that its agency for the government is that of a private individual; from none of which it can derive any exemption not common to private corporations.

The charter itself, abstracted from the individuals upon whom it is conferred, must be without any operative effect. It is in the nature of a grant; but a grant is nothing, unless there be a grantee to take, as well as a subject to be granted. When an association of individuals is formed, and enable themselves to a grant of corporate franchises, so as to [791 give operative effect to that grant, they acquire in it a private vested right; it becomes their private property; and so long as they comply with its terms, they can no more be disturbed in the possession of it, by the grantors, than by a third person or stranger. Such is the situation of the bank. The charter is their property, derived, to be sure, from a public grant, but, nevertheless, as distinctly the private property of the individuals as if derived from a contract or grant from individuals, its former proprietors. Why is it an incident to this species of property, that it should be exempt from taxation by the states?

One reason only is offered. It is granted by the national government; and if the states can tax it, they may, in effect, render it useless to the grantees. But the states may confessedly exercise this power over the employments and property of individuals. All property is held subject to it, when held by individuals, no matter whence it is derived. In Ohio, the state cannot tax the public lands, while owned by the government, nor for five

years after they become the property of individuals. She is bound by compact on this point. But it never was conceived, that because it was once owned by the nation, and the title to the individual derived from a national grant, the states could not tax it. Restricted as this power of taxation is in the state of Ohio, yet there can be no possible difficulty in so employing it as to defeat all future sales of public lands within that state. It is only to provide by law for assessing such tax upon all lands hereafter sold, to be collected after the 792^d expiration of five years from the sale, as would render the lands a burden to the proprietor, and the object would be effected. Yet the power to do this would hardly be held a sufficient ground for attaching to lands thus sold, an exemption from state taxation as incident to the grant. Why should a grant of franchises be distinguished from a grant of land, when the grantee, in both cases, receives it in confirmation of a purchase from the government, to be held as his own individual property? We are warranted by the opinion of at least one of the judges of this court, in asserting, that "a grant of franchises is not, in point of principle, distinguishable from a grant of any other property." If this be correct, then there can be no reason for attaching any exemption to a grant of franchises, because the grant is conferred by the national government. The grantee must hold the property subject to all the burthens which might be imposed upon it, had he obtained it from any other source.

It may be objected, that this doctrine asserts a power in the states to tax the patent rights granted by the national government. And why not? By the grant it is constituted individual property; but does the power conferred upon the national government, to secure to the authors of useful inventions the exclusive use of their machines, necessarily attach to the patent for such exclusive right an exemption from taxation also? Is it not enough, that the inventor of a new species of property may be secured in a monopoly of its employment? Does the mere fact of conferring such monopoly, of necessity imply a right to enjoy it exempt from the burthens to which other property is subject? How far is this exemption to be carried? Would it exempt a steam loom from a general tax upon looms? or a steam mill from a general tax upon mills? Would a barrel of flour be subject to taxation, if, in the process of manufactory, it were carried from the meal chest to the cooling room upon a miller's shoulder; but exempt if it were hoisted by elevators, be gathered to the bolt-hopper by a hopper-boy? Does this exemption attach to the grant, only in the hands of the monopolist, or extend also to his grantees of the monopoly? Is the exemption to be withdrawn so soon as the invention passes into the hands of the mechanic for practical purposes? or does it adhere to the machinery, and attach to the fabric manufactured? At whatever point it is withdrawn, the same consequences may follow. The power of state taxation, if it attach at all, may be so used as to render the patent of very little value. If the patent itself, or the machinery when constructed, or the employment of such machinery,

or the fabrics manufactured by it, may be taxed, an excessive tax can, in one way as well as another, affect the benefits derived by the patentee from the patent, and may even prevent its use. Still, in this respect, it stands upon the same footing with other private property, and there is no sound reason for conferring upon it any higher privilege. Every thing in the nature of property, produced by the labor of the husbandmen and the mechanic, may be taxed. They have no other security that the tax may not be excessive and oppressive, than what is afforded by their weight in government, and a sense of justice in legislative assemblies. If the powers of genius be so applied as to produce anything in which the inventor claims a property, this product of labor must be treated as other productions of the same class. No special exemptions are necessary incidents of its invention or creation. So far, then, as there is a just analogy between the bank and patent rights, so far they are alike to be looked upon as private property, and no exemption from taxation can be conceded to either, as an incident of the franchise conferred upon them by a grant from the national legislature.

Last of all, this exemption from taxation is not an incident essential to the very existence of the bank; the bank may exist without it; may exist beneficially without it, as we contend, did exist for twenty years without it, and was extensively useful. This exemption may conduce much to its convenience, and, perhaps, very considerably to its profit. But many things may be convenient and beneficial in the account of mercantile profit or bank dividends, which are not necessary to the very existence of the corporation. Certainly the exemption from taxation is of this character. It is not incident to the corporation. If necessary to secure to it the most beneficial uses of its corporate franchises, it must obtain it by a special grant; it must be specially inserted. An inquiry, how far Congress have constitutional power to do this, were they to attempt it, would still further elucidate the erroneous character of the position, that it is an incident of the charter, independent of special grant.

Mr. Clay, for the respondents, declined arguing the question of the right of the state of Ohio to tax the bank, considering it as finally determined by the former decision of the court, which was supported by irresistible arguments, to which he could add no farther illustration. But this was not, like the law of Maryland, a case of taxation. It was a law enacted for the purpose of expelling the branches of the bank from the state of Ohio, by inflicting penalties amounting to a prohibition. It might be called a bill of pains and penalties. An examination of its provisions would show that the penalties were greater in amount than the entire dividends. It was unequal and unjust in its operations. It was a confiscation, and not a tax. It was the same on the branch at Cincinnati, which had a capital of one million and a half, with that at Chillicothe, which had only a capital of half a million of dollars. It was obvious, that if one state could, in this manner, expel one of the offices of discount and deposit from its territory, every state

might do the same thing. If one state may expel a branch, another state may expel the parent bank itself; and thus this great institution of the national government would be extirpated and destroyed by the local governments, within whose territory it was established.

Is it possible, that against this highly penal law, there is no preventive, peaceable remedy? that the bank must submit to the alternative of withdrawing its branches, or of paying the penalty? that it must do this, not for one year, but for the whole period of its existence? Is it possible that our jurisprudence should be so defective that the law of the whole may be defeated in its operation by a single part; that if a state should lay a duty on imports or tonnage, contrary to the express provisions of the constitution, no adequate means could be found to prevent its collection by the officers of the state government?

All these propositions must be maintained by our opponents, or they must surrender their cause. It is, accordingly, contended by them, that the remedy is misconceived, (1) because the state is not made a party. But if such parties are before the court, as will enable it to make an effectual decree, it will proceed, although there be improper parties made, or parties omitted, who might have been made. Such is the practice where jurisdiction is sustained in the Circuit Court against some parties, against whom an effectual decree can be made, although others are omitted, on account of their being absent, or citizens of the same state with the plaintiff. The true ground seems to be, that if the court can give redress; if its decree can be rendered effectual; if the party can be put in possession of the thing claimed, the court will proceed. Here the party omitted is a sovereign state, who is entirely exempt from jurisdiction. The court will therefore proceed against the other proper parties.

But it is also insisted that the remedy is misconceived, because a state is the real party defendant. We deny that a collateral or contingent interest will necessarily make a party who must be joined.

The state is not a formal party on the record; and that the state is not necessarily a party, by reason of its incidental interest, is conceded by the admission that the bank might have recovered in trover, trespass, or detinue, against the defendants, who actually took the money. That the suit concerns the public acts of an officer of the state government, who is one of the defendants, does not make the state itself a necessary party. This is the settled law of the court. In the case of *The United States v. Peters*,¹ it was held that, although the interests of a state may be ultimately affected by the decision of a cause, yet if an effectual remedy can be had, without making the state a defendant to the suit, the courts of the United States are bound to exercise jurisdiction. So, in England, in *The Grenada case*, the fiscal rights of the sovereign were drawn directly in question, and finally determined, in a suit brought by an individual, to recover back from the collector of the customs of the island, the

amount of duties unconstitutionally levied by that officer.² The party there was not compelled to resort to his petition of right, or any other mode of proceeding peculiar to claims against the crown. The immunity of one of the states of this Union from suits in the courts of justice, is not greater than that of the crown in England. The constitution merely ordains that a state, in its sovereign capacity, shall not be sued. It does not ordain that the citizen shall not have justice done him, because a state may happen to be collaterally interested. It does not ordain that a law of the United States shall be violated, to the prejudice of a citizen, because a law of the state happens to come under consideration. If the state of Ohio is a party, so is the government of the United States a party in its sovereign interests, which are more sacred and important than mere proprietary interests. But even if the state be a party, that circumstance would not oust the jurisdiction of the court, in a case arising under the constitution and laws of the Union. There the nature of the controversy, and not the character of the parties, must determine the question of jurisdiction. Such is conceived to be the spirit and effect of the decision of the court in the case of *Cohens v. Virginia*. It is competent for Congress to determine what court shall have jurisdiction in this class of cases, which it has done as to the bank, by giving it the right of suing in the circuit courts of the Union.

Again, if the state is to be considered a party, it is a party plaintiff. The state is the actor, and the bank is a defendant. In form it may not be so, but the substance is to be regarded. The injunction is essentially a defensive proceeding. Suppose the state, or even the United States, had recovered a judgment against the bank, might not the proceedings upon that judgment be enjoined? And is the nature of the case varied because the proceeding is here in pais? Suppose the state had proceeded by distraining for the tax, and the bank had replevied; who would have been both the real and technical plaintiff in that case? The whole case is to be considered according to its true nature and character, which is, that of a proceeding by the state to recover a tax or penalty; and the bank resorts to its natural protector for defense, by means of an injunction, which is a parental, preventive, peaceable remedy.

It is said that this is a case of trespass only, and that the party ought to have been left to his appropriate remedy at law. But this is not a case of a solitary remediable trespass. It is one of annual, of repeated, vexatious occurrence, for which an injunction is the appropriate remedy. All injunctions are discretionary, and granted upon the peculiar circumstances of the case. The jurisdiction of a court of equity as to injunctions, has been always considered a most useful one, and, of late years, they have been dispensed with a much more liberal hand than formerly. They are granted to prevent fraud or injustice; to stay proceedings in other courts; to restrain the infringement of patent and copyrights; to restrain the

1.—3 Cranch, 115.
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2.—*Campbell v. Hall*, Cowp. 204.

800*] "transfer of negotiable instruments, where the transfer will defeat the object of the suit; to stay waste, in which case they have superseded the common law remedy by writ of estrepement. In the case of patents and copyrights, it is not necessary to establish previously the right at law, for it is grounded on an act of parliament, and appears by record." The principle on which injunctions in all these cases are granted, is to prevent a wrong where damages would not give adequate relief. So, there are cases where bills of peace have been brought, though a mere general right was claimed by the plaintiff, and no privity between him and the defendants, nor any general rights on the part of the defendants, and where many more might be concerned than those brought before the court.* Such are bills for duties, as in the case of *The City of London v. Perkins*. In the present case, it is quite clear that it would be an idle mockery to compel the parties to resort to their legal remedy, which would be wholly inadequate to prevent the destruction of their franchise.

As to the formal objection of the defect of a warrant of attorney from the bank, authorizing these proceedings, it is now too late to take that objection, even if it could have been available at any stage of the suit. It is matter of form only, which should have been pleaded in abatement. It is cured by the provisions of the judiciary act of 1789, ch. 20, s. 34.

801*] "Mr. Wright, for the appellants, in reply, insisted, that a special authority must be shown for the institution of the suit in the name of a corporation, which could only appear by attorney, under its common seal. Admitting, however, that the corporation might, by a mere resolution of the board of directors, authorize the suit, following the analogy of the cases of *The Bank of Columbia v. Patterson*, and *Fleckner v. The Bank of the United States*, such resolution must appear on the record, in the same manner as a warrant of attorney. Nor are the defendants precluded by the appeal from taking advantage of this defect. A decree is a judicial act. Its validity depends upon there being a party before the court, legally competent to ask it. A corporation can only appear by its attorney or solicitor, duly authorized; and if this authority is not apparent upon the face of the record, the decree is erroneous, and cannot be supported.

There are no proofs or admissions sufficient to charge the defendant, Sullivan. He knows nothing of his own knowledge. The information from his predecessor in office, Currie, is no proof. The bill charges that he received the money as a deposit, without any interest in it. The answer states that he receives and holds it as a public officer, and has no private interest in it. The case in 6 Ves. Jun. 733, was a much stronger admission than this, and yet it was held insufficient. The answer of one defendant cannot affect another. The answer of a party having no interest, cannot affect a person having an interest. The answer of Sullivan and Currie could not affect the state of Ohio, against which the decree oper-

ated, and whose treasury was entered, in order to execute the writ of sequestration.

It is impossible to determine whether the injunction is meant to be supported upon the ground of preventing an irreparable injury, or of protecting the franchise of the plaintiffs. No case has been shown of an injunction to prevent a mere trespass on chattels, or where the injury intended is not an interference in the enjoyment of the plaintiff's exclusive privileges, but only a trespass upon their property, for which they have an adequate remedy, by suit at law, in various forms of action. Mere general principles, upon which courts of equity may have proceeded a certain length in interposing by injunction, will not warrant the extending this extraordinary remedy still further. Some analogous case must be found to support this injunction.

~~An injunction binds no person but the parties to the suit.~~ Here the sole interest is in the state of Ohio. She is, therefore, an indispensable party to the bill. But she cannot be made a party, because she cannot be sued. The inevitable consequence is, that the court below cannot take jurisdiction of the cause. ~~Where, indeed, the proceeding is in rem, or operates upon the subject-matter in controversy, disconnected from the persons interested; if it can be shown that any person interested, who is subject to the jurisdiction of the court, is~~ [§03] absent beyond the reach of its process, it is not necessary to make such a person a party. But here the party omitted is a sovereign state, who is within reach of process, but is not subject to the jurisdiction, and cannot be brought before the court. The case of *Cohens v. Virginia* does not apply. The case relates exclusively to the appellate jurisdiction of the Supreme Court, and merely establishes the doctrine, that where the state commences a suit in its own courts, and a question arises under the constitution, laws and treaties of the Union, the defendant may bring the cause before this court by appeal or writ of error. The appellate process is not considered as a suit against the state, within the meaning of the 11th amendment. The *Grenada* case, in England, is equally inapplicable. It was an action of assumpsit, brought to recover back the amount of certain duties paid to the collector of the island, and which had been retained in his hands, by the consent of the Attorney-General, for the express purpose of trying the question as to the validity of the King's proclamation, by which the duties were imposed. The court determined that the King had precluded himself from the exercise of his power of prerogative legislation over a conquered country, by previously authorizing the establishment of a colonial legislature, and, therefore, gave judgment for the plaintiff. The present suit is substantially a suit against the state. The 11th amendment to the constitution was intended to protect the state effectually from the suit of an individual, not to permit [§04] its sovereign rights to be drawn in question, and its property to be taken indirectly by suing its officers. In the case of *The United States v.*

1.—1 Madd. Ch. 113, 123, 129, and the cases there cited.
8 L. ed.

2.—7 Ves. 253; 4 Johns. Ch. Rep. 25.

3.—Cowp. 204.

But the interference of the state was by a law passed subsequent to the decree, and intended to operate directly upon it, and defeat its execution. A court of law, from necessity, sometimes allows suits to be maintained against mere agents, who are the active parties, in cases of trespass or other torts; but it is the invariable practice of the Court of Chancery to proceed against the parties really interested, and the omission of any of them is a fatal defect. The policy which exempts the states from being sued in the courts of the Union, is the same, whether the case arise under the constitution and laws of the United States, or whether the jurisdiction is founded upon the character of the parties. The terms of the exemption equally comprehend both classes of cases.

The court having expressed a wish that the cause should be re-argued upon the point of the constitutionality and effect of the provision in the charter of the bank, which authorizes it to sue in the circuit courts of the Union, it was this day again argued upon that point (in connection with the case of *The Bank of the United States v. The Planters' Bank of Georgia*, in which the same question was involved), by Mr. Clay, Mr. Webster and Mr. Sergeant for the jurisdiction, and by Mr. Harper, Mr. Brown and Mr. Wright against it.

[803] In favor of the jurisdiction, it was argued, ~~that the jurisdiction was expressly~~ and unequivocally conferred by the act of 1816, s. 7, incorporating the bank. The terms used were free from all ambiguity, and they were introduced for the avowed purpose of giving jurisdiction to the circuit courts. In the case of *The Bank of the United States v. Deveaux*,¹ it had been decided that the former national bank had not, by virtue of its charter, a right to sue in the federal courts. That charter gave it a right "to sue and be sued, in courts of record, or any other place whatsoever," which it was determined did not confer the privilege of suing in the courts of the Union, they not being expressly mentioned. But no doubt was intimated that those courts would have had jurisdiction, if they had been mentioned in the act. It was to supply this defect that Congress adopted the phraseology which is contained in the present charter, giving the bank power "to sue and be sued in all state courts having competent jurisdiction, and in any circuit court of the United States." Power in the party "to sue," confers jurisdiction on the court. Jurisdiction is always given for the sake of the suitor, never for the sake of the court. It was most natural to give the privilege to the suitor, and that necessarily carries with it the jurisdiction; for without the jurisdiction, he cannot enjoy the right. To authorize the bringing of a suit, is to authorize a suit to be entertained. The patent laws, and many [806] other statutes of Congress, have been construed to give jurisdiction by the use of similar terms.

2. That Congress had constitutional authority to confer this jurisdiction on the circuit courts. It was "a case arising under the constitution and laws of the United States." Every case, in which the bank of the United States

is a party, is, in the strictest literal interpretation of the clause, a case arising under a law and the constitution of the United States. But for the law, the case would never have existed. But for the continued existence of the law, it could not continue to exist. If, by any conceivable means, the law were to be determined, the case must be at an end. There is, therefore, an inseparable, indissoluble connection between the law and the case, as cause and effect. The case owes its being to the law, and only to the law. The establishment of a corporation is a legislative creation of a faculty, of a moral being, invisible and intangible, but with capacities, powers and privileges, rights and duties. The rights it may require, the wrongs it may suffer, the obligations it may incur, the injuries it may inflict, the acts it may do, its power to do, or to endure, are all derived from, and dependent upon, the charter. To the charter it owes its being, its continued existence, its qualities and properties. The charter defines its duties, and affords the only measures of its responsibilities. Every act it performs, derives its validity from the charter only, and whenever it deals with another, it deals under and according to the charter. In the same manner, whoever deals with it, deals under and according to the charter. Its [807] capacity to contract, and to sue and be sued, all are derived from that source. ~~It cannot come into court, unless bringing the law in its hand.~~ It is bound in every case to show that it is acting within the limits of its corporate powers, ~~as defined in the law.~~ There can be no case, where the bank is a party, in which questions may not arise under the laws of the United States. In every such case, it must appear that it was duly created, continues to exist, has power to contract, and to bring the suit. All these matters arising under the laws of the United States, and under no other. Suppose an officer created by act of Congress, could not Congress confer on him the privileges of suing and being sued, in his official capacity, in the courts of the Union? Such an officer has two capacities, private and official, and may be subject to different jurisdictions, according as either is affected. But a corporation has but one capacity, and its faculties cannot be divided. Wherever an authority is given, all that is done by virtue of that authority, is done under it. Everything done by the bank, is done under the charter.

If it should be contended that the character of the case depends upon the questions to arise in it, the answer is, that it is not so restricted by the constitution; and that it cannot be previously known what particular questions may arise in the progress of the cause. The principal draws to it the incident, or accessory. The character of the case depends upon its general nature. Every suit brought by the bank, is for the funds placed in its charge, under the law of the United States.

But the question here is about the [808] exercise of a sovereign power, given for great national purposes. Those who framed the constitution, intended to establish a government complete for its own purposes, supreme within its sphere, and capable of acting by its own proper powers. They intended it to consist of three co-ordinate branches, legislative, Wheat. 9.

executive, and judicial. In the construction of such a government, it is an obvious maxim, "that the judicial power should be competent to give efficacy to the constitutional laws of the legislature." The judicial authority, therefore, must be co-extensive with the legislative power.¹ It would be quite as reasonable to leave the execution of the laws of the Union to the state executives, as to leave the exposition of them to the state judiciaries. It was intended that the federal judiciary should expound all the laws of the government, and that the federal executive should execute them all. This association is so inseparable that the power of legislation carries with it the power of establishing judicial tribunals. It is so with respect to the power of exclusive legislation within the District of Columbia. So the power of establishing postoffices and post-roads, involves that of providing judicial means for the punishment of mail robbers. Most of the statutes for the punishment of crimes are founded on the same basis. ~~The great object, then, of the constitutional provision, respecting the judiciary, must make it co-extensive with the power of legislation, and to associate them inseparably, so that where one went, the other might go along with it.~~ The first part of the article, where the jurisdiction is made to depend upon the nature of the controversy, is employed for this purpose, not to limit and restrain. But it was necessary, for great purposes of public policy, to extend it to other cases, where the jurisdiction is made to depend upon the character of the parties. These are the subject of the remaining part of the article. In that part of it which relates to cases arising under the constitution, laws, and treaties of the Union, there is a redundancy in the language: "All cases." The pleonasm is here meant to perform its usual office, to be emphatic. It marks the intention, and affords a principle of construction. The additional terms, "all cases in law and equity," also serve to heighten the effect, and to show that nothing of this essential power was to be put to hazard. Surely such a clause must be construed liberally. It is a maxim applicable to the interpretation of a grant of political power, that the authority to create must infer a power effectually to protect, to preserve, and to sustain.² It is no less a maxim, that the power to create a faculty of any sort must infer the power to give it the means of exercise. A grant of the end is necessarily a grant of the means. ~~The constitutional power of Congress to create a Bank, is derived from the necessity of such an institution for the fiscal purposes of the Union.~~ It is established, not for the benefit of the stockholders, but for the benefit of the nation. It is part of the fiscal means of the nation. Indeed, "the power of creating a corporation is never used for its own sake, but for the purpose of effecting something else."³ The bank is created for the purpose of facilitating all the fiscal operations of the national government. ~~All its powers and faculties are conferred for this purpose, and for this alone, and it is to be~~

supposed that no other or greater powers are conferred than are necessary to this end. ~~The collection and administration of the public revenue is, of all others, the most important branch of the public service.~~ It is that which least admits of hindrance or obstruction. The bank is, in effect, an instrument of the government, and its instrumental character is its principal character. That is the end; all the rest are means. It is as much a servant of the government as the treasury department. The two faculties of the bank, which are essential to its existence and utility, are, its capacity to hold property, and that of suing and being sued. The latter is the necessary sanction and security of the former, and of all the rest. The former must be inviolable, and the latter must be sufficient to secure its inviolability. But it is not so, if Congress cannot erect a forum, to which the bank may resort for justice. A needful operation of the government becomes dependent upon foreign support, which may be given, but which may [^{§11} also be withheld. There is no unreasonable jealousy of the state judicatures; but the constitution itself supposes that they may not always be worthy of confidence, where the rights and interests of the national government are drawn in question. It is indispensable that the interpretation and application of the laws and treaties of the Union should be uniform. The danger of leaving the administration of the national justice to the local tribunals, is not merely speculative. In Ohio, the bank has been outlawed; and if it cannot seek redress in the federal tribunals, it can find it nowhere. Where is the power of coercion in the national government? What is to become of the public revenue while it is going on. Congress might not only have given original, but it might have given exclusive jurisdiction, in the cases mentioned in the 25th section of the judiciary act of 1789, c. 20; instead of which, it has contented itself with giving an appellate jurisdiction; to correct the errors of the state courts, where a question incidentally arises under the laws and treaties of the Union. But here the question is, whether the government of the United States can execute one of its own laws, through the process of its own courts. The right of the bank to sue in the national courts, is one of its essential faculties. If that can be taken away, it is deprived of a part of its being, as much as if it were stripped of its power of discounting notes, receiving deposits, or dealing in bills of exchange.

Against the jurisdiction, it was said, that by the act incorporating the old Bank of the United States, authority is given to [^{§12} the corporation "to sue, etc., in courts of record, or any other place whatsoever." By the present charter, it is empowered "to sue, etc., in all state courts having competent jurisdiction, and in any circuit court of the United States." No difference is perceived in the legal effect of these two acts. Both give the same privileges. The circuit courts of the Union are "courts of record;" and an authority to sue in courts of record, or any other place whatsoever, is an authority to sue in the circuit courts. So that, if Congress were competent, under the constitution, to vest such a jurisdiction in the federal courts, it was vested by the first act of incorporation. But in the case of The Bank

1.—Cohens v. Virginia, 6 Wheat. Rep. 414.

2.—The Federalist, No. 50; Cohens v. Virginia, 6 Wheat. Rep. 354.

3.—M'Culloch v. Maryland, 4 Wheat. Rep. 426.

4.—M'Culloch v. Maryland, 4 Wheat. Rep. 411. 6 L. ed.

of the United States v. Deveaux,¹ the court says, that "by the judiciary act, the jurisdiction of the circuit courts is extended to cases where the constitutional right to plead and be impleaded in the courts of the Union, depends on the character of the parties; but where that right depends on the nature of the case, the circuit courts derive no jurisdiction from that act, except in the single case of a controversy between citizens of the same state claiming lands under grants from different states. Unless, then, jurisdiction over this cause has been given to the Circuit Court, by some other than the judiciary act, the Bank of the United States had not a right to sue in that court, upon the principle that the case arises under a law of the United States." ~~The constitution~~ ~~Sec. 1] proceeds to consider whether jurisdic-~~ ~~tion had been given to the Circuit Court by the act incorporating the bank, and determines that it had not. The judiciary act, nor no other law of Congress, can extend the jurisdiction of the federal courts beyond the constitutional limits. The charter attempted to confer jurisdiction on the state courts, in cases where the bank is a party. This provision, and that empowering it to sue in the circuit courts of the Union, are both equally void. The act must therefore be restricted, so as to give the corporation authority to sue and be sued in such courts only as are competent to take jurisdiction. This court has determined that the right of the corporation to litigate in the courts of the Union, depends upon the bank's nature as to citizenship of the members which compose the body corporate, and that corporation, as such cannot be a citizen, within the meaning of the constitution. There is here no averment on the record, that the plaintiffs have a right to sue, upon the ground of the corporation being citizens of a different state from the defendants; nor could such averment have been made, consistently with the truth of the fact.~~

~~It had been said that every suit brought by the bank, arises under the laws of the United States, because the bank, with all its powers and faculties, was created, and existed, by a law of the United States. So it might be said of an alien who is naturalized by the laws of §14*) the Union, that he derives his citizenship from those laws. But, could Congress, therefore, authorize all naturalized citizens to sue in the courts of the Union? A clear distinction exists between a party and a cause; the party may originate under a law with which the cause has no connection. A revenue officer may commit a trespass while executing his official duties, and if he justifies under the statutes of the United States, a question will arise under them, in which an appellate jurisdiction is given to this court, to correct the errors of the state courts. But could Congress give additional jurisdiction to the federal courts, in all suits brought by or against the revenue officers? In *M'Intyre v. Wood*,² this court says, "when questions arise under the constitution of the United States, in the state courts, and the party who claims a right or~~

privilege under them is unsuccessful, an appeal is given to the Supreme Court; and this provision the legislature has thought sufficient at present for all the political purposes to be answered by the clause of the constitution which relates to the subject." And it may be added, that it must remain sufficient until the law shall be changed by some unequivocal provision within the constitutional competency of Congress to make.

~~It was also contended, that every right that accrues to the bank in its corporate character, upon which a suit can be maintained, is to be regarded as arising under the charter, and, consequently, under a law of the United States. But the jurisdiction of the federal (§313 courts, if it attach at all, must attach either to the party or to the case. The party and his rights cannot be so mixed together as that the legal origin of the first shall give character to the latter. A controversy regarding a promissory note or bill of exchange cannot be said to arise under an act of Congress, because the bank which is created by an act of Congress, has purchased the note or bill. Neither the rules of evidence, nor the law of contract, can be regulated by the national legislature. But, in the case supposed, no question can arise, except under the law of contract and the rules of evidence. No law of Congress is drawn into question, and its correct decision cannot possibly depend upon the construction of such law. The bank cannot come into the federal courts as a party suing for a breach of contract or a trespass upon its property; for, neither its character as a party, nor the nature of a controversy, can give the court jurisdiction. The case does not arise under its charter. It arises under the general or local law of contract, and may be determined without opening the statute book of the United States. The privilege conferred upon the bank in its charter, to sue in the circuit courts, must be limited, not only by the criterion indicated; it must also be limited by the general provisions of the judiciary act, regulating the exercise of jurisdiction in the circuit courts. It cannot sue upon a chose in action assigned to it, unless the jurisdiction would have attached between the original parties; it cannot sue a party in the Circuit Court, over whom (§310 the existing laws give the Supreme Court exclusive jurisdiction. The privilege must be enjoyed, subject to existing laws. As to the legislation of Congress in giving to the courts of the Union cognizance of criminal offenses, that depended on the plain principle, that where a power is granted, all its incidents pass. Congress has power to legislate on various subjects. It is an incident, that they may enforce obedience to the laws they make on those subjects, by punishing offenses against them. Thus, for example, the right to punish perjury, and the falsification of judicial records, as essential to the administration of justice. Hence, Congress has assumed the power of punishing those offenses, when connected with the proceedings in the courts of the Union. So, in the case of patents, the grant creates the right; and the power to secure to inventors the exclusive benefit to their discoveries, could not be executed without giving the patentees a right to sue in those courts.~~

1.—5 Cranch, 85.

2.—*Hope Insurance Company v. Boardman*, 5 Cranch, 61.

3.—7 Cranch, 605.

Mr. Chief Justice Marshall delivered the opinion of the court, and after stating the case, proceeded as follows:

At the close of the argument, a point was suggested, of such vital importance as to induce the court to request that it might be particularly spoken to. That point is, the right of the bank to sue in the courts of the United States. It has been argued, and ought to be disposed of, before we proceed to the actual exercise of jurisdiction, by deciding on the rights of the parties.

817] "The appellants contest the jurisdiction of the courts on two grounds:

1st. That the act of Congress has not given it.

2d. That, under the constitution, Congress cannot give it.

1. The first part of the objection depends entirely on the language of the act. The words are, that the bank shall be "made able and capable in law," "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction, and in any circuit court of the United States."

These words seem to the court to admit of but one interpretation. They cannot be made plainer by explanation. They give, expressly, the right "to sue and be sued," "in every circuit court of the United States," and it would be difficult to substitute other terms which would be more direct and appropriate for the purpose. The argument of the appellants is founded on the opinion of this court, in *The Bank of the United States v. Deveaux*, 5 Cranch, 86. In that case it was decided that the former Bank of the United States was not enabled, by the act which incorporated it, to sue in the federal courts. The words of the 2d section of that act are that the bank may "sue and be sued," etc., "in courts of record, or any other place whatsoever." The court was of opinion that these general words, which are usual in all acts of incorporation, gave only a general capacity to sue, not a particular privilege to sue in the "courts of the United States;" and this opinion was strengthened by the circumstance that the 9th rule of the 7th section of the same acts, subjects the directors, in case of excess in contracting debt, to be sued in their private capacity, "in any court of record of the United States, or either of them." The express grant of jurisdiction to the federal courts, in this case, was considered as having some influence on the construction of the general words of the 2d section, which does not mention those courts. Whether this decision be right or wrong, it amounts only to a declaration, that a general capacity in the bank to sue, without mentioning the courts of the Union, may not give a right to sue in those courts. To infer from this, that words expressly conferring a right to sue in those courts do not give the right, is surely a conclusion which the premises do not warrant.

The act of incorporation, then, confers jurisdiction on the circuit courts of the United States, if Congress can confer it.

2. We will now consider the constitutionality of the clause in the act of incorporation, which authorizes the bank to sue in the federal courts.

In support of this clause, it is said that the legislative, executive, and judicial powers, of

every well-constructed government, are co-extensive with each other; that is, they are potentially co-extensive. The executive department may constitutionally execute every law which the legislature may constitutionally make, and the judicial department may receive from the legislature the power of construing every such law. All governments "which [*919] are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws. If we examine the constitution of the United States, we find that its framers kept this great political principal in view. The 2d article vests the whole executive power in the President; and the 3d article declares, "that the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.

The suit of *The Bank of the United States v. Osborn et al.*, is a case, and the question is, whether it arises under a law of the United States.

The appellants contend that it does not, because several questions may arise in it, which depend on the general principles of the law, not on any act of Congress.

If this were sufficient to withdraw a case from "the jurisdiction of the federal [*920] courts; almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends on the constitution, laws, or treaties of the United States. The questions, whether the fact alleged as the foundation of the action, be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any manner released his claims, are questions, some or all of which may occur in almost every case; and if their existence be sufficient to arrest the jurisdiction of the court, words which seem intended to be as extensive as the constitution, laws, and treaties of the Union, which seem designed to give the courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing.

In those cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be exercised in its appellate form. In every other case the power is to be exercised in its original or appel-

~~its form, or both, as the wisdom of Congress~~ may direct. With the exception of these cases, in which original jurisdiction is given to this court, there is none to which the judicial power extends, from which the original jurisdiction [§21] of the inferior courts is excluded "by the constitution. Original jurisdiction, so far as the constitution gives a rule, is co-extensive with the judicial power. We find, in the constitution, no prohibition to its exercise, in every case in which the judicial power can be exercised. It would be a very bold construction to say that this power could be applied in its appellate form only, to the most important class of cases to which it is applicable.

~~The constitution constitutes the Supreme Court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive; and then defines that which is appellate, but does not insinuate that in any such case the power cannot be exercised in its original form by courts of original jurisdiction. It is not insinuated that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance, in the courts of the Union, but must first be exercised in the tribunals of the State; tribunals over which the Government of the Union has an adequate control, and which may be deemed to any claim asserted under laws of the United States.~~

We perceive, then, no ground on which the proposition can be maintained, that Congress is incapable of giving the circuit courts original jurisdiction, in any case to which the appellate jurisdiction extends.

We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact [§22] and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action, be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it, shall disable Congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those Courts to take jurisdiction of the whole case, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal

courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may [§23] be given to it by another tribunal, into which he is forced against his will.

We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

~~The case of the bank is not a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?~~

Take the case of a contract, which is put as the strongest against the bank.

When a bank sues, the first question which presents itself, and which lies at the foundation of the cause is, has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a law of the United [§24] States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided forever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defense, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.

~~The appellants say that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is compelled, in every case, [§25] to show its validity. The case arises on~~

phatically under the law. The act of Congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case; is its origin; is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter.

The clause giving the bank a right to sue in the circuit courts of the United States, stands on the same principle with the acts authorizing officers of the United States who sue in their own names, to sue in the courts of the United States. The Postmaster-General, for example, cannot sue under that part of the constitution which gives jurisdiction to the federal courts, in consequence of the character of the party, nor is he authorized to sue by the judiciary act. He comes into the courts of the Union under the authority of an act of Congress, the constitutionality of which can only be sustained by the admission that his suit is a case arising under a law of the United States. If it be said, that it is such a case, because a law of the United States authorizes the contract, and authorizes the suit, the same reasons exist with respect to a suit brought by the bank. That, too, is such a case; because that suit, too, is itself authorized, and is brought on a contract authorized by a law of the United States. [§ 826] depends absolutely on that law, and cannot exist a moment without its authority.

If it be said that a suit brought by the bank may depend in fact altogether on questions unconnected with any law of the United States, it is equally true with respect to suits brought by the Postmaster-General. The plea in bar may be payment, if the suit be brought on a bond, or non assumpsit, if it be brought on an open account, and no other question may arise than what respects the complete discharge of the demand. Yet the constitutionality of the act authorizing the Postmaster-General to sue in the courts of the United States, has never been drawn into question. It is sustained singly by an act of Congress, standing on that construction of the constitution which asserts the right of the legislature to give original jurisdiction to the circuit courts, in cases arising under a law of the United States.

The clause in the patent law, authorizing suits in the circuit courts, stands, we think, on the same principle. Such a suit is a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point which requires the construction of an act of Congress. He may rest his defense exclusively on the fact that he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause, cannot oust the jurisdiction of the court, or establish the position, that the case does not arise under a law of the United States.

It is said that a clear distinction exists between [§ 827] the party and the cause; that the party may originate under a law with which the cause has no connection; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature

of a law, a right to sue in the courts of the United States, as give that right to the bank.

This distinction is not denied; and, if the act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made, all the faculties and capacities which that being possesses. Every act of the bank grows out of this law, and is tested by it. To use the language of the constitution, every act of the bank arises out of this law.

~~A naturalized citizen is indeed made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge these rights. The simple power of the national legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue. He is distinguishable in nothing from [§ 828] a native citizen, except so far as the constitution makes the distinction. The law makes none.~~

~~There is, then, no resemblance between the act incorporating the bank, and the general naturalization law.~~

Upon the best consideration we have been able to bestow on this subject, we are of opinion that the clause in the act of incorporation enabling the bank to sue in the courts of the United States, is consistent with the constitution, and to be obeyed in all courts.

We will not proceed to consider the merits of the cause.

The appellants contend, that the decree of the Circuit Court is erroneous.

1. Because no authority is shown in the record, from the bank, authorizing the institution or prosecution of the suit.

2. Because, as against the defendant, Sullivan, there are neither proofs nor admissions, sufficient to sustain the decree.

3. Because, upon equitable principles, the case made in the bill does not warrant a decree against either Osborn or Harper, for the amount of coin and notes in the bill specified to have passed through their hands.

4. Because the defendants are decreed to pay interest upon the coin, when it was not in the power of Osborn or Harper, and was stayed in the hands of Sullivan by injunction.

5. Because the case made in the bill does not warrant the interference of a court of [§ 829] chancery, by injunction.

6. Because, if any case is made in the bill proper for the interference of a court of chancery, it is against the state of Ohio, in which case the Circuit Court could not exercise jurisdiction.

7. Because the decree assumes that the Bank of the United States is not subject to the taxing power of the state of Ohio, and decide-

that the law of Ohio, the execution of which is enjoined, is unconstitutional.

These points will be considered in the order in which they are made.

1. It is admitted that a corporation can only appear by attorney, and it is also admitted that the attorney must receive the authority of the corporation to enable him to represent it. It is not admitted that this authority must be under seal. On the contrary, the principle decided in the cases of *The Bank of Columbia v. Patterson*, etc., is supposed to apply to this case, and to show that the seal may be dispensed with. It is, however, unnecessary to pursue this inquiry, since the real question is, whether the non-appearance of the power in the record be error, not whether the power was insufficient in itself.

Natural persons may appear in court either by themselves or by their attorneys. But no man has a right to appear as the attorney of another without the authority of that other. In ordinary cases, the authority must be produced, because there is, in the nature of things, no prima facie evidence that one man is the attorney of another. The case of an attorney-at-law, an attorney for the purpose of representing another in court, and prosecuting or defending a suit in his name, is somewhat different. The power must indeed exist, but its production has not been considered as indispensable. Certain gentlemen, first licensed by government, are admitted by order of court, to stand at the bar, with a general capacity to represent all the suitors in the court. The appearance of any one of these gentlemen in a cause, has always been received as evidence of his authority; and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishment of our courts, and no departure from it has been made in those of any state, or of the Union.

The argument supposes some distinction, in this particular, between a natural person and a corporation; but the court can perceive no reason for this distinction. A corporation, it is true, can appear only by attorney, while a natural person may appear for himself. But when he waives this privilege, and elects to appear by attorney, no reason is perceived why the same evidence should not be required, that the individual professing to represent him has authority to do so, which would be required if he were incapable of appearing in person. The universal and familiar practice, then, of permitting gentlemen of the profession to appear without producing a warrant of attorney, forms a rule, which is as applicable in reason to their appearance for a corporation, as for a natural person. Were it even otherwise, the practice is as uniform and as ancient, with regard to corporations, as to natural persons. No case has ever occurred, so far as we are informed, in which the production of a warrant of attorney has been supposed a necessary preliminary to the appearance of a corporation, either as plaintiff or defendant, by a gentleman admitted to the bar of the court. The usage, then, is as full authority for the case of a corporation as of an individual. If this usage ought to be altered, it should be a rule to operate

prospectively, not by the reversal of a decree pronounced in conformity with the general course of the court, in a case in which no doubt of the legality of the appearance had ever been suggested.

In the statutes of jeofails and amendment, which respect this subject, the non-appearance of a warrant of attorney in the record has generally been treated as matter of form; and the 32d section of the judiciary act may very well be construed to comprehend this formal defect in its general terms, in a case of law. No reason is perceived why the courts of chancery should be more rigid in exacting the exhibition of a warrant of attorney than a court of law; and, since the practice has, in fact, been the same in both courts, an appellate court ought, we think, to be governed in both by the same rule.

2. The second point is one on which the productiveness of any decree in favor of the plaintiffs most probably depends; for, if the claim be not satisfied with the money found in the possession of Sullivan, it is, at best, uncertain whether a fund, out of which it can be satisfied, is to be found elsewhere.

In inquiring whether the proofs or admissions in the cause be sufficient to charge Sullivan, the court will look into the answer of Currie, as well as into that of Sullivan. In objection to this course, it is said that the answer of one defendant cannot be read against another. This is generally, but not universally, true. Where one defendant succeeds to another, so that the right of the one devolves on the other, and they become privies in estate, the rule is not admitted to apply. Thus, if an ancestor die, pending a suit, and the proceedings be revived against his heir, or if a suit be revived against an executor or administrator, the answer of the deceased person, or any other evidence, establishing any fact against him, might be read also against the person who succeeds to him. So, a pendente lite purchaser is bound by the decree without being even made a party to the suit; a fortiori, he would, if made a party, be bound by the testimony taken against the vendor.

In this case, if Currie received the money taken out of the bank, and passed it over to Sullivan, the establishment of this fact, in a suit against Currie, would seem to bind his successor, Sullivan, both as a privy in estate, and as a person getting possession pendente lite, if the original suit had been instituted against Currie. We can perceive no difference, so far as respects the answer of Currie, between the case supposed and the case as it stands. If Currie, who was the predecessor of Sullivan, admits that he received the money of the bank, the fact seems to bind all those coming in under him, as completely as it binds himself. This, therefore, appears to the court to be a case in which, upon principle, the answer of Currie may be read.

His answer states, that on or about the 19th or 20th of September, 1819, the defendant, Harper, delivered to him, in coin and notes, the sum of \$98,000, which he was informed and believed to be the money levied on the bank as a tax, in pursuance of the law of the state of Ohio. After consulting counsel on the question, whether he ought to retain this sum within his individual control, or pass it to the cred-

it of the state on the books of the treasury, he adopted the latter course, but retained it carefully in a trunk, separate from the other funds of the treasury. The money afterwards came to the hands of Sullivan, the gentleman who succeeded him as treasurer, and gave him a receipt for all the money in the treasury, including this, which was still kept separate from the rest.

We think no reasonable doubt can be entertained, but that the \$98,000, delivered by Harper to Currie, were taken out of the bank. Currie understood and believed it to be the fact. When did he so understand and believe it? At the time when he received the money. And from whom did he derive his understanding and belief? The inference is irresistible that he derived it from his own knowledge of circumstances, for they were of public notoriety, and from the information of Harper. In the necessary course of things, Harper, who was sent, as Currie must have known, on this [§ 31] business, "brings with him to the treasurer of the state a sum of money, which, by the law, was to be taken out of the bank, pays him \$98,000 thereof, which the treasurer receives and keeps, as being money taken from the bank, and so enters it on the books of the treasury. In a suit brought against Mr. Currie for this money, by the state of Ohio, if he had failed to account for it, could any person doubt the competency of the testimony to charge him? We think no mind could hesitate in such a case.

Currie, then, being clearly in possession of this money, and clearly liable for it, we are next to look into Sullivan's answer, for the purpose of inquiring whether he admits any facts which show him to be liable also.

Sullivan denies all personal knowledge of the transaction; that is, he was not in office when it took place, and was not present when the money was taken out of the bank, or when it was delivered to Currie. But when he entered the treasury office, he received this sum of \$98,000, separate from the other money of the treasury, which, he understood from report, and was informed by his predecessor, from whom he received it, was the money taken out of the bank. This sum has remained untouched ever since, from respect to the injunction awarded by the court.

We ask, if a rational doubt can remain on this subject.

Mr. Currie, as treasurer of the state of Ohio, receives \$98,000, as being the amount of a tax imposed by the legislature of that state on [§ 35] "the Bank of the United States; enters the same on the books of the treasury; and, the legality of the act by which the money was levied being questioned, puts it in a trunk, and keeps it apart from the other money belonging to the public. He resigns his office, and is succeeded by Mr. Sullivan, to whom he delivers the money, informing him, at the same time, that it is the money raised from the bank; and Mr. Sullivan continues to keep it apart, and abstains from the use of it, out of respect to an injunction, forbidding him to pay it away or in any manner to dispose of it. Is it possible to doubt the identity of this money?

Even admitting that the answer of Currie, though establishing his liability as to himself, could not prove even that fact as to Sullivan;

the answer of Sullivan is itself sufficient, we think, to charge him. He admits that these \$98,000 were delivered to him, as being the money which was taken out of the bank, and that he so received it; for, he says, he understood this sum was the same as charged in the bill; that his information was from report, and from his predecessor; and that the money has remained untouched, from respect to the injunction. This declaration, then, is a part of the fact. The fact, as admitted in his answer, is not simply that he received \$98,000, but that he received \$98,000 as being the money taken out of the bank—the money to which the writ of injunction applied.

In a common action between two private individuals, such an admission would, at least, be sufficient to throw on the defendant the burthen of "proving that the money, which [§ 36] he acknowledges himself to have received and kept as the money of the plaintiff, was not that which it was declared to be on its delivery. A declaration, accompanying the delivery, and constituting a part of it, gives a character to the transaction, and is not to be placed on the same footing with a declaration made by the same person at a different time. The answer of Sullivan, then, is in the opinion of the court, sufficient to show that these \$98,000 were the specific dollars for which this suit was brought. This sum having come to his possession with full knowledge of the fact, in a separate trunk, unmixed with money, and with notice that an injunction had been awarded respecting it, he would seem to be responsible to the plaintiff for it, unless he can show sufficient matter to discharge himself.

3. The next objection is, to the decree against Osborn and Harper, as to whom the bill was taken for confessed.

The bill charges that Osborn employed John L. Harper to collect the tax, who proceeded by violence to enter the office of discount and deposit at Chillicothe, and forcibly took therefrom \$100,000 in specie and bank notes; and that, at the time of the seizure, Harper well knew, and was duly notified, that an injunction had been allowed, which money was delivered either to Currie or Osborn.

So far as respects Harper and Osborn, these allegations are to be considered as true. If the act of the legislature of Ohio, and the official "character of Osborn, constitute a de- [§ 37] fence, neither of these defendants are liable, and the whole decree is erroneous; but if the act be unconstitutional and void, it can be no justification, and both these defendants are to be considered as individuals who are amenable to the laws. Considering them, for the present, in this character, the fact, as made out in the bill, is, that Osborn employed Harper to do an illegal act, and that Harper has done that act; and that they are jointly responsible for it, is supposed to be as well settled as any principle of law whatever.

We think it unnecessary, in this part of the case, to enter into the inquiry respecting the effect of the injunction. No injunction is necessary to attach responsibility on those who conspire to do an illegal act, which this is, if not justified by the authority under which it was done.

4. The next objection is, to the allowance of interest on the coin, which constituted a part

of the sum decreed to the complainants. Had the complainants, without the intervention of a court of equity, resorted to their legal remedy for the injury sustained, their right to principal and interest would have stood on equal ground. The same rule would be adopted in a court of equity, had the subject been left under the control of the party in possession, while the right was in litigation. But the subject was not left under the control of the party. The court itself interposed, and forbade the person, in whose possession the property was, to make any use of it. This order having been obeyed, places the defendant in the same situation, so far as respects interest, as if the court had taken the money into its own custody. The defendant, in obeying the mandate of the court, becomes its instrument, as entirely as the clerk of the court would have been had the money been placed in his hands. It does not appear reasonable that a decree which proceeds upon the idea that the injunction of the court was valid, ought to direct interest to be paid on the money which that injunction restrained the defendant from using.

5. The fifth objection to the decree is, that the case made in the bill does not warrant the interference of a court of chancery.

In examining this question, it is proper that the court should consider the real case, and its actual circumstances. The original bill prays for an injunction against Ralph Osborn, auditor of the state of Ohio, to restrain him from executing a law of that state, to the great oppression and injury of the complainants, and to the destruction of rights and privileges conferred on them by their charter, and by the constitution of the United States. The true inquiry is, whether an injunction can be issued to restrain a person, who is a state officer, from performing any official act enjoined by statute; and whether a court of equity can decree restitution, if the act be performed. In pursuing this inquiry, it must be assumed, for the present, that the act is unconstitutional, and furnishes no authority or protection to the officer who is about to proceed under it. This must be assumed, because, in the arrangement of his argument, the counsel who opened the cause has chosen to reserve that point for the last, and to contend that, though the law be void, no case is made out against the defendants. We suspend, also, the consideration of the question, whether the interest of the state of Ohio, as disclosed in the bill, shows a want of jurisdiction in the Circuit Court, which ought to have arrested its proceedings. That question, too, is reserved by the appellants, and will be subsequently considered. The sole inquiry, for the present, is, whether, stripping the case of these objections, the plaintiffs below were entitled to relief in a court of equity, against the defendants, and to the protection of an injunction. The appellants expressly waive the extravagant proposition that a void act can afford protection to the person who executes it, and admits the liability of the defendants to the plaintiffs, to the extent of the injury sustained, in an action at law. The question, then, is reduced to the single inquiry, whether the case is cognizable in a court of equity. If it is, the decree must be affirmed, so far as it is supported by the evidence in the cause.

The appellants allege that the original bill contains no allegation which can justify the application for an injunction, and treat the declarations of Ralph Osborn, the auditor, that he should execute the law, as the light and frivolous threats of an individual that he would commit an ordinary trespass. But surely this is not the point of view in which the application for an injunction is to be considered. The legislature of Ohio had passed a law for the avowed purpose of expelling the bank from the state; and had made it the duty of the auditor to execute it as a ministerial officer. He had declared that he would perform this duty. The law, if executed, would unquestionably effect its object, and would deprive the bank of its chartered privileges so far as they were to be exercised in that state. It must expel the bank from the state; and this is, we think, a conclusion which the court might rightfully draw from the law itself. That the declarations of the auditor would be fulfilled, did not admit of reasonable doubt. It was to be expected that a person continuing to hold an office would perform a duty enjoined by his government, which was completely within his power. This duty was to be repeated until the bank should abandon the exercise of its chartered rights.

To treat this as a common casual trespass, would be to disregard entirely its true character and substantial merits. The application to the court was, to interpose its writ of injunction to protect the bank, not from the casual trespass of an individual, who might not perform the act he threatened, but from the total destruction of its franchise, of its chartered privileges, so far as respected the state of Ohio. It was morally certain that the auditor would proceed to execute the law, and it was morally certain that the effect must be the expulsion of the bank from the state. An annual charge of \$100,000 would more than absorb all the advantages of the privilege, and would consequently annul it.

The appellants admit that injunctions are often awarded for the protection of parties in the enjoyment of a franchise; but deny that one has ever been granted in such a case as this. But, although the precise case may never have occurred, if the same principle applies the same remedy ought to be afforded. The interference of the court in this class of cases, has most frequently been to restrain a person from violating an exclusive privilege, by participating in it. But if, instead of a continued participation in the privilege, the attempt be to disable the party from using it, is not the reason for the interference of the court rather strengthened than weakened? Had the privilege of the bank been exclusive, the argument admits that any other person, or company, might have been enjoined, according to the regular course of the Court of Chancery, from using or exercising the same business. Why would such person or company have been enjoined? To prevent a permanent injury from being done to the party entitled to the franchise or privilege; which injury, the appellants say, cannot be estimated in damages. It requires no argument to prove that the injury is greater, if the whole privilege be destroyed, than if it be divided; and, so far as respects the estimate of damages, although precise accuracy

may not be attained, yet a reasonable calculation may be made of the amount of the injury, so as to satisfy the court and jury. It will not be pretended that, in such a case, an action at law could not be maintained, or that the materials do not exist on which a verdict might be found, and a judgment rendered. But in this, and many other cases of continuing injuries, as in the case of repeated ejections, a Court of Chancery will interpose. The injury done, by denying to the bank the exercise of its franchise in the state of Ohio, is as difficult to calculate, as the injury done by participating in an exclusive privilege. The single act of levying the tax in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition, and protects the privilege. The same conservative principle, which induces the court to interpose its authority for the protection of exclusive privileges, to prevent the commission of waste, even in some cases of trespass, and in many cases of destruction, will, we think, apply to this. Indeed, trespass is destruction, where there is no privy of estate.

If the state of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is, that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited, to show that a court of chancery will not make a decree, unless all those who are substantially interested be made parties to the suit.

~~It is not necessary to suppose that the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the real party, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best-established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him, could his principal be joined in the suit. It is admitted that the privilege of the principal is not communicated to the agent; for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury. It is admitted, then, that the agent is not privileged by his connection with his principal, that he is responsible for his own acts, to the full extent of the injury, why should not the preventive power of the court also be applied to him? Why may it not restrain him from the commission of a wrong, which it would punish him for committing? We put out of view the character of the principal as a sovereign state, because that is made a distinct point, and consider the question singly as respects the want of parties. Now, if the party before the court would be responsible for the whole injury, why may he not be restrained from its commission, if no other party can be brought before the court? The appellants found their distinction on the legal principle that all trespasses are several as well as joint, without inquiry into the validity of this reason, if true. We ask, if it be true? Will it be said that the action of trespass is the only remedy given for this in-~~

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jury? Can it be denied that an action on the case, for money had and received to the plaintiff's use, might be maintained? We think it cannot; and if such an action might be maintained, no plausible reason suggests itself to us, for the opinion that an injunction may not be awarded to restrain the agent, with as much propriety as it might be awarded to restrain the principal, could the principal be made a party.

~~We think the reason for an injunction is much stronger in the case, than it would be in the supposed case. In the regular course of things, the agent would pay over the money immediately to his principal, and would thus place it beyond the reach of the injured party, since his principal is not amenable to the law. The remedy for the injury would be against the agent only, and what agent could make compensation for such an injury? The remedy would have nothing real in it. It would be a remedy in name only, not in substance. This alone would, in our opinion, be sufficient reason for a court of equity. The injury would, in fact, be irreparable, and the case an innumerable in which injunctions are awarded on this ground.~~

But, were it even to be admitted that the injunction, in the first instance, was improperly awarded, and that the original bill could not be maintained, that would not, we think, materially affect the case. An amended and supplemental bill, making new parties, has been filed in the cause, and on that bill, with the proceedings under it, the decree was pronounced. The question is, whether that bill and those proceedings support the decree.

The case they make is, that the money and notes of the plaintiffs, in the Circuit Court, have been taken from them without authority, and are in possession of one of the defendants, who keeps them separate and apart from all other money and notes. It is admitted that this defendant would be liable for the whole amount in an action at law; but it is denied that he is liable in a court of equity.

We think it a case in which a court of equity ought to interpose, and that there are several grounds on which its jurisdiction may be placed.

One, which appears to be ample for the purpose, is, that a court will always interpose to prevent the transfer of a specific article, which, if transferred, would be lost to the owner. Thus, the holder of negotiable securities, indorsed in the usual manner, if he has acquired them, fraudulently, will be enjoined from negotiating them; because, if negotiated, the maker or indorser must pay them. Thus, too, a transfer of stock will be restrained in favor of a person having the real property in the article. In these cases, the injured party would have his remedy at law; and the probability that this remedy would be adequate, is stronger in the cases put in the books than in this, where the sum is so greatly beyond the capacity of an ordinary agent to pay. But it is the province of a court of equity, in such cases, to arrest the injury, and prevent the wrong. The remedy is more beneficial and complete than the law can give. The money of the bank, if mingled with the other money in the treasury, and put into circulation, would be totally lost to the

owners; and the reason for an injunction is, at least, as strong in such a case, as in the case of a negotiable note.

6. We proceed now to the 6th point made by the appellants, which is, that if any case is made in the bill, proper for the interference of a court of chancery, it is against the state of Ohio, in which case the Circuit Court could not exercise jurisdiction.

The bill is brought, it is said, for the purpose of protecting the bank in the exercise of a franchise granted by a law of the United States, which franchise the state of Ohio asserts a right to invade, and is about to invade. It prays the aid of the court to restrain the officers of the state from executing the law. It is, then, a controversy between the bank and the state of Ohio. The interest of the state is direct and immediate, not consequential. The process of the court, though not directed against the state by name, acts directly upon it, by restraining its officers. The process, therefore, is substantially, though not in form, against the state, and the court ought not to proceed without making the state a party. -If this cannot be done, the court cannot take jurisdiction of the cause.

The full pressure of this argument is felt, and the difficulties it presents are acknowledged. The direct interest of the state in the suit, as brought, is admitted; and, had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in §17] the cause, until the "state was before the court. But this was not in the power of the bank. The eleventh amendment of the constitution has exempted a state from the suits of citizens of other states, or aliens; and the very difficult question is to be decided, whether, in such a case, the court may act upon the agents employed by the state, and on the property in their hands.

Before we try this question, by the constitution, it may not be time misapplied, if we pause for a moment and reflect on the relative situation of the Union with its members, should the objection prevail.

A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best-established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a state, alleging the authority of a law void in itself, because repugnant to the constitution, may arrest the execution of any law in the United States. It maintains that, if a state shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by the ministerial officer, without the sanction even of its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the government. The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, may all be inhibited, under ruinous §18] penalties, "from the performance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties, and the person thus obstructed in the performance of his duty, may indeed resort to

his action for damages, after the infliction of the injury, but cannot avail themselves of the preventive justice of the nation to protect him in the performance of his duties. Each member of the Union is capable, at its will, of attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs, while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws, otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agents to make compensation.

These are said to be extreme cases; but the case at bar, had it been put by way of illustration in argument, might have been termed an extreme case; and, if a penalty on a revenue officer, for performing his duty, be more obviously wrong than a penalty on a bank, it is a difference in degree, not in principle. Public sentiment would be more shocked by the infliction of a penalty on a public officer for the performance of his duty, than by the infliction of this penalty on a bank, which, while carrying on the fiscal operations of the government, is also transacting its own business; but, in both cases, the officer levying the penalty acts under a void authority, and the power "to re- [§19 strain him is denied as positively in the one as in the other.

The distinction between any extreme case, and that which has actually occurred, if, indeed, any difference of principle can be supposed to exist between them, disappears when considering the question of jurisdiction; for, if the courts of the United States cannot rightfully protect the agents who execute every law authorized by the constitution, from the direct action of state agents in the collection of penalties, they cannot rightfully protect those who execute any law.

The question, then, is, whether the constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular state to resist the execution of those laws.

The state of Ohio denies the existence of this power, and contends that no preventive proceedings whatever, or proceedings against the very property which may have been seized by the agent of a state, can be sustained against such agent, because they would be substantially against the state itself, in violation of the 11th amendment of the constitution.

That the courts of the Union cannot entertain a suit brought against a state by an alien, or the citizen of another state, is not to be controverted. Is a suit, brought against an individual, for any cause whatever, a suit against a state, in the sense of the constitution?

*The 11th amendment is the limitation [§250 of a power supposed to be granted in the original instrument; and to understand accurately the extent of the limitation, it seems proper to define the power that is limited.

The words of the constitution, so far as they respect this question, are: "The judicial power shall extend to controversies between two or more states, between a state and citizens of an-
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other state, and between a state and foreign states, citizens, or subjects."

A subsequent clause distributes the power previously granted, and assigns to the Supreme Court original jurisdiction in those cases in which "a state shall be a party."

The words of the 11th amendment are: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of a foreign state."

The Bank of the United States contends that in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but is not shown by the record to be a party.

The appellants admit that the jurisdiction of the court is not ousted by any incidental or consequential interest, which a state may have in the decision to be made, but is to be considered as a party where the decision acts directly and immediately upon the state, through its officers. §51.] "If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced where any person has been considered as a party, who is not made so in the record. But the court will not review those decisions, because it is thought a question growing out of the constitution of the United States requires rather an attentive consideration of the words of that instrument, than of the decisions of analogous questions by the courts of any other country.

Do the provisions, then, of the American constitution, respecting controversies to which a state may be a party, extend, on a fair construction of that instrument, to cases in which the state is not a party on the record?

The first in the enumeration, is a controversy between two or more states.

There are not many questions in which a state would be supposed to take a deeper or more immediate interest, than in those which decide on the extent of her territory. Yet the constitution, not considering the state as a party to such controversies, if not plaintiff or defendant on the record, has expressly given jurisdiction in those between citizens claiming lands under grants of different states. If each state, in consequence of the influence of a decision on her boundary, had been considered, by the framers of the constitution, as a party to that controversy, the express grant of jurisdiction would have been useless. The grant of it certainly proves that the constitution does not §52.] "consider the state as a party in such a case.

Jurisdiction is expressly granted in those cases only where citizens of the same state claim lands under grants of different states. If the claimants be citizens of different states, the court takes jurisdiction for that reason. Still, the right of the state to grant, is the essential point in dispute; and in that point the state is deeply interested. If that interest converts the state into a party, there is an end of the cause; and the constitution will be construed to forbid the circuit courts to take cognizance of questions to which it was thought necessary expressly to extend their jurisdiction, 6 L. ed.

even when the controversy arose between citizens of the same state.

We are aware that the application of these cases may be denied, because the title to the state comes on incidentally, and the appellants admit the jurisdiction of the court, where its judgment does not act directly upon the property or interests of the state; but we deemed it of some importance to show that the framers of the constitution contemplated the distinction between cases in which a state was interested, and those in which it was a party, and made no provision for a case of interest, without being a party on the record.

In cases where a state is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend, not on this plain fact, but on the interest of the state, what rule has the constitution given, by which this interest is to be measured? If no rule [§53 be given, is it to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into, and deciding on, the extent of a state's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?

The next in the enumeration, is a controversy between a state and the citizens of another state.

~~Can this case arise, if the state be not a party on the record? If it can, the question recurs, what degree of interest shall be sufficient to charge the parties, and arrest the proceedings against the individual? Controversies respecting boundary have lately existed between Virginia and Tennessee, between Kentucky and Tennessee, and now exist between New York and New Jersey. Suppose, while such a controversy is pending, the collecting officer of one state should seize property for taxes belonging to a man who supposes himself to reside in the other state, and who seeks redress in the Federal Court of that state in which the officer resides. The interest of the state is obvious. Yet it is admitted that in such a case the action would lie, because the officer might be treated as a trespasser, and the verdict and judgment against him would not act directly on the property of the state. That it would not so act, may, perhaps, depend on circumstances. The officer may retain the amount of the taxes in his hands, and, on the proceedings of the state against him, may plead in bar the judgment of a court of competent jurisdiction. [§54] If this plea ought to be sustained, and it is far from being certain that it ought not, the judgment so pleaded would have acted directly on the revenue of the state, in the hands of its officer. And yet the argument admits that the action, in such a case, would be sustained. But, suppose, in such a case, the party conceiving himself to be injured, instead of bringing an action sounding in damages, should sue for the specific thing, while yet in possession of the seizing officer. It being admitted, in argument, that the action sounding in damages would lie, we are unable to perceive the line of distinction between that and the action of detinue. Yet the latter action would claim the specific article seized for the tax, and would obtain it, should the seizure be deemed unlawful.~~

It would be tedious to pursue this part of the

inquiry farther, and it would be useless, because every person will perceive that the same reasoning is applicable to all the other enumerated controversies to which a state may be a party. The principle may be illustrated by a reference to those other controversies where jurisdiction depends on the party. But, before we review them, we will notice one where the nature of the controversy is, in some degree, blended with the character of the party.

~~But suppose a suit to be brought which affects the interest of a foreign minister, or by which the person of his secretary, or of his servant, is arrested. The minister does not, by the mere arrest of his secretary, or his servant, become a party to this suit, but the actual defendant pleads to the jurisdiction of the court, and asserts his privilege. If the suit affects a foreign minister, it must be dismissed, not because he is a party to it, but because it affects him. The language of the constitution in the two cases is different. This court can take cognizance of all cases "affecting" foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes, when the enumeration proceeds to states. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national courts jurisdiction over all cases by which they were in any manner affected. In the case of states, whose immediate or remote interest were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties.~~

In proceeding with the cases in which jurisdiction depends on the character of the party, the first in the enumeration is, "controversies to which the United States shall be a party."

Does this provision extend to the cases where the United States are not named in the record, but claim, and are actually entitled to, the whole subject in controversy?

Let us examine this question.

Suits brought by the Postmaster-General are [§ 56] for money due to the United States. The nominal plaintiff has no interest in the controversy, and the United States are the only real party. Yet these suits could not be instituted in the courts of the Union, under that clause which gives jurisdiction in all cases to which the United States are a party; and it was found necessary to give the court jurisdiction over them, as being cases arising under a law of the United States.

The judicial power of the Union is also extended to controversies between citizens of different states; and it has been decided that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is litigated, or of those who are parties on the record? In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest; but it has never been suspected that, if the executor be a resident of another state, the jurisdiction of the federal courts could be ousted

by the fact that the creditors or legatees were citizens of the same state with the opposite party. The universally received construction in this case is, that jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined, in which the existence of an interest out of the party on the record is more unequivocal than in that which has been just stated. Why, then, is it universally admitted that this interest in no manner affects the jurisdiction of the court? The plain and obvious answer is, because the jurisdiction of the court depends, not upon this interest, but upon the actual party on the record.

Were a state to be the sole legatee, it will not, we presume, be alleged that the jurisdiction of the court, in a suit against the executor, would be more affected by this fact than by the fact that any other person, not subje in the courts of the Union, was the sole legatee. Yet, in such a case, the court would decide directly and immediately on the interest of the state.

This principle might be further illustrated by showing that jurisdiction, where it depends on the character of the party, is never conferred in consequence of the existence of an interest in a party not named; and by showing that, under the distributive clause of the 2d section of the 3d article, the Supreme Court could never take original jurisdiction, in consequence of an interest in a party not named in the record.

But the principle seems too well established to require that more time should be devoted to it. It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, which restrains the jurisdiction granted by the constitution over suits against states, is, of necessity, limited to those suits in which a state is a party on the record. The amendment has its full effect, if the constitution be construed as it would have [§ 33] been construed, had the jurisdiction of the court never been extended to suits brought against a state, by the citizens of another state, or by aliens.

~~The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.~~

In pursuing the arrangement which the appellants have made for the argument of the cause, this question has already been considered. The responsibility of the officers of the state for the money taken out of the bank was admitted, and it was acknowledged that this responsibility might be enforced by the proper action. The objection is to its being enforced against the specific article taken, and by the decree of this court. But it has been shown, we think, that an action of detinue might be maintained for that article, if the bank has possessed the means of describing it, and that the

interest of the state would have been an obstacle to the suit of the bank against the individual in possession of it. The judgment in such a suit might have been enforced, had the article been found in possession of the individual defendant. It has been shown that the danger of its being parted with, of its being lost to the plaintiff, and the necessity of a discovery, justified the application to a court of equity. It [§ 39] was in a court of equity alone that the relief would be real, substantial and effective. The parties must certainly have a real interest in the case, since their personal responsibility is acknowledged, and, if denied, could be demonstrated.

It was proper, then, to make a decree against the defendants in the Circuit Court, if the law of the state of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which this suit was instituted.

7. Is that law unconstitutional?

This point was argued with great ability, and decided by this court, after mature and deliberate consideration, in the case of *McCulloch v. The State of Maryland*. A revision of that opinion has been requested; and many considerations combine to induce a review of it.

The foundation of the argument in favor of the right of a state to tax the bank, is laid in the supposed character of that institution. The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object.

~~If these premises were true, the conclusion drawn from them would be inevitable.~~ This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the state, as any individual would be; and the casual circumstance of its being "employed by the government in the transaction of its fiscal affairs," would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner. But the premises are not true. The bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the court, in the case of *McCulloch v. The State of Maryland*, is founded on, and sustained by, the idea that the bank is an instrument which is "necessary and proper for carrying into effect the powers vested in the government of the United States." It is not an instrument which the government found ready-made, and has supposed to be adapted to its purposes; but one which was created in the form in which it now appears, for national

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purposes only. It is, undoubtedly, capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage. The appellants endeavor to distinguish between this trade and its "agency" [§ 61] for the public, between its banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality, etc. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business.

If there be anything in this distinction, it would tend to show that so much of the act as incorporates the bank is constitutional, but so much of it as authorizes its banking operations is unconstitutional. Congress can make the inanimate body, and employ the machine as a depository of, and vehicle for, the conveyance of the treasure of the nation, if it be capable of being so employed, but cannot breathe into it the vital spirit which alone can bring it into useful existence.

Let this distinction be considered.

Why is it that Congress can incorporate or create a bank? This question was answered in the case of *McCulloch v. The State of Maryland*. It is an instrument which is "necessary and proper" for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money which is conferred by its charter? If it can, if it be as competent to the purposes of government without, as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. It is, in that view of the subject, "the vital part of the corporation: it is [§ 62] its soul; and the right to preserve it originates in the same principle with the right to preserve the skeleton or body which it animates. The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute.

This distinction, then, has no real existence. To tax its faculties, its trade and occupation, is to tax the bank itself. To destroy or preserve the one, is to destroy or preserve the other.

It is urged, that Congress has not, by this act of incorporation, created the faculty of trading in money; that it had anterior existence, and may be carried on by a private individual, or company, as well as by a corporation. As this profession or business may be taxed, regulated, or restrained, when conducted by an individual, it may likewise be taxed, regulated, or restrained, when conducted by a corporation.

The general correctness of these propositions need not be controverted. Their particular application to the question before the court is

alone to be considered. We do not maintain that the corporate character of the bank exempts its operations from the action of state authority. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties. The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character, as national instruments. The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially.

Were the Secretary of the Treasury to be authorized, by law, to appoint agencies throughout the Union, to perform the public functions of the bank, and to be endowed with its faculties, as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the states as the bank, and not more so. If, instead of the Secretary of the Treasury, a distinct office were to be created for the purpose, filled by a person who should receive, as a compensation for his time, labor, and expense, the profits of the banking business, instead of other emoluments, to be drawn from the treasury, which banking business was essential to the operations of the government, would each state in the Union possess a right to control these operations? The question on which this right would depend must always be, are these faculties so essential to the fiscal operations of the government, as to authorize Congress to confer them? Let this be admitted, and the question, does the right to preserve them exist, must always be answered in the affirmative.

Congress was of opinion that these faculties were necessary to enable the bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of the national legislature. But, were it not to undergo revision, who would have the hardihood to say, that, without the employment of a banking capital, those services could be performed? That the exercise of these faculties greatly facilitates the fiscal operations of the government, is too obvious for controversy; and who will venture to affirm that the suppression of them would not materially affect those operations, and essentially impair, if not totally destroy, the utility of the machine to the government? The currency which it circulates, by means of its trade with individuals, is believed to make it a more fit instrument for the purposes of government than it could otherwise be; and, if this be true, the capacity to carry on this trade is a faculty indispensable to the character and objects of the institution.

The appellants admit that, if this faculty be necessary, to make the bank a fit instrument

for the purposes of the government, Congress possesses the same power to protect the machine in this, as in its direct fiscal operations; but they deny that it is necessary to those purposes, and insist that it is granted solely for the benefit of the members of the corporation. Were this proposition to be admitted, all the consequences which are drawn from it might follow. But it is not admitted. The court has already stated its conviction that, without this capacity to trade with individuals, the bank would be a very defective instrument, when considered with a single view to its fitness for the purposes of government. On this point the whole argument rests.

It is contended that, admitting Congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and, not being expressed, ought not to be implied by the court.

It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from state control, which is said to be so objectionable in this instance. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted, that all who are employed in them, are protected, while in the line of duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which these institutions are created, and is secured to the individuals employed in them, by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security.

That department has no will, in any case. If the sound construction of the act be, that it exempt the trade of the bank, as being essential to the character of a machine necessary to the fiscal operations of the government, from the control of the states, courts are as much bound to give it that construction as if the exemption had been established in express terms. Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.

The appellants rely greatly on the distinction between the bank and the public institutions, such as the mint or the post-office. The agents in those offices are, it is said, officers of government, and are excluded from a seat in Congress. Not so the directors of the bank. The connection of the government with the bank, is likened to that with contractors.

It will not be contended that the directors, or other officers of the bank, are officers of government. But it is contended, that, were their resemblance to contractors more perfect than it is, the right of the state to control its operations, if those operations be necessary to its character, as a machine employed by the government, cannot be maintained. Can a contractor, for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true, that the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under state control.

If the trade of the bank be essential to its character as a machine for the fiscal operations of the government, that trade must be as exempt from state control as the actual conveyance of the public money. Indeed, a tax bears upon the whole machine; as well upon the faculty of collecting and transmitting the money of the nation, as on that of discounting the notes of individuals. No distinction is taken between them.

~~Concerning the character of carrying on the~~ trade of banking, as an important feature in the character of this corporation, which was necessary to make it a fit instrument for the objects for which it was created, the court adheres to its decision in the case of *McCulloch v. State of Maryland*, and is of opinion that the act of the state of Ohio, which is certainly much more objectionable than that of the state of Maryland, is repugnant to a law of the United States, made in pursuance of the constitution, and, therefore, void. The counsel for the appellants are too intelligent, and have too much self-respect, to pretend that a void act can afford any protection to the officers who execute it. They expressly admit that it cannot.

It being then shown, we think conclusively, that the defendants could derive neither authority nor protection from the act which they executed, and that this suit is not against the state of Ohio within the view of the constitution, the state being no party on the record, the only real question in the cause is, whether the record contains sufficient matter to justify the court in pronouncing a decree against the defendants? That this question is attended with great difficulty, has not been concealed or denied. But when we reflect that the defendants, Osborne and Harper, are incontestably liable for the full amount of the money taken out of the bank; that the defendant, Currie, is also responsible for the sum received by him, it having come to his hands with full knowledge of the unlawful means by which it was acquired; that the defendant, Sullivan, is also responsible for the sum specifically delivered to him, with notice that it was the property of the bank, unless the form of having made an entry on the books of the treasury can countervail the fact, that it was, in truth, kept untouched, in a trunk, by itself, as a deposit, to await

the event of the pending suit respect- [*309 ing it; we may lay it down as a proposition, safely to be affirmed, that all the defendants in the cause were liable in an action at law for the amount of this decree. If the original injunction was properly awarded, for the reasons stated in the preceding part of this opinion, the money, having reached the hands of all those to whom it afterwards came with notice of that injunction, might be pursued, so long as it remained a distinct deposit, neither mixed with the money of the treasury, nor put into circulation. Were it to be admitted that the original injunction was not properly awarded, still the amended and supplemental bill, which brings before the court all the parties who had been concerned in the transaction, was filed after the cause of action had completely accrued. The money of the bank had been taken, without authority, by some of the defendants, and was detained by the only person who was not an original wrong-doer, in a specific form: so that detinue might have been maintained for it, had it been in the power of the bank to prove the facts which are necessary to establish the identity of the property sued for. Under such circumstances, we think, a court of equity may afford its aid, on the ground that a discovery is necessary, and also on the same principle that an injunction issues to restrain a person who has fraudulently obtained possession of negotiable notes, from putting them into circulation; or a person having the apparent ownership of stock really belonging to another, from transferring it. The suit, then, might be as well sustained in a court of equity as in a court of law, and the [*370 objection that the interests of the state are committed to subordinate agents, if true, is the unavoidable consequence of exemption from being sued—of sovereignty. The interests of the United States are sometimes committed to subordinate agents. It was the case in *Hoyt v. Geiston*, in the case of *The Apollon*, and in the case of *Doidridge's Lessee v. Thompson and Wright*, and in many others. An independent foreign sovereign cannot be sued, and does not appear in court. But a friend of the court comes in, and, by suggestion, gives it to understand that his interests are involved in the controversy. The interests of the sovereign, in such a case, and in every other where he chooses to assert them under the name of the real party to the cause, are as well defended as if he were a party to the record. But his pretensions, where they are not well founded, cannot arrest the right of a party having a right to the thing for which he sues. Where the right is in the plaintiff, and the possession in the defendant, the inquiry cannot be stopped by the mere assertion of title in a sovereign. The court must proceed to investigate the assertion, and examine the title. In the case at bar, the tribunal established by the constitution, for the purpose of deciding, ultimately, in all cases of this description, had solemnly determined, that a state law imposing a tax on the bank of the United States, was unconstitutional and void, before the wrong was committed for which this suit was brought.

We think, then, that there is no error in the decree of the Circuit Court for the [*371 district of Ohio, so far as it directs restitution

of the specific sum of \$95,000, which was taken out of the bank unlawfully, and was in the possession of the defendant, Samuel Sullivan, when the injunction was awarded, in September, 1820, to restrain him from paying it away, or in any manner using it; and so far as it directs the payment of the remaining sum of \$2,000, by the defendants, Ralph Osborne and John L. Harper; but that the same is erroneous, so far as respects the interest on the coin, part of the said \$95,000, it being the opinion of this court, that, while the parties were restrained by the authority of the Circuit Court from using it, they ought not to be charged with interest. The decree of the Circuit Court for the district of Ohio is affirmed, as to the said sums of \$95,000 and \$2,000; and reversed, as to the residue.

Mr. Justice Johnson. The argument in this cause presents three questions: (1) Has Congress granted to the Bank of the United States an unlimited right of suing in the courts of the United States? (2) Could Congress constitutionally grant such a right? and (3) Has the power of the courts been legally and constitutionally exercised in this suit.

I have very little doubt that the public mind will be easily reconciled to the decision of the court here rendered; for, whether necessary or unnecessary originally, a state of things has now grown up, in some of the states, which [872] renders all the protection necessary, that the general government can give to this bank. The policy of the decision is obvious, that is, if the bank is to be sustained; and few will bestow upon its legal correctness, the reflection that it is necessary to test it by the constitution and laws under which it is rendered.

The Bank of the United States is now identified with the administration of the national government. It is an immense machine, economically and beneficially applied to the fiscal transactions of the nation. Attempts have been made to dispense with it, and they have failed; serious and very weighty doubts have been entertained of its constitutionality, but they have been abandoned; and it is now become the functionary that collects, the depository that holds, the vehicle that transports, the guard that protects, and the agent that distributes and pays away, the millions that pass annually through the national treasury; and all this, not only without expense to the government, but after paying a large bonus, and sustaining actual annual losses to a large amount; furnishing the only possible means of embodying the most ample security for so immense a charge.

Had its effects, however, and the views of its framers, been confined exclusively to its fiscal uses, it is more than probable that this suit, and the laws in which it originated, would never have had existence. But it is well known, that with that object was combined another, of a very general and not less important character.

The expiration of the charter of the former bank led to state creations of banks; each new [873] bank increased the facilities of creating others; and the necessities of the general government, both to make use of the state banks for their deposits, and to borrow largely of all who would lend to them, produced that rage

for multiplying banks, which, aided by the emoluments derived to the states in their creation, and the many individual incentives which they developed, soon inundated the country with a new description of bills of credit, against which it was obvious that the provisions of the constitution opposed no adequate inhibition.

A specie-paying bank, with an overwhelming capital, and the whole aid of the government deposits, presented the only resource to which the government could resort, to restore that power over the currency of the country, which the framers of the constitution evidently intended to give to Congress alone. But this necessarily involved a restraint upon individual cupidity, and the exercise of a state power; and, in the nature of things, it was hardly possible for the mighty effort necessary to put down an evil spread so wide, and arrived to such maturity, to be made without embodying against it an immense moneyed combination, which could not fail of making its influence to be felt, wherever its claimants could reach or its industry and wealth be brought to operate.

I believe that the good sense of a people, who know that they govern themselves, and feel that they have no interests distinct from those of their government, would readily concede to the bank, thus circumstanced, some, if not all the rights here contended for. But I [874] cannot persuade myself that they have been conceded in the extent which this decision affirms. Whatever might be proper to be done by an amendment of the constitution, this court is only, at present, expounding its existing provisions.

In the present instance, I cannot persuade myself that the constitution sanctions the vesting of the right of action in this bank, in cases in which the privilege is exclusively personal, or in any case, merely on the ground that a question might possibly be raised in it, involving the constitution, or constitutionality of a law of the United States.

~~When laws were heretofore passed for raising a revenue by a duty on stamped paper, the tax was quietly acquiesced in, notwithstanding it entrenched so closely on the unquestionable power of the states over the law of contracts, but had the same law which declared void contracts not written upon stamped paper, declared that every person holding such paper should be entitled to bring his action "in any circuit court" of the United States, it is confidently believed that there could have been but one opinion on the constitutionality of such a provision. The whole jurisdiction over contracts might thus have been taken from the state courts, and conferred upon those of the United States. Nor would the evil have rested there; by a similar exercise of power, imposing a stamp on deeds generally, jurisdiction over the territory of the state, whoever might be parties, even between citizens of the same state—jurisdiction of suits instituted for the recovery of legacies or distributive [875] portions of intestates' estates—jurisdiction, in fact, over almost every possible case might be transferred to the courts of the United States. Wills may be required to be executed on stamped paper; taxes may be, and have been, imposed upon legacies and distributions; and, in all such cases, there is not only a possibility~~

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but a probability, that a question may arise, involving the constitutionality, construction, etc., of a law of the United States. If the circumstance that the questions which the case involves are to determine its character, whether those questions be made in the case or not, then every case here alluded to, may as well be transferred to the jurisdiction of the United States, as those to which this bank is a party. But still farther, as was justly insisted in argument, there is not a tract of land in the United States, acquired under laws of the United States, whatever be the number of mesne transfers that it may have undergone, over which the jurisdiction of the courts of the United States might not be extended by Congress, upon the very principle on which the right of suit in this bank is here maintained. Nor is the case of the alien, put in argument, at all inapplicable. The one acquires its character of individual property, as the other does its political existence, under a law of the United States; and there is not a suit which may be instituted to recover the one, nor an action of ejectment to be brought by the other, in which a right acquired under a law of the United States does not lie as essentially at the basis of the right of action, as in the suits brought by this bank. §70.] It is no answer to the argument, to say that the law of the United States is but ancillary to the constitution, as to the alien; for the constitution could do nothing for him without the law; and, whether the question be upon law or constitution, still if the possibility of its arising be a sufficient circumstance to bring it within the jurisdiction of the United States courts, that possibility exists with regard to every suit affected by alien disabilities; to real actions in time of peace—to all actions in time of war.

I cannot persuade myself, then, that, with these palpable consequences in view, Congress ever could have intended to vest in the Bank of the United States the right of suit to the extent here claimed. And, notwithstanding the confidence with which this point has been argued, an examination of the terms of the act, and a consideration of them with a view to the context, will be found to leave it by no means a clear case, that such is the legal meaning of the act of incorporation. To be sure, if the act had simply and substantively given the right "to sue and be sued in the circuit courts of the United States," there could have been no question made upon the construction of those words. But such is not the fact. The words are, not that the bank shall be made able and capable in law, to sue, etc., but that it shall, "by a certain name," be made able and capable in law to do the various acts therein enumerated. And these words, under the force of which this suit is instituted, are found in the ordinary incorporating clause of this act, a §77] clause "which is well understood to be, and which this court, in the case of Deveaux, has recognized to be, little more than the mere common place or formula of such an act. The name of a corporation is the symbol of its personal existence; a misnomer there is fatal to a suit (and still more fatal as to other transactions). By the incorporating clause, a name is given it, and, with that name, a place among created beings; then usually follows an enu-

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meration of the ordinary acts in which it may personate a natural man; and among those acts, the right to sue and be sued, of which the court, in Deveaux's case, very correctly remarks, that it is "a power which, if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear as a corporation in any court which would by law have cognizance of the cause if brought by individuals." With this qualification, the clause in question will be construed as an enumeration of incidents, instead of a string of enactments; and such a construction is strongly countenanced by the concluding sentence of the section; for, after running through the whole routine of powers, most of which are unquestionably incidental, and needed no enactment to vest them, it concludes thus: "and generally to do and execute all and singular the acts, matters, and things, which to them it shall and may appertain to do." And, in going over the act, it will be found, that whenever it is contemplated to vest a power not incidental, it is done by a specific provision, made the subject of a distinct clause; [§79 such is that power to transact the business of the loan-office of the United States. And, indeed, there is one section of the act which strikingly exhibits the light in which the law-makers considered the incorporating clause. I mean the tenth; which, notwithstanding that the same clause in the seventh section, which is supposed to confer this sweeping power to sue, confers also, in terms equally comprehensive, the power to make laws for the institution, and "to do and execute all and singular the matters and things, which to them it shall and may appertain to do," contains an enactment in the following words: "That they shall have power to appoint such officers, clerks and servants, under them, for executing the business of the corporation, and to allow them such compensation for their services, respectively, as shall be reasonable; and shall be capable of exercising such other powers and authorities for the well governing and ordering the officers of the said corporation, as shall be prescribed by the laws, regulations and ordinances of the same;" a section which would have been altogether unnecessary had the seventh section been considered as enacting, instead of enumerating and limiting. I consider the incorporating clause, then, not as purporting the absolute investment of any power, but as the usual and formal declaration of the extent to which this artificial should personate the natural person, in the transactions incident to ordinary life, or to the peculiar objects of its creation; and, therefore, not vesting the right to sue in the courts of the United States, but only the right of [§70 personating the natural man in the courts of the United States, as it might, upon general principles, in any other courts of competent jurisdiction. And this, I say, is consonant to the decision in Deveaux's case, and sustained by abundant evidence on the face of the act itself. Indeed, any other view of the effect of the section converts some of its provisions into absolute nonsense.

It has been argued, and I have no objection to admit, that the phraseology of this act has

been varied from that incorporating the former bank, with a view to meet the decision in Deveaux's case. ~~But it is perfectly obvious that~~ in the prosecution of that design, the purport of Deveaux's case has been misapprehended. ~~The court there decide that the jurisdiction of the United States depended, (1) on the character of the cause; (2) on the character of the parties;~~ that the judiciary act confined the jurisdiction of the circuit courts to the second class of cases, and the incorporating act contained no words that purported to carry it further. Whether the legislative power of the United States could extend it as far as is here insisted on, or what words would be adequate to that purpose, the case neither called on the court to decide, nor has it proposed to decide. If anything is to be inferred from that decision on those points, it is unfavorable to the sufficiency of the words inserted in the present act. For, the argument of the court intimates that where the legislature propose to give jurisdiction to the courts (830*) of the United States, they do "it by a separate provision, as in the case of the action of debt for exceeding the sum authorized to be loaned. And on the words of the incorporating section, it makes this remark, "that it is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear as a corporation in any court, which would by law have cognizance of the cause if brought by individuals. If jurisdiction is given by this clause to the federal courts, it is equally given to all courts having original jurisdiction, and for all sums, however small they be." Now, the difference of phraseology between the former act and the present, in the clause in question, is this: the former has these words, "may sue and be sued, etc., in courts of record or any other place whatsoever;" the present act has substituted these words, "in all state courts having competent jurisdiction, and in any circuit court of the United States." Now, the defect here could not have been the want of adequate words, had the intent appeared to have been, to enlarge the jurisdiction of any particular court. For, if the circuit courts were courts of record, the right of suit given was as full as any other words could have made it. But, as the court in its own words assigns the ground of its decision, the clause could not have been intended to enlarge the jurisdiction of the state courts, and therefore could not have been intended to enlarge that of the federal courts, much less to have extended it to the smallest sum possible. Therefore it concludes, that the clause is one (831*) of mere enumeration, containing, "as it expresses it, "the powers which, if not incident to a corporation, are conferred by every incorporating act, and are not understood to enlarge," etc. If, then, this variation had in view the object which is attributed to it, the words intended to answer that object have been inserted so unhappily as to neutralize its influence; but I think it much more consistent with the respect due to the draftsman, who was known to have been an able lawyer, to believe that, with such an object in view, he would have pursued a much more plain and obvious course, and given it a distinct and unequivocal section to itself, or at least have worded it with

more marked attention. This opinion is further supported, by considering the absurdities that a contrary opinion would lead to.

A literal translation of the words in question is impossible. Nothing but inconsistencies present themselves, if we attempt to apply it without a reference to the laws and constitution of the United States, forming together the judicial system of the Union. The words are, "may sue and be sued, etc., in any state court having competent jurisdiction, and in any circuit court of the United States." But why should one member of the passage be entitled to an enacting effect, and not the residue? Yet, who will impute to the legislature or the draftsman, an intention to vest a jurisdiction by these words in a state court? I do not speak of the positive effect; since the failure of one enactment, because of a want either of power to give or capacity to receive, will not control the effect as to any other enactment. I speak of the intent or understanding of the law-maker, who must have used these words, as applicable to the state courts, in an enacting sense, if we suppose him to have used them in that sense, as to the courts of the United States. Yet I should be very unwilling to impute to him, or to the legislature of the country, ignorance of the fact that such an enactment, if it was one, could not give a right to sue in the state courts, if the right did not exist without it. Or, in fact, that such enactment was altogether unnecessary, if the legislative power, which must give effect to such an enactment, was adequate to constitute effectually this body corporate.

But why should this supposed enactment go still farther, and confer the capacity to be sued, as well as to sue, either in the courts of the one jurisdiction or the other? Did the law-givers suppose that this corporation would not be subject to suit, without an express enactment for that purpose also? Or was it guilty of the more unaccountable mistake, of supposing that it could confer upon individuals, indiscriminately, this privilege of bringing suits in the courts of the United States against the bank? that, too, for a cause of action originating, say, in work and labor, or in a special action on the case, or perhaps, ejectment to try title to land mortgaged by a person not having the estate in him, or purchased of a tortious holder for a banking-house? I cannot acquiesce in the supposition; and yet, if one is an enactment, and takes effect as such, (833*) they are all enactments, for they are uttered eodem statu.

My own conclusion is, that none of them are enactments, but all merely declaratory; or, at most, only enacting, in the words of the court, in the case of Deveaux, that the bank may, by its corporate name and metaphysical existence bring suit, or personate the natural man, in the courts specified, as though it were in fact a natural person; that is, in those cases in which, according to existing laws, suits may be brought in the courts specified respectively.

Indeed, a more unrestricted sense given to the words of the act, could not be carried into execution; a literal exercise of the right of suit, supposed to be granted, would be impossible. Can the Bank of the United States be sued (in the literal language of the act) "in any circuit
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court of the United States!" in that of Ohio, or Louisiana, for instance? Locality, in this respect, cannot be denied to such an institution; or, at least, it is only incidentally, by distress infinite, or attachment, for instance, that such a suit could be maintained. Nor, on the other hand, could the bank sue literally in any circuit court of the United States. It must, of necessity, be confined to the Circuit Court of that district in which the defendants resides, or is to be found. And thus, at last, we circumscribe these general words, by reference to the judicial system of the United States, as it existed at the time. And why the same restriction should not have been imposed as to amount, which is imposed as to all other suits—\$500 ors, "to wit, \$500 and upwards, is to me inscrutable, except on the supposition that this clause was not intended for any other purpose than that which I have supposed. The United States have suffered no other suitors to institute a suit in its courts for less than that sum, and it is hard to conceive why the bank should be permitted to institute a suit to recover, if it will, a single cent. This consideration is expressly drawn into notice by this court, in the case of *Devenux*, and if it was entitled to weight then, in fixing the construction of the incorporating section, I see no reason why it should be unnoticed now.

I will dwell no longer on a point which is in fact secondary and subordinate; for if Congress can vest this jurisdiction, and the people will it, the act may be amended, and the jurisdiction vested. I next proceed to consider, more distinctly, the constitutional question on the right to vest the jurisdiction to the extent here contended for.

And here I must observe, that I altogether misunderstood the counsel who argued the cause for the plaintiff in error, if any of them contended against the jurisdiction, on the ground that the cause involved questions depending on general principles. No one can question that the court which has jurisdiction of the principal question, must exercise jurisdiction over every question. Neither did I understand them as denying that, if Congress could confer on the circuit courts appellate, they could confer original jurisdiction. The argument went to deny the right to assume jurisdiction on a mere hypothesis. It was one §33*) of "description, identity, definition; they contended that, until a question involving the construction or administration of the laws of the United States did actually arise, the *casus fœderis* was not presented, on which the constitution authorized the government to take to itself the jurisdiction of the cause. That until such a question actually arose, until such a case was actually presented, non constat, but the cause depended upon general principles, exclusively cognizable in the state courts; that neither the letter nor the spirit of the constitution sanctioned the assumption of jurisdiction on the part of the United States at any previous stage.

And this doctrine has my hearty concurrence in its general application. A very simple case may be stated to illustrate its bearing on the question of jurisdiction between the two governments. By virtue of treaties with Great Britain, aliens holding lands were exempted

from alien disabilities, and made capable of holding, aliening, and transmitting their estates, in common with natives. But why should the claimants of such lands, to all eternity, be vested with the privilege of bringing an original suit in the courts of the United States? It is true, a question might be made, upon the effect of the treaty, on the rights claimed by or through the alien; but until that question does arise, nay, until a decision against the right takes place, what end has the United States to subscribe in claiming jurisdiction of the cause? Such is the present law of the United States, as to all but this one distinguished party; and that law was passed "when the doctrines, the views and [§36] ends of the constitution, were, at least, as well understood as they are at present. I attach much importance to the 25th section of the judiciary act, not only as a measure of policy, but as a contemporaneous exposition of the constitution on this subject; as an exposition of the words of the constitution, deduced from a knowledge of its views and policy. The object was, to secure a uniform construction and a steady execution of the laws of the Union. Except as far as this purpose might require, the general government had no interest in stripping the state courts of their jurisdiction; their policy would rather lead to avoid encumbering themselves with it. Why, then, should it be vested with jurisdiction in a thousand causes, on a mere possibility of a question arising, which question, at last, does not occur in one of them? Indeed, I cannot perceive how such a reach of jurisdiction can be asserted, without changing the reading of the constitution on this subject altogether. The judicial power extends only to "cases arising," that is, actual, not potential cases. The framers of the constitution knew better than to trust such a *quo minus* fiction in the hands of any government.

~~I have never understood anyone to question the right of Congress to vest original jurisdiction in its inferior courts, in cases coming properly, within the description of "cases arising under the laws of the United States," but surely, it must first be ascertained, in some proper mode, that the cases are such as the constitution describes. By possibility, a constitutional question may be raised in "any conceivable suit that may be instituted; but that would be a very insufficient ground for assuming universal jurisdiction; and yet, that a question has been made, as that, for instance, on the bank charter, and may again be made, seems still worse, as a ground for extending jurisdiction. For the folly of raising it again, in every suit instituted by the bank, is too great to suppose it possible. Yet this supposition, and this alone, would seem to justify vesting the bank with an unlimited right to sue in the federal courts. Indeed, I cannot perceive how, with ordinary correctness, a question can be said to be involved in a cause, which only may possibly be made, but which, in fact, is the very last question that there is any probability will be made; or rather, how that can any longer be denominated a question, which has been put out of existence by a solemn decision. The constitution presumes that the decisions of~~

the supreme tribunal will be acquiesced in; and after disposing of the few questions which the constitution refers to it, all the minor questions belong properly to the state jurisdictions, and never were intended to be taken away in mass.

Efforts have been made to fix the precise sense of the constitution, when it vests jurisdiction in the general government, in "cases arising under the laws of the United States." To me, the question appears susceptible of a very simple solution; that all depends upon the identity of the case supposed; according to which idea, a case may be such in its very existence, or it may become such in its progress. An action may "live, move, and have SSS" its being," in a law of the United States; such is that given for the violation of a patent-right, and four or five different actions given by this act of incorporation; particularly that against the president and directors for over-issuing; in all of which cases the plaintiff must count upon the law itself as the ground of his action. And of the other description, would have been an action of trespass, in this case, had remedy been sought for an actual levy of the tax imposed. Such was the case of the former Bank v. Deveaux, and many others that have occurred in this court, in which the suit, in its form, was such as occur in ordinary cases, but in which the pleadings or evidence raised the question on the law or constitution of the United States. In this class of cases, the occurrence of a question makes the case, and transfers it, as provided for under the twenty-fifth section of the judiciary act, to the jurisdiction of the United States. And this appears to me to present the only sound and practical construction of the constitution on this subject; for no other cases does it regard as necessary to place under the control of the general government. It is only when the case exhibits one or the other of these characteristics, that it is acted upon by the constitution. Where no question is raised, there can be no contrariety of construction; and what else had the constitution to guard against? As to cases of the first description ex necessitate rei, the courts of the United States must be susceptible of original jurisdiction; and as to all other cases, I should hold them, also, susceptible of original jurisdiction, S89] if it were practicable, "in the nature of things, to make out the definition of the case, so as to bring it under the constitution judicially, upon an original suit. But until the plaintiff can control the defendant in his pleadings, I see no practical mode of determining when the case does occur, otherwise than by permitting the cause to advance until the case for which the constitution provides shall actually arise. If it never occurs, there can be nothing to complain of; and such are the provisions of the twenty-fifth section. The cause might be transferred to the Circuit Court before an adjudication takes place; but I can perceive no earlier stage at which it can possibly be predicated of such a case, that it is one within the constitution; nor any possible necessity for transferring it then, or until the court has acted upon it to the prejudice of the claims of the United States. It is not, therefore, because Congress may not vest an original

jurisdiction, where they can constitutionally vest in the circuit courts appellate jurisdiction, that I object to this general grant of the right to sue; but, because that the peculiar nature of this jurisdiction is such as to render it impossible to exercise it in a strictly original form, and because the principle of a possible occurrence of a question as a ground of jurisdiction, is transcending the bounds of the constitution, and placing it on a ground which will admit of an enormous accession, if not an unlimited assumption, of jurisdiction.

But, dismissing the question of possibility, which, I must think, would embrace every other case as well as those to which this bank is a party, in what sense can it be predicated of this case, that it is one arising under a law of the United States? It cannot be denied that jurisdiction of this suit in equity could not be entertained, unless the court could have had jurisdiction of the action of trespass, which this injunction was intended to anticipate. And, in fact, there is no question that the bank here maintains that the right to sue extends to common trespass, as well as to contracts, or any other cause of action. But suppose trespass in the common form instituted; the declaration is general, and the defendant pleads not guilty, and goes to trial. Where is the feature in such a cause that can give the court jurisdiction? What question arises under a law of the United States? or what question that must not be decided exclusively upon the lex loci, upon state laws? Take also the case of a contract, and in what sense can it be correctly predicated of that, that in common with every other act of the bank, it arises out of the law that incorporates it? May it not with equal propriety be asserted that all the crimes and all the controversies of mankind, arise out of the fiat that called their progenitor into existence. It is not because man was created, that he commits a trespass, or incurs a debt; but because, being induced with certain faculties and propensities, he is led by an appropriate motive to the one action or the other. Sound philosophy attributes effects to their proximate causes. It is but pursuing the grade of creation from one step to another, to deduce the acts of this bank from state law, or even divine law, with as much correctness as from the law of its immediate creation. Its contracts arise under its own acts, and not under a law of the United States; so far from it, indeed, that their effect, their construction, their limitation, their conception, are all the creatures of the respective state laws in which they originate. There is a satisfactory illustration of the distinction between contracts which draw their existence from statutes, and those which originate in the acts of man, afforded by this act of incorporation itself. It will be unnecessary to look beyond it. The action of debt before alluded to, given by the ninth clause of the seventh section, against the directors, to anyone who will sue, is one of those factitious or statute contracts which exist in, and expire with, the statute that creates it. Not so with the ordinary contracts of the bank; upon the expiration of the charter, they would be placed in the state of the credits of an intestate before administration; there is no one to sue for them; but the moral obli-

tion would remain, and a court of equity would enforce it against their debtors, at the suit of the individual stockholders. Nor would this be on the principle of contracts executed under power of attorney; for, the law applicable to principals would govern every question in such causes. All the acts of the corporation are executed in their own right, and not in the right of another. A personal existence, with all its incidents, is given to them, and it is in right of that existence that they are capable of acting, and do act.

Nor, indeed, in another point of view, is it strictly predicable of this bank, that its acts (§92*) arise "out of, because its existence is drawn from, a law of the United States. It is because it is incorporated, not because incorporated by a law of the United States, that it is made capable of exercising certain powers incidentally, and of being vested with others expressly. The same effects would follow, if incorporated by any other competent legislative power. The law of the United States creates the bank, and the common law, or state law more properly, takes it up and makes it what it is. Who can deny, that in many points the incidents to such an institution may vary in different states, although its existence be derived from the general government? It is the case with a natural alien, when adopted into the national family. His rights, duties, powers, etc., receive always a shade from the *lex loci* of the state in which he fixes his domicile.

If the right to sue could be vested at all in the bank, it is obvious that it must have been for one or more of three causes: (1) That a law of the United States incorporated it; (2) that a law of the United States vested in it the power to sue; or (3) that the power to defend itself from trespasses as applicable to this case strictly, or to contract debts as applicable to the Georgia case, was conferred on it by a law of the United States expressly.

The first I have considered. On the second, no one would have the hardihood to contend that such a grant has any efficacy, unless the suits come within the description of cases arising under a law of the United States, (§93*) independently of the "grant of the right to sue; and it only remains to add a few more remarks on the third ground.

Of the power to repel trespasses, and to enter into contracts, as mere incidents to its creation, I trust I have shown that neither comes within the description of a case arising under a law of the United States. But where will we find, in the law in question, any express grant of power relative to either! The contracts on which the Georgia case is founded, are declared on as common promissory notes, payable to bearer. Now, as mere incidents, I have no doubt of an action being sustainable in a state court in both cases. But if an express grant is relied on, as bringing this, or the case of a contract, within the description of "a case arising under a law of the United States," then I look through the law in vain for any express grant, either to make the contract or repel the trespass. It is true, the sweeping terms with which the incorporating section concludes, import, that "by that name it shall and may be lawful for the bank to do and execute all and

singular the acts, matters and things, which to them it shall and may appertain to do." But this contains no grant of either, since the inquiry, at last, must be into the incidents of such an institution, and, as incidents, they needed not these words to sustain them; nor could those words give any more force to the right. So that, at last, we are referred to the mere fact of its corporate existence, for the basis of either of the actions, or either of the powers here insisted on, as bringing this cause within the constitutional definition. Having a legal "existence as an incorporated" (§94*) banking institution, it has a right to security in its possessions, and to the performance of its contracts; but that right will be precisely the same, if incorporated by a state law, or even, as was held in the case of *Terrett v. Taylor*, if having a common law corporate existence. The common law, or the state law, is referred to by the law of the United States, as the source of these incidents, when it speaks of the acts which are appurtenant to it; and I know of no other law that can define them, or confer them as incidents. Suppose a naturalization act passed, which, after specifying the terms and conditions upon which an alien shall become a citizen, proceeds to declare, "that, as a citizen, he shall lawfully do and execute all and singular the acts, matters and things, which to 'a citizen,' or 'to him as a citizen,' it shall and may appertain to do." would not these words be a mere nullity? His new existence, and the relations with the society into which he is introduced, that grow out of that connection, give him the right to defend his property or his existence (as in this case), and to enter into and enforce those contracts which, as an alien, he would have been precluded from. He was no more a citizen, without an act of Congress, than this was a bank. Finally, after the most attentive consideration of this cause, I cannot help thinking that this idea of taking jurisdiction upon a hypothesis, or even of assuming original, unlimited jurisdiction, of all "questions" arising under a law of the United States, involves some striking inconsistencies. A court may take cognizance of a question "in a cause," (§95*) and enter a judgment upon it, and yet not have jurisdiction of the cause itself. Such are all questions of jurisdiction, of which every court, however limited its jurisdiction, must have cognizance in every cause brought before it. So, also, I see not why, upon the same principle, a law expressly violating the constitution, may not be made the groundwork of a transfer of jurisdiction. Cases may arise, and would arise, under such a law; and if the simple existence, or possibility of such a case, is a sufficient ground of jurisdiction, and that ground sufficient to transfer the whole case to the federal judiciary, the least that can be said of it is, that it was not a case within the mischief intended to be obviated by the constitution. I shall say no more on this subject, but proceed to one which also acts forcibly on my judgment in forming my opinion in this cause.

I will not undertake to define the limits within which the discretion of the legislature of the Union may range, in the adoption of

measures for executing their constitutional powers. It is very possible, that in the choice of means as "proper and necessary" to carry their powers into effect, they may have assumed a latitude not foreseen at the adoption of the constitution. For example, in order to collect a stamp duty, they have exercised a power over the general law of contracts; in order to secure debts due the United States, they have controlled the state laws of estates of deceased persons and of insolvents' estates; in the distributions and the powers of individuals themselves, when insolvent, in the assignment of §96] their own estates; in the exercise of various powers, they have taken jurisdiction over crimes which the state laws took cognizance of; and all this, being within the range of their discretion, is also from judicial control, while unaffectedly exercised for the purposes of the constitution. Nor, indeed, is there much to be alarmed at in it, while the same people who govern the states, and, where they will, control the legislature of the United States.

Yet, certainly, there is one limit to this chain of implied powers, which must lie beyond the reach of legislative discretion. No one branch of the general government can remodel the constitutional structure of the other.

Much stress was laid, in the argument, upon the necessity of giving co-ordinate extent to the several departments of a government; but it was altogether unnecessary to bring this consideration into the present case. As a ground of policy, this is not its proper place; and as a ground of construction, it must be needless, when applied to the constitution in which the judicial power so very far transcends both the others, in its acknowledged limits.

~~The power of every government~~ should possess the means of protecting itself; that is, of constraining and enforcing its own laws. But this is not the half of the extent of the judicial power of the Union. Its most interesting province is to enforce the equal administration of laws, and systems of laws, over which the legislative power can exercise no control. And thus, the judicial power is §97] distributed into the two classes: (1) That which is defined by the circumstances of the case; and (2) that which depends upon the circumstances of the person. On the first, I have endeavored to show, that the end is adequately effected by the provisions of the 25th section of the judiciary act, and, practically, can be exercised in no other way. But with regard to the second class, the argument turns against the United States; and every reason that may be urged in favor of eking out the jurisdiction in the first class of cases, reacts forcibly to confine the jurisdiction strictly within its constitutional limits, as to the second class. When the alien, or the citizen of another state, or the grants of another state, are implicated, the state courts open their tribunals to the judiciary of the United States, and recognize their power as co-ordinate. Their citizens, their territory, their laws, all are subjected to a power quite foreign to the states, and judicial power is literally poured out upon the courts of the Union, without stint.

How interesting, then, is it to the states, that the number of these persons who claim the

privilege of coming into the courts of the United States should be strictly limited. Cases, since they arise out of laws, etc., of the United States, must be very limited in number; but persons may bring into the courts of the United States any question and every question, and, if this law be correctly construed, for any, the very smallest possible amount.

But if the plain dictates of our senses be relied on, what state of facts have we exhibited here? "Making a person, makes a case; [§98 and thus, a government which cannot exercise jurisdiction unless an alien or citizen of another state be a party, makes a party which is neither alien nor citizen, and then claims jurisdiction because it has made a case. If this be true, why not make every citizen a corporation sole, and thus bring them all into the courts of the United States quo minus? Nay, it is still worse, for there is not only an evasion of the constitution implied in this doctrine, but a positive power to violate it. Suppose every individual of this corporation were citizens of Ohio, or, as applicable to the other case, were citizens of Georgia, the United States could not give any one of them, individually, the right to sue a citizen of the same state in the courts of the United States; then, on what principle could that right be communicated to them in a body? But the question is equally unanswerable, if any single member of the corporation is of the same state with the defendant, as has been repeatedly adjudged.

One of the counsel who argued this cause in behalf of the bank, has denominated it a bundle of faculties. This is very true; but those faculties are substituted for the organization of a natural person; and it is perfectly certain, that when it comes into this court, it must be treated as a person. It is altogether inadmissible, to refine away the principles of jurisprudence, so as to consider it in any other light than that of a person. As such, it sues out a writ, declares, pleads, takes judgment, and levies an execution. If it is not a person, [§99 it has no standing in this court; it must, therefore, abandon this suit, or be subjected to personal disabilities. Gentlemen have a right to take what ground here they please, to sustain this action; but it is perfectly clear to me that the act of Congress was intended to vest this right as a personal right, or not at all. Let anyone look through this act, and notice the unrestricted latitude that has been assumed in vesting the right to sue both by and against this bank, and he will see that either there is no general right to sue given in the seventh section, now relied on, or that it is given under the general power granted to pass all laws necessary to carry the powers of the general government into execution. The proviso to the 17th section is a remarkable proof of this. It puts the limits of judicial power altogether out of view. If Congress, in legislating on this subject, did intend such a grant as is here contended for, it must be presumed that they did not advert to the consideration that granting to an individual a right to sue was enlarging the jurisdiction of the court. It never can be supposed that they meant to assume the power of adding to the number of persons who might constitutionally become suitors in the courts of

the United States. But every difficulty vanishes when we limit the meaning of the language of the act, by a reference to the context. In fact, a general power to bring actions in the courts of the United States, is so peculiarly and explicitly personal on the face of the constitution, that it is hard to perceive how Congress could have for a moment lost sight of the restrictions [900'] imposed, in this respect, upon the judicial power.

Nor had the bank any idea that this power was vested in it, upon the ground that every possible case in which it might be involved in litigation, came within the constitutional definition of cases arising under laws, etc., of the United States. In its averments, those on which it claims jurisdiction, it simply takes two grounds: (1) That it was incorporated by an act of Congress. (2) That the right to sue was given it by an act of Congress. But there is no averment that the cause of action was a case arising under a law of the United States. It well knew that it was a case emphatically arising out of an act of the state of Ohio, operating upon the domicile of the bank, which, although purchased in right of an existence metaphysically given it by Congress, was acquired and held according to the laws of Ohio, acting upon its own territory. Technically, these averments cover only two grounds; they affirm, (1) that the bank, being incorporated by Congress, had, therefore, a right to sue; (2) that being incorporated, and having the right to sue conferred upon it by an act of Congress, therefore it could maintain this action. But yet neither, nor both of these, could give the right, unless in one of the cases defined in the constitution, which case is not the subject of an averment. I would not willingly place the case on the ground of mere technicality; and, therefore, only make the observation to show that the ground assumed in argument is an afterthought. I believe that, [901'] until this argument, the ground now made was never thought of; and I am at a loss to conceive how it is possible to maintain the position that all possible cases in which this bank shall sue or be sued, come within the description now contended for. Take, for instance, a trespass or a fraud committed by the bank, and suit brought by the injured party, in what sense could they be said to be cases arising under a law of the United States? Or, take the case of ejectment, suppose to recover part of the premises of the banking-house in Philadelphia, and not a question raised in the suit, but what arises under the territorial laws of the country, and what circumstances characterize that as a case of the proper description to give this court jurisdiction? If this cause of action arises under a statute, why is not the statute referred to, and the provision particularly relied on, if there is any other than what the averments specify?

Various instances have been cited and relied on, in which this right of suit in the courts of the United States has been given to particular officers of the United States. But on these I would remark, that it is not logical to cite as proofs the exercise of this right, in instances which may themselves be the subject of con-

stitutional questions. It cannot be intended to surprise this court into the recognition of the constitutionality of the laws so cited. But there is a stronger objection; no such instance is in point, until it be shown that Congress has authorized such officers to bring their private contracts and private controversies into the courts of the United States. In all the cases cited, the individual [902] is acting distinctly as the organ of government; but let them take the character of a mere contractor, a factor, a broker, a common carrier, and then let laws authorizing them to sue in the courts of the United States be passed, and I will acknowledge the cases to be in point; though I will still dispute the principle, that a repetition of error can convert an act into law or truth. The distinction is a clear one between all these cases and the bank. The latter is a mere agent or attorney, in some instances; in others, and especially in the cases now before the court, it is a private person, acting on its own account, not clothed with an official character at all. But the acts of public officers are the acts of government; and emphatically so, in suits by the Postmaster-General; the money to be recovered being the property of the United States, it may be considered that they are parties to the suit, just as those states are to the suits by or against their Attorney-General, where he is by law authorized to bring and defend suits in his own name officially. When the United States are parties, the grant of jurisdiction is general. But there is express law also for every contract that the postmaster enters into, or it will be in vain for him to bring his suit in his own name or otherwise. It would be in vain for him to rely simply on his being made postmaster under an act of Congress; in which point alone, there would seem to exist any analogy between his case and that of the bank.

As to the instance of the action given under the patent law, it has been before remarked, that so entirely is its existence blended with an act of Congress, that to prosecute it, it is indispensable that the act should be set forth as the ground of action. I rather think it an unfortunate quotation, since it presents a happy illustration of what we are to understand by those cases arising under a law of Congress, which in their nature admit of an exercise of original jurisdiction. The plaintiff must recover, must count upon the act of Congress; the constitutional characteristic appears on the record before the defendant is called to answer; and the repeal of the statute before judgment, puts an end to his right altogether. Various such cases may be cited. But how the act of Congress is to be introduced into an action of trespass, ejectment, or slander, before the defendant is called to plead, I cannot imagine.

Upon the whole, I feel compelled to dissent from the court, on the point of jurisdiction; and this renders it unnecessary for me to express my sentiments on the residue of the points in the cause.

Decree affirmed, except as to interest on the amount of the specie in the hands of the defendant, Sullivan.

BANK OF THE UNITED STATES vs. PLANTER'S BANK OF GEORGIA

6 L.Ed. (9 Wheat) 244

(1824)

"Relinquishment Of Sovereignty"
(Government As Corporator)

UNIVERSITY OF CALIFORNIA
DEPARTMENT OF CHEMISTRY
SCHOOL OF CHEMISTRY
UNIVERSITY OF CALIFORNIA

(1954)

6 PAGES (2 PAGES)

TYPE OF THE SKILLED ELDER AS BYWATER, 2 TYPE OF DIRECTLY

904*] [*Constitutional Law.]

THE BANK OF THE UNITED STATES
v.
THE PLANTERS' BANK OF GEORGIA.

The circuit courts of the United States have jurisdiction of suits brought by the Bank of the United States against another bank, incorporated under a law of a state, and of which the state itself is a stockholder, together with private individuals, who are citizens of the same state with some of the stockholders of the Bank of the United States.

The Bank of the United States may sue in the circuit courts, as indorsee or bearer of a promissory note, although the original payee or indorser could not sue in the same courts, being a citizen of the same state with the defendants.

The circumstance that a state is a member of a private corporation, will not give this court original jurisdiction of suits where the corporation is a party, or oust the circuit courts of the jurisdiction vested in them by law.

THIS cause was brought up on a certificate of a division of opinion between the judges of the Circuit Court of Georgia, upon the questions arising in it, and was argued by the same counsel with the preceding case of *Osborn v. The Bank of the United States*.

Mr. Chief Justice Marshall delivered the opinion of the court:

In this case, the petition of the plaintiffs, which, according to the practice of the state of Georgia, is substituted for a declaration, is founded on promissory notes, payable to a person named in the note, "or bearer," and states 905*] that the notes were "duly transferred, assigned and delivered" to the plaintiffs, "who thereby became the lawful bearer thereof, and entitled to payment of the sums therein specified; and that the defendants, in consideration of their liability, assumed," etc.

The Planters' Bank pleads to the jurisdiction of the court, and alleges that it is a corporation, of which the state of Georgia, and certain individuals, who are citizens of the same state with some of the plaintiffs, are members. The plea also alleges that the persons to whom the notes mentioned in the petition were made payable, were citizens of the state of Georgia, and, therefore, incapable of suing the said bank in a circuit court of the United States; and being so incapable, could not, by transferring the notes to the plaintiffs, enable them to sue in that court.

To this plea the plaintiffs demurred, and the defendants joined in demurrer.

On the argument of the demurrer, the judges were divided on two questions:

1. Whether the averments in the declaration be sufficient in law to give this court jurisdiction of the cause.

2. Whether, on the pleadings in the same, the plaintiffs be entitled to judgment.

The first question was fully considered by the court in the case of *Osborn v. The Bank of the United States*, and it is unnecessary to repeat the reasoning used in that case. We are of opinion that the averments in the declaration are sufficient to give the court jurisdiction of the cause.

906*] 21. The second point is understood to involve two questions:

1. Does the circumstance that the state is a

corporator, bring this cause within the clause in the constitution which gives jurisdiction to the Supreme Court where a state is a party, or bring it within the 11th amendment?

2. Does the fact that the note is made payable to a citizen of the state of Georgia, or bearer, oust the jurisdiction of the court?

1. Is the state of Georgia a party defendant in this case? If it is, then the suit, had the 11th amendment never been adopted, must have been brought in the Supreme Court of the United States. Could this court have obtained jurisdiction in the case?

We think it could not. To have given the Supreme Court original jurisdiction, the state must be plaintiff or defendant as a state, and must, as a state, be a party on the record. A suit against the Planters' Bank of Georgia is no more a suit against the state of Georgia than against any other individual corporator. The state is not a party, that is, an entire party, in the cause.

If this suit could not have been brought originally in the Supreme Court, it would be difficult to show that it is within the 11th amendment. That amendment does not purport to do more than to restrain the construction which might otherwise be given to the constitution; and if this case be not one of which the Supreme Court could have taken original jurisdiction, it is not within the amendment. "This is not, we think, a 1807 case in which the character of the defendant gives jurisdiction to the court. If it did, the suit could be instituted only in the Supreme Court. This suit is not to be sustained because the Planters' Bank is suable in the federal courts, but because the plaintiff has a right to sue any defendant in that court, who is not withdrawn from its jurisdiction by the constitution, or by law. The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators. The state does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the state of Georgia, although the state holds an interest in it.

It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union who have an interest in banks, are not suable even in their own courts; yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of 1808 that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act.

*See also
the character
of the
notes
22 USC A
286 E*

~~The government of the Union held shares in~~
the old Bank of the United States; but the
privileges of the government were not im-
parted by that circumstance to the bank. The
United States was not a party to suits brought
by or against the bank in the sense of the
constitution. So with respect to the present
bank. Suits brought by or against it are not
understood to be brought by or against the
United States. The government, by becoming
a corporator, lays down its sovereignty, so far
as respects the transactions of the corpora-
tion, and exercises no power or privilege which
is not derived from the charter.

We think, then, that the Planters' Bank of
Georgia is not exempted from being sued in
the federal courts, by the circumstance that
the state is a corporator.

We proceed next to inquire, whether the
jurisdiction of the court is ousted by the cir-
cumstance that the notes on which the suit
was instituted, were made payable to citizens
of the state of Georgia.

Without examining whether, in this case, the
original promise is not to the bearer, the
court will proceed to the more general ques-
tion, whether the bank, as indorsee, may
maintain a suit against the maker of a note
payable to a citizen of the state. The
words of the judiciary act, section 11, are,
"nor shall any district or circuit court have
cognizance of any suit, to recover the con-
tents of any promissory note, or other chose
in action, in favor of an assignee, unless a
suit might have been prosecuted in such court
to recover the said contents, if no assignment
had been made, except in cases of foreign bills
of exchange."

This is a limitation on the jurisdiction con-
ferred by the judiciary act. It was apprehend-
ed that bonds and notes, given in the usual
course of business, by citizens of the same
state, to each other, might be assigned to the
citizens of another state, and thus render the
maker liable to a suit in the federal courts.
To remove this inconvenience, the act which
gives jurisdiction to the courts of the Union
over suits brought by the citizen of one state
against the citizen of another, restrains that
jurisdiction, where the suit is brought by an
assignee, to cases where the suit might have
been sustained, had no assignment been made.
But the bank does not sue in virtue of any
right conferred by the judiciary act, but in
virtue of the right conferred by its charter. It
does not sue because the defendant is a citizen
of a different state from any of its members,
but because its charter confers upon it the
right of suing its debtors in a circuit court of
the United States.

If the Bank could not sue a person who was
a citizen of the same state with any one of its
members, in the Circuit Court, this disability
would defeat the power. There is, probably,
not a commercial state in the Union, some of
whose citizens are not members of the
Bank of the United States. There is, conse-
quently, scarcely a debt due to the bank, for
which a suit could be maintained in a federal
court, did the jurisdiction of the court depend
on citizenship. A general power to sue in any
circuit court of the United States, expressed
in terms obviously intended to comprehend
G. L. ed.

every case, would thus be construed to com-
prehend no case. Such a construction cannot
be the correct one.

We think, then, that the charter gives to
the bank a right to sue in the circuit courts of
the United States, without regard to citizen-
ship; and that the certificate on both ques-
tions must be in favor of the plaintiff.

Mr. Justice Johnson. This cause is one in
which, from the great importance of the ques-
tions it gave rise to, was certified to this court,
on a pro forma difference of opinion, that it
might undergo the fullest investigation, and
give time for the maturest reflection.

The first of the points certified involved the
question of jurisdiction; for my opinion on
which, I must refer to the case of Osborn et al.
v. The Bank of the United States, argued in
conjunction with this, and decided this term.

That opinion is final on the judgment which
I must give in the cause; but there were other
questions, which, although not touched upon in
the argument here, were very ably argued in
the court below, and on which, having formed
an opinion, I will make some remarks.

The case of The Bank v. Deveaux, [*911
having decided that this court will look into
the individual characters of the corporators
plaintiffs, in order to give jurisdiction, where
it depends on circumstances of the person, it
was contended in the court below, that this
court was bound, in justice, to look behind
the charter of the bank defendant, in order to
determine the individual characters of the cor-
porators defendants also. And the pleas were
so drafted as to exhibit to the court two
grounds on which to decide against the juris-
diction of the Circuit Court, as depending on
individual character. The one was, that a citi-
zen of one state was suing a citizen of the
same state; the other, that the state of Geo-
rgia was a defendant, being a member of the
corporation defendant, and was exempt from
suit under the 11th amendment. And on both
these grounds, I see not how I can refuse my
assent to the doctrine of the pleas. The case
of Deveaux forms, I presume, one of the can-
ons of this court. On no other ground can
that decision be law, but that the individual
corporators were the real parties plaintiffs.
The same principle, when applied to the corpo-
ration defendant, will make the individual cor-
porators here the real defendants to the suit.
If, then, the real plaintiffs and the real de-
fendants are so related in personal character,
as to preclude this court from taking juris-
diction, I see no ground on which we can sus-
tain the demurrer, unless we reverse the de-
cision in Deveaux's case.

So, also, with regard to the state of Georgia.
An original suit against that state for the re-
covery of a debt, could not be main- [*912
tained. Yet, if an original suit against a
corporation be an original suit against each
corporator, I see not wherein the case differs
from that of a direct suit against the state.
Suppose the case of a joint bond, given by a
state and individuals, to an individual con-
tractor, citizen of another state, what would
except a suit on such a bond from the opera-
tion of the 11th amendment of the constitu-
tion? If it be said that the amendment al-

luded to has regard only to suits instituted against states in their sovereign capacity, I would ask, in what other capacity can a state appear, or even exist? In every possible form and shape, it is a sovereign state, or it is nothing. And this very stock, held in this bank, is the property of the people of Georgia, held by them in the name and capacity of the state of Georgia. If any dispute were to arise on the title to the stock, in what capacity could they sue or be sued for the interest held by them in the stock, unless in their sovereign capacity? It is not because it imparts its own immunities to the other stockholders, that this action cannot be maintained, but because that the judicial power must reach each and every defendant, in order to bring a case within the prescribed limits of the constitution. Each defendant occupies his own peculiar rank, claims his own peculiar immunities; but they are not suable in the courts of the United States, as long as any one of them is exempted from suit in those courts.

I am here expressing a technical opinion, founded on the authority of the case of 013*) The Bank v. Deveaux. That decision brings it strictly within the letter of the 11th amendment; although I am ready to admit that, unaffected by that decision, it is not within its purview. Although not responsible for that decision, I acknowledge its obligation, until overruled.

The last question which the pleadings in this cause present, arises out of the nature of the contract, the form of the declaration, and that provision of the judiciary act, which precludes suits by an assignee of choses in action, when the suit could not be brought in the courts of the United States, as between the original parties.

The plaintiff counts upon a number of promissory notes, payable to A, B, or bearer, commonly called bank notes, delivered to A, B, and by him "transferred, assigned, and set over" to the plaintiffs in this action. The plea states, that, as between the original promisor and promisee, suit could not have been brought in the circuit courts of the United States; and, therefore, it cannot, as between the present parties, the promisor and

assignee. As all the facts are admitted by the demurrer, it is difficult to see on what ground this case is to be excepted from the operation of the provisions of the judiciary act on this subject. Whatever difficulties may be suggested, on the technical meaning of the term assignment, it is very clear that he who acquires a chose in action, by mere delivery, has been recognized in the laws of the United States as an assignee. If any considerations could be introduced into the case, besides what the pleadings bring out, there might be much reason to doubt, whether the [214] case of bank bills, properly so called, and particularly so declared on, came within the general law applicable to promissory notes; but here, non constat, that the notes declared upon were ever thrown into circulation, as the representative of property, as a currency, a substitute for gold and silver.

But the case does not rest here. This ground of defense, depends not on a constitutional provision, but on an act of Congress; and if it be true that the unrestricted right to sue on all its contracts be vested in the Bank of the United States, whatever their origin, or whatever their amount, it follows that such a provision amounts to a repeal of the law here relied on. I rather think that the improbability of such a provision being intended by the legislature, operates against the construction that would sustain it. But if such be the legal construction of the incorporating act, there can be no doubt of its being fatal to this plea.

Certificate.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Georgia, and on the questions in said cause, on which the judges of the said Circuit Court were divided in opinion, and was argued by counsel. On consideration whereof, this court is of opinion, 1. That the averments in the declaration in said cause, are sufficient in law to give the said Circuit Court jurisdiction in said cause.

2. That, on the pleadings in the same, the plaintiffs are entitled to judgment.

All which is ordered to be certified to the said Circuit Court.

Wheat. 9.

BANK OF THE UNITED STATES vs. BANK OF THE STATE OF GEORGIA

6 L.Ed. (10 Wheat) 331
(1824)

"Negligence - Fraud - Liability"

BANK OF THE UNITED STATES OF THE STATE OF GEORGIA

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It may be considered as peculiarly the duty of the officers of the customs, to watch over any maritime infractions of the laws of the United States; and, by the collection act of 1799, ch. 123, s. 70, it is made the duty of all custom-house officers, as well within their districts as without, to make seizures of all vessels violating the revenue laws.

The section, then, in the next clause, authorizes the President of the United States to employ any of the armed vessels of the United States to cruise on any part of the coast, to prevent violations of the act, and to instruct and direct the commanders of such armed vessels, to seize all vessels contravening the act, "wheresoever found on the high seas," omitting the words, "in any river, port, bay or harbor," contained in the former clause. It then proceeds to declare that the proceeds of all such vessels, when condemned, "shall be divided equally between the United States, and the officers and men who shall make such seizure, take or bring the same into port for condemnation, whether such service be made by an armed vessel of the United States, or revenue cutters thereof, and the same shall be distributed in like manner as is provided by law for the distribution of prizes taken from an enemy." In a strict sense, the present seizure was not made by an armed vessel of the United States, nor by a revenue cutter, which, by the act of 1799, ch. 123, s. 93, the President is at liberty to require to co-operate with the navy. But if we consider these cases as put only by way of example, or if we give an enlarged meaning to the words "revenue cutter," so as to include revenue boats, such as the collector is, by the act of 1799, ch. 123, s. 101, authorized to employ, with the approbation of the treasury department, then the seizure of Mr. Chew may be brought within the general terms of the act. The United States do not appear to have resisted this construction as to the proceeds of the sale of the Josefa Segunda. And, on the other hand, if we consider that the act meant to deal out the same rights to all parties who might seize the offending vessel, whether they were officers of armed vessels, or of revenue cutters, or merely private individuals, who may seize and prosecute to condemnation, then, under that construction, Mr. Chew may be properly deemed the seizing officer, entitled, with his crew, to the proceeds of the vessel. If such a construction is not admissible, within the equity of the act, then it is a *casus omissus*, and the property yet remains undisposed of by law.

Upon the best consideration which we have been able to give the case, we are of opinion that it is a *casus omissus*, or rather, that all the beneficial interest vests in the United States. The first clause of the seventh section declares that all vessels offending against it, "shall be forfeited to the use of the United States," and may be seized, prosecuted and condemned, accordingly. The seizure may be made by any person; but the forfeiture is still to be, by the terms of the act, for the use of the United States. If the act had stopped here, no difficulty in its construction could have occurred. As nothing is given by it to the

seizing officer, nothing could be claimed by him except from the bounty of the government. The subsequent clause looks exclusively to cases where the seizure is made by armed vessels of the navy, or by revenue cutters, and directs, in such an event, a distribution to be made in the same manner as in cases of prizes taken from an enemy. Correctly speaking, these cases constitute exceptions from the preceding clause, and take them out of the general forfeiture "to the use of the United States." It might have been a wise policy to have extended the benefit of these provisions much farther, or to have given, as the act of the 20th of April, 1813, ch. 55, has given, a moiety in all cases to the person who should prosecute the seizure to effect. But courts of law can deal with questions of this nature only so far as the legislature has clearly expressed its will. Mr. Chew appears to be a very meritorious officer, and deserving of public respect for his good conduct on this occasion. But as the act has made no provision for his compensation, he must be left, in common with those who made the military seizure, to the liberality of the government.

The remarks which have been already made, dispose of the case, so far as respects the proceeds of the vessel, and we think they are decisive as to the claim to the proceeds of sale of the negroes. The case as to this matter is also a *casus omissus* in the act of Louisiana. That act had a direct reference to the act of Congress, and "the commanding officer of the capturing vessel," in the sense of the former, must mean the commanding officer of such an armed vessel, or revenue cutter, as is entitled to share in the distribution of the proceeds by the latter. It would be going very far to give a larger construction to the words than in their strict form they import; and since they admit of a reasonable interpretation, by confining them to the cases provided for by Congress, we are satisfied that our duty is complied with, by assigning to them this unembarrassed limitation.

The decree of the District Court, so far as it dismisses the claims of Messrs Roberts, Humphrey, Mende and Gardner, is affirmed, and so far as it sustains the claim of Mr. Chew, and the naval officer and surveyor of the port of New Orleans, is reversed.

Decree accordingly.

[*Promissory Note. Payment.] [*333

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF THE UNITED STATES.

v.
THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF THE STATE OF GEORGIA.

In general, a payment received in forged paper, or in any base coin, is not good; and if there be no negligence in the party, he may recover back the consideration paid for them, or sue upon his original demand.

But this principle does not apply to a payment
Wheat. 10.

made bona fide to a bank, in its own notes, which are received as cash, and afterwards discovered to be forged.

In case of such a payment upon general account, an action may be maintained by the party paying the notes, if there is a balance due him from the bank upon their general account, either upon an *in simul* computassent, or as for money had and received.

ERROR to the Circuit Court of Georgia.

This was an action of assumpsit, brought by the plaintiffs in error, the president, etc., of the Bank of the United States, against the defendants in error, the president, etc., of the Bank of the state of Georgia, in which the plaintiffs declared for the balance of an account stated, and for money had and received to their use. At the trial, the plaintiffs offered evidence to prove that mutual dealings existed between the parties, in the course of which, each being in the receipt of the bills of the other, they mutually paid in or deposited the bills of the other [33-4] party, at intervals, as "each found the bills of the other party had accumulated to any considerable amount in their respective vaults; and upon each of such payments or deposits, the amount thereof was entered as so much "cash" in the customer's book of the party depositing, by the proper officer of the bank receiving the same; from which said book of the plaintiffs, which was given in evidence, it appeared that the sum of \$5,000 was the balance due from the defendants to the plaintiffs, at the time of instituting this action. The plaintiffs also offered evidence, that the transactions between the parties were almost exclusively in the deposits of their respective bills as aforesaid. And the defendants, to maintain their said defense, offered evidence to prove that, in one of the said deposits so made by the plaintiffs, in the bank of the defendants, and so entered in the said book of the plaintiffs by the proper officer of the defendants, at the time the said deposit was made, to wit, on the 25th of February, in the year 1819, and which is one of the items comprised in the account upon which the balance was claimed by the plaintiffs, there were paid in 38 bills of the defendants' own issues or notes, of \$5.00 each, which had been fraudu-

lently altered by some person or persons unknown, from the denomination of 5 to that of 50; and 40 bills of the defendants' own issues or notes of \$10.00 each, which had in like manner been fraudulently altered by some person or persons unknown, to that of hundreds, making together the sum of \$5,000, demanded by the plaintiffs in this action; which said [*335 bills or notes had been subsequently tendered by the defendants to the plaintiffs, before the institution of this action, and by the plaintiffs refused. The plaintiffs then offered evidence to prove that no notice or intimation of the said fraudulent alteration aforesaid was given by the defendants to the plaintiffs, until the 16th of March, 1819, and that the tender to return the said altered notes to the plaintiffs by the defendants, was not made until the 17th of March, 1819, nineteen days after the receipt of the said notes by the defendants from the plaintiffs, and the entry of the same in the customer's book of the plaintiffs. The defendants further offered evidence to prove that the said altered bills, so deposited by the plaintiffs and received by the defendants, had been received by the plaintiffs from the Planters' and Merchants' Bank of Huntsville, concerning which notes a correspondence had taken place between the plaintiffs and the said Planters' and Merchants' Bank of Huntsville, subsequently to the detection of the said fraudulent alteration, in the following words and figures, to wit:

Office Bank United States,
Savannah, 17th of March, 1819.

Edward Rawlins, Esq.,
Cashier Planters' and Merchants' Bank of
Huntsville.

Sir—Upon a more minute investigation of the bills received last month from Mr. Hobson, of your bank, it turns out that 40 of the \$100.00 notes of the state bank, of this place, were altered from \$10.00, and 53 of the \$50.00 [*336 notes of the same bank were altered from \$5 notes, producing against us a difference in the \$100 notes of \$3,600, and in the \$50, \$2,610, making the whole difference \$6,210. By the person which we shall in a few days send to your place, as heretofore intimated, we will

Note—Payment in forged, or depreciated paper. In general, payment in forged paper, spurious bills, base coin, or counterfeit money, is not good. *Jones v. Ryde*, 1 Marsh. 137; *3 Taunt. 438*; *Fuller v. Smith*, 1 Ky. & Moo. 49; *Eagle Bank v. Smith*, 3 Conn. 71; *Baker v. Bonesteel*, 2 Hill. N. Y. 337; *Rumstale v. Horton*, 3 Penn. St. 330; *Anderson v. Hawkins*, 3 Hawks (No. Car.) 563; *Semmes v. Wilson*, 6 Cranch, C. C. 253; *U. S. v. Morgan*, 11 How. 154; *Thomas v. Todd*, 6 Hill. 340; *Burrill v. Watertown Bk.* 51 Barb. 105.

Where payment of a note is made in counterfeit bank bills, the person making payment not knowing they were false, the payee may recover of him the amount of such bills. *Markie v. Hatfield*, 2 Jobb. 453; *Young v. Adams*, 6 Mass. 152; *6 Mass. 321*. But such bills must be offered back in reasonable time. *Atwood v. Cornwall*, 23 Mich. 350; *S. C.* 15 Am. Rep. 219; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Simms v. Clark*, 11 Ill. 137; *Burrill v. Watertown Bk.* 51 Barb. 105; *Mudd v. Reeves*, 2 Harr. & J. 365; *Hargrave v. Dusenberry*, 2 Hawks, 326; *Keene v. Thompson*, 4 Gill. & J. 463; *Carrier v. Pennock*, 14 Serg. & R. 51; *Bruce v. Bruce*, 1 Marsh. 165; *3 Taunt. 425*, n; *Cocks v. Masterman*, 9 Barn. & C. 802; *Mudate v. Neidinger*, 5 Ind. 520; *Lawrenceburgh Bk. v. Stevenson*, 51 Ind. 504.

6 L. ed.

Payment of the bills of an insolvent bank which has stopped payment, is not a satisfaction of a debt although at the time and place of payment the bills are in full credit and the parties to the transaction are wholly ignorant of such insolvency. *Ontario Bk. v. Lightbody* 13 Wend. 101; *Townsend v. Bk. of Racine*, 7 Wis. 135; *Magee v. Carmack*, 13 Ill. 289; *Frontier Bk. v. Morse*, 22 Me. 53; *Witte v. Guthrie*, 1 J. J. Marsh. Ky. 503; *Fogg v. Sawyer*, 9 N. H. 363; *Westfall v. Braley*, 10 Ohio St. 183; *Wainwright v. Webster*, 11 Vt. 576. But see *Ware v. Street*, 2 Head. Tenn. 609; *Scruggs v. Gass*, 3 Yerg. Tenn. 175; *Lowry v. Murrill*, 2 Port. Ala. 250; *Hayard v. Shunk*, 1 Watts & S. 92; *Edmunds v. Diggs*, 1 Gratt. Va. 350.

Ordinarily, where bank bills are paid, there is an implied contract on the part of him who pays that they are correct and will pass readily in mercantile and business transactions, as money. *Kottwitz v. Bagby*, 16 Tex. 656.

A creditor is not compellable to receive, in satisfaction of his debts, currency which is at a discount in the place where the debt is payable. *Howe v. Wade*, 4 McLean. 319; *Braydon v. Gouldman*, 1 T. H. Mon. Ky. 115.

But in *Edmunds v. Diggs*, 1 Gratt. Va. 350, it is held that there is no implied warranty of the value of current money of the country, passing from hand to hand, in the course of trade. cum-

forward these altered bills for the purpose of getting you to exchange them for other money.

Elezar Early, Cashier.

P. S.—Herein I enclose, for your future security, the official notice of the banks of Georgia, pointing out the difference between the genuine and altered bills. E. E. Cashier.

Office Bank United States,
Savannah, 25th March, 1818.

Le Roy Pope, Esq.,
President Bank Huntsville.

Sir—Will you suffer me to introduce to your acquaintance and kindness, the bearer, Mr. Heinemann, our teller, whose objects have already been imparted to you in my letters of 23d February and 13th inst. (copies in Mr. H.'s possession), and which, we doubt not, will receive every facility for your institution. Mr. Heinemann is also instructed to lay before you formal notice of a claim which we shall make on your bank for the spurious notes received from Mr. Holson, in the event of our being cast in the suit about to be brought between the [237*] Bank of Georgia, and ourselves, in the case. It has been deemed a better course than that proposed in our cashier's letter to Mr. Rawlins, your cashier, of the 17th inst., and will, no doubt, be more agreeable to you.

Your obedient servant,

R. Richardson, President.

Planters' and Merchants' Bank
of Huntsville, 4th May, 1810.

Sir—Your favor under date of the 25th has been handed me by Mr. Heinemann, wherein you give me notice that your bank holds this institution bound to make good the amount of the spurious notes which you say was received from Mr. Holson, in the event of your being cast in a suit about to be brought between the Bank of Georgia and yourselves. I am directed by the board of directors to state to you, that they highly approve of the course your bank have adopted in regard to these spurious notes, and we shall cheerfully acquiesce with the decision of the court, let that be what it may.

I am, respectfully,

Your obedient servant,

Le Roy Pope, President.

R. Richardson, Esq.,

President Office Bank United States,
Savannah.

merce and other business. And that this is true, not only of the money made by law a good tender in the payment of debts, but is equally so in regard to bank notes payable to bearer and circulated by delivery. See *Eidenour v. Clark*, 6 Blackf. Ind. 411. That a debt arose from the receipt of the bills of a bank chartered illegally, and were void at law, and finally proved worthless, is no defense where the bills were actually current at the time the defendant received them, and did not prove worthless in his hands, and he is not bound to take them back from persons to whom he paid them away. *Orchard v. Hughes*, 1 Wall. 73; *Alexander v. Myers*, 19 Ind. 301; *Davis v. Anderson*, 18 Ind. 52.

But if the drawee of a forged bill accept and pay it, or pay it without acceptance, he cannot recover back the money from the person to whom it was paid, for the drawee is bound to know that the bill is genuine.

Price v. Neal, 3 Burr. 1351; 1 Bac. Abr. 413; *Godard v. Merchants' Bk.*, 4 Const. 147; *Bk. of Commerce v. Union Bk.*, 3 Const. 220; *Hortsmann* 330

And the plaintiffs further offered evidence to prove that the officers of the defendants, at the time of receiving the said altered notes, had in their possession a certain book, called a bank note register of the said bank of the state of Georgia, wherein were registered and recorded, the date, number, letter, amount, and payees' name, of all the notes ever issued by the said bank, by means of which, and by reference whereunto, the forgeries or alterations aforesaid could have been promptly and satisfactorily detected; and further, that so far as related to the said notes purported to be genuine notes of \$100, all the genuine notes of the defendants of that amount in circulation on the said 25th of February, 1819, were marked with the letter A, whereas twenty-three of the notes of \$100 each, so received by the defendants, were genuine notes, when in fact they were altered notes, bore the letters B, C, or D.

And the defendants further offered evidence to prove that the alteration in the said notes consisted in extracting the ink of certain printed figures and words which expressed the amount of said notes, and substituting therefor other printed figures and words; the signature and every other part of said notes, remaining unaltered. Whereupon, the parties having offered the above evidence, the plaintiffs prayed the court,

1. To instruct the jury, that if they believed the said evidence, the said plaintiffs were entitled to recover of the said defendants the whole sum of \$6,000, being the balance so exhibited by their customer's book aforesaid, and as due from the said defendants to the said plaintiffs; which instruction the judges aforesaid, being divided in opinion, refused to give; and the counsel for the plaintiffs excepted to the refusal.

2. The plaintiffs prayed the court to instruct the jury, that if they believed the evidence so given, the plaintiffs were entitled to recover of the defendants the sum of \$690, being the original value of the altered notes; which instruction the said judges, being divided in opinion, did not give; to which refusal the said counsel for the plaintiffs excepted.

3. The plaintiffs prayed the court to instruct the jury, that if they believed the evidence so given, the plaintiffs were entitled to recover of the defendants the whole sum of \$6,900, being the balance so exhibited by their customer's book aforesaid, as due from the defendants to

v. Henshaw, 11 How. 177; *Ellis v. Ohio I. Co.*, 4 Ohio St. 623; *Whitney v. Bunnell*, 3 Ia. Ann. 429.

An acceptor is bound to know the drawer's hand-writing, and, if he accept a forged bill, he will, nevertheless, be bound to pay it. *Canal Bk. v. Bk. of Albany*, 1 Hill, N. Y. 257; *Peoria B. Co. v. Neill*, 16 Ill. 269; *Leach v. Buchanan*, 4 Esp. 226; *Smith v. Chester*, 1 Term R. 651; *Levy v. D. S. Bank*, 4 Dall. 234; 1 Blon. 27; *Jennings v. Fowler*, 2 Strange, 946; *Hoffman v. Bank*, 12 Wall. 107.

Nor can the bankers of the drawee paying a forged bill on his account recover back the amount for the same reason. *Smith v. Moore*, 6 Taunt. 76; but see *Martin v. Morgan*, 5 Moo. 675; *Wilkinson v. Johnson*, 3 Burr. & C. 428; *Sanderson v. Coleman*, 1 Mann. & G. 209; see 2 Daniel, Neg. Instrument, s. 1655-1657, for qualifications of this rule.

A reason of the above rule as to an acceptor is that an acceptance is an admission of the signature of the drawer. 1 Daniel, Neg. Instruments, s. 523; 2 Id., s. 1225.

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the plaintiffs, with legal interest thereon from the day of instituting their action aforesaid; which instruction the judges aforesaid, being divided in opinion, refused to give; to which refusal the counsel for the plaintiffs excepted. Judgment being rendered upon this bill of exceptions, for the defendants in the court below, the cause was brought, by writ of error, to this court.

It was insisted, on the part of the plaintiffs, that the judgment ought to be reversed, on the following grounds:

1. That what took place on the 25th of February, 1819, between the parties, was not only equivalent to payment, but was payment itself; and the defendants are, in all respects, to be considered as if they were suing to recover back the money.

2. That if understood only as an acceptance, or agreement to pay, the principal would still be the same.

3. That, in either case, the plaintiffs were entitled to recover.

The cause was argued by Mr. Sergeant for the plaintiffs, and by Mr. Berrien for the defendants.

Mr. Justice Story delivered the opinion of the court:

This is a case of great importance in a practical view, and has been very fully argued upon its merits. The Bank of Georgia having originally issued the bank notes in question, they were, in the course of circulation, fraudulently altered, and having found their way into the Bank of the United States, the latter presented them to the former, who received them as genuine, and placed them to the general account of the Bank of the United States, as cash, by way of general deposit. The forgery was not discovered until nineteen days afterwards, upon which notice was duly given, and a tender of the notes was made to the Bank of the United States, and by them refused. Both parties are equally innocent of the fraud, and it is not disputed that the Bank of the United States were holders, bona fide, for a valuable consideration. Under these circumstances, the question arises, which of the parties is to bear the loss, or, in other words, whether the plaintiffs are entitled to recover, in this action, the amount of this deposit.

Some observations have been made as to the form of the action, the declaration embracing counts for the balance of the account stated, as well as for money had and received, etc. But, if the plaintiffs are entitled to recover at all, we see no objection to a recovery upon either of these counts. The sum sued for is the balance due upon the general account of the parties, and it is money had and received to the use of the plaintiffs, if the transaction entitled the plaintiffs to consider the deposit as money. It

is, clearly, not the case of a special deposit, where the identical thing was to be restored by the defendants; the notes were paid as money upon general account, and deposited as such; so that, according to the course of business, and the understanding of the parties, the identical notes were not to be restored, but an equal amount in cash. They passed, therefore, into the general funds of the Bank of Georgia, and became the property of the bank. The action has, therefore, assumed the proper shape, and if it is maintainable upon the merits, there is no difficulty in point of form.

We may lay out of the case, at once, all consideration of the point, how far the defendants would have been liable if these notes had been the notes of any other bank, deposited by the plaintiff, in the Bank of Georgia, as cash. That might depend upon a variety of considerations, such as the usages of banks, and the implied contract resulting from their usual dealings with their customers, and upon the general principles of law applicable to cases of this nature. The modern authorities certainly do, in a strong manner, assert that a payment received in forged paper, or in any base coin, is not good; and that if there be no negligence in the party, he may recover back the consideration paid for them, or sue upon his original demand. To this effect are the authorities cited at the bar, and particularly Markle v. Hatfield, 2 Johns. Rep. 455; Young v. Adams, 6 Mass. Rep. 192, and Jones v. Ryde, 5 Taunt. Rep. 458. But, without entering upon any examination of this doctrine, it is sufficient to say that the present is not such a case. The notes in question were not the notes of another bank or the security of a third person, but they were received and adopted by the bank as its own genuine notes, in the most absolute and unconditional manner. They were treated as cash, and carried to the credit of the plaintiff in the same manner, and with the same general intent, as if they had been genuine notes or coin.

Many considerations of public convenience and policy would authorize a distinction between cases where a bank receives forged notes purporting to be its own, and those where it receives the notes of other banks in payment, or upon general deposit. It has the benefit of circulating its own notes as currency, and commanding thereby the public confidence. It is bound to know its own paper, and provide for its payment, and must be presumed to use all reasonable means, by private marks and otherwise, to secure itself against forgeries and impositions. In point of fact, it is well known that every bank is in the habit of using secret marks, and peculiar characters, for this purpose, and of keeping a regular register of all the notes it issues, so as to guide its own discre-

1. He cited Bolton v. Richards, 6 Term Rep. 149; The Manhattan Company v. Lillie, 4 Johns. Rep. 377; Levy v. Bank of United States, 4 Dall. Rep. 274; S. C. 1 Binn. Rep. 27; Chitty on Bills, 143; Smith v. Chester, 1 Term Rep. 655; Bass v. Clive, 4 Maul. & Selw. 15; Master v. Miller, 4 Term Rep. 320; Barber v. Glencell, 3 Esp. N. P. 60; Jordan v. Lashbrook, 7 Term Rep. 604; Price v. Neal, 8 Burr. Rep. 1254; Jones v. Ryde, 5 Taunt. Rep. 458; Markle v. Hatfield, 2 Johns. Rep. 462; Gloucester Bank v. Salem Bank, 17 Mass. Rep. 33; 6 L. ed.

Smith v. Mercer, 6 Taunt. Rep. 76; Meade v. Young, 4 Term Rep. 29; Jenys v. Fowler, 2 Str. Rep. 946.

2. He cited Gates v. Winslow, 1 Mass. Rep. 60; Meade v. Young, 4 Term Rep. 29; Kyd on Bills, 202, 203; Lambert v. Oaks, 1 Lord Raym. 443; Union Bank v. Bank U. S., 3 Mass. Rep. 74; 1 Johns. Cas. 145; 5 Johns. Rep. 63; 2 Term Rep. 366; Buller v. Harrison, Cowp. Rep. 515; Miller v. Race, 1 Burr. Rep. 457; 2 Ersk. Pothier, 19, 495; Toby v. Darber, 5 Johns. Rep. 72.

to its discounts and circulation, and to enable it to detect frauds. Its own security, not less than that of the public, requires such precautions.

Under such circumstances, the receipt by a bank of forged notes, purporting to be its own, must be deemed an adoption of them. It has the means of knowing if they are genuine; if these means are not employed, it is certainly evidence of a neglect of that duty, which the public have a right to require. And in respect to persons equally innocent, where one is bound to know and act upon his knowledge, and the other has no means of knowledge, there seems to be no reason for burthening the latter with any loss in exoneration of the former. There is nothing unconscientious in retaining the sum received from the bank in payment of such notes, which its own acts have deliberately assumed to be genuine. If this doctrine is applicable to ordinary cases, it must apply with greater strength to cases where the forgery has not been detected until after a considerable lapse of time. The holder, under such circumstances, may not be able to ascertain from whom he received them, or the situation of the other parties may be essentially changed. Proof of actual damage may not always be within his reach; and therefore, to confine the remedy to cases of that sort, would fall far short of the actual grievance. The law will, therefore, presume a damage actual or potential, sufficient to repel any claim against the holder. Even in relation to forged bills of third persons received in payment of a debt, there has been a qualification engrafted on the general doctrine, that the notice and return must be within a reasonable time; and any neglect will absolve the payer from responsibility.

If, indeed, we were to apply the doctrine of negligence to the present case, there are circumstances strong to show a want of due diligence and circumspection on the part of the Bank of Georgia. It appears from the statement of facts, that all the genuine notes of \$100, in circulation at this time, were marked with the letter A; whereas twenty-three of the forged notes of \$100, bore the marks of the letters B, C, and D. These facts were known to the defendants, but unknown to the plaintiff; so that by ordinary circumspection the fraud might have been detected.

The argument against this view of the subject, derived from the fact that the defendants have received no consideration to raise a promise to pay this sum, since the notes were forgeries, is certainly not of itself sufficient. There are many cases in the law, where the party has received no legal consideration, and yet in which, if he has paid the money, he cannot recover it back; and in which, if he has merely promised to pay, it may be recovered of him. The first class of cases often turns upon the point, whether in good faith and conscience the money can be justly retained; in the latter, whether there has been a credit thereby given to or by a third person, whose interest may be materially affected by the transaction. So that, to apply the doctrine of a want of consideration to any case, we must look to all the circumstances, and decide upon them all.

Passing from these general considerations, it is material to inquire how, in analogous cases, the law has dealt with this matter. The present case does not, indeed, appear to have been in terms decided in any court; but if principles have been already established, which ought to govern it, then it is the duty of the court to follow out those principles on this occasion.

The case has been argued in two respects: first, as a case of payment, and, second, as a case of acceptance of the notes.

In relation to the first view of the facts, we are of opinion that it is a case of actual payment. We treat it, in this respect, exactly as the parties have treated it, that is, as a case where the notes have been paid and credited as cash. The notes have not been credited as notes, or as a special deposit; but the transaction is precisely the same as if the money had been first paid to the plaintiffs, and instantaneously the same money had been deposited by them. It can make no difference that the same agent is employed by both parties, the one to receive, and the other to pay and credit. Upon what principle is it, then, that the court is called upon to construe the act different from the avowed intention of the parties? It is not a case where the law construes an act done with one intent to be a different act, for the purpose of making it available in law; to do that, *ex pres*, which would be defective in its direct form. Here the parties were at liberty to treat it as they pleased, either as a payment of money, or as a credit of the notes. In either way it was a legal proceeding, effectual and perfect; and as no reason exists for a different construction, we think that the parties, by treating it as a cash deposit, must be deemed to have considered it as paid in money, and then deposited; since that is the only way in which it could legally become, or be treated as cash. Nor is there any novelty in this view of the transaction. Bank notes constitute a part of the common currency of the country, and, ordinarily, pass as money. When they are received as payment, the receipt is always given for them as money. They are a good tender as money, unless specially objected to; and, as Lord Mansfield observed, in *Miller v. Race*, 1 Burr. Rep. 457, they are not, like bills of exchange, considered as mere securities or documents for debts. If this be true in respect to bank notes in general, it applies, a fortiori, to the notes of the bank which receives them; for they are then treated as money received by the bank, being the representative of so much money admitted to be in its vaults for the use of the depositor. The same view was taken of this point in the case of *Levy v. The Bank of The United States*, 4 Dall. Rep. 234; S. C. 1 Lynn. Rep. 27, where a forged check had been accepted by the bank, and carried to the credit of the plaintiff (a depositor) as cash, and upon a subsequent discovery of the fraud, the bank refused to pay the amount. The court there said: "It is our opinion, that when the check was credited to the plaintiff as cash, it was the same thing as if it had been paid; it is for the interest of the bank that it should be so taken. In the latter case, the bank would have appeared as plaintiffs; and every mistake which

notice of presentment & dishonor

There is a mistake - they are liable - how can we call them a good agent?

could have been corrected in an action by them, may be corrected in this action, and §48] none other." The case of Bolton v. Richards, 6 D. & E. 133, is not, in all its circumstances, directly in point; but there the court manifestly considered the carrying of a check to the credit of a party was equivalent to the transfer of so much money in the hands of the banker, to his account.

Considering, then, the credit in this case as a payment of the notes, the question arises, whether, after a payment, the defendants would be permitted to recover the money back; if they would not, then they have no right to retain the money, and the plaintiffs are entitled to a recovery in the present suit.

In Price v. Neal, 3 Burr. Rep. 1355, there were two bills of exchange which had been paid by the drawee, the drawer's handwriting being a forgery; one of these bills had been paid, when it became due, without acceptance; the other was duly accepted, and paid at maturity. Upon discovery of the fraud, the drawee brought an action against the holder to recover back the money so paid, both parties being admitted to be equally innocent. Lord Mansfield, after adverting to the nature of the action, which was for money had and received, in which no recovery could be had unless it be against conscience for the defendant to retain it, and that it could not be affirmed that it was unconscientious for the defendant to retain it, he having paid a fair and valuable consideration for the bills, said, "here was no fraud, no wrong. It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or §49] paid it. But it was not incumbent upon the defendant to inquire into it. There was notice given by the defendant to the plaintiff, of a bill drawn upon him, and he sends his servant to pay it, and take it up. The other bill he actually accepts, after which the defendant, innocently and bona fide, discounts it. The plaintiff lies by for a considerable time after he has paid these bills, and then found out that they were forged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff for negotiating the second bill, from the plaintiff's having, without any scruple or hesitation, paid the first; and he paid the whole value bona fide. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man. But, in this case, if there was any fault or negligence in anyone, it certainly was in the plaintiff, and not in the defendant." The whole reasoning of this case applies with full force to that now before the court. In regard to the first bill, there was no new credit given by any acceptance, and the holder was in possession of it before the time it was paid or acknowledged. So that there is no pretense to allege that there is any legal distinction between the case of a holder before or after the accepted. Both were treated in this judgment as being in the same predicament, and entitled to the same equities. The case of Neal v. Price §50] has never since been departed from; 6 L. ed.

and, in all the subsequent decisions in which it has been cited, it has had the uniform support of the court, and has been deemed a satisfactory authority. The case of Smith v. Mercer, 6 Taunt. Rep. 76, was a stronger application of the principle. There, the acceptance was a forgery, and it purported to be payable at the plaintiff's, who was a banker, and paid it, at maturity, to the agent of the defendant, who paid in account with the defendant. A week afterwards the forgery was discovered, and due notice given to the defendant. But the court (Mr. Justice Chambre dissenting) decided that the plaintiff was not entitled to recover. Two of the judges proceeded upon the ground that the banker was bound to know the handwriting of his customers; and that there was a want of caution and negligence on the part of the plaintiff. The Chief Justice, without dissenting from this ground, put it upon the narrower ground, that during the whole week the bill must be considered as paid, and if the defendant were now compelled to pay the money back, he could not recover against the prior indorsers; so that he would sustain the whole loss from the negligence of the plaintiff. The very case occurred in The Gloucester Bank v. The Salem Bank, 17 Mass. Rep. 33, where forged notes of the latter had been paid to the former, and, upon a subsequent discovery, the amount was sought to be recovered back. The authorities were there elaborately reviewed, both by the counsel and the court, and the conclusion to which §51 the latter arrived was, that the plaintiffs were not entitled to recover, upon the ground, that by receiving and paying the notes, the plaintiffs adopted them as their own; that they were bound to examine them when offered for payment, and if they neglected to do it within a reasonable time, they could not afterwards recover from the defendants a loss occasioned by their own negligence. In that case, no notice was given of the doubtful character of the notes until fifteen days after the receipt, and no actual averments of forgery until about fifty days. The notes were in a bundle when received, which had not been examined by the cashier until after a considerable time had elapsed. Much of the language of the court, as to negligence, is to be referred to this circumstance. The court said, "the true rule is, that the party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not, he is negligent, and negligence will defeat his right of action. This principle will apply in all cases where forged notes have been received, but certainly with more strength when the party receiving them is the one purporting to be bound to pay. For he knows better than any other whether they are his notes or not; and if he pays them, or receives them in payment, and continues silent after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own."

Against the pressure of these authorities there is not a single opposing case; and we must therefore conclude, that both §52 in England and America, the question has been supposed to be at rest. The case of Jones v. Ryde, 5 Taunt. Rep. 488, is clearly distin-

guishable, as it ranged itself within the class of cases, where forged securities in payment of debts had been received in payment. *Price v. Neal*, 5 Taunt. Rep. 495, is very obscurely and obscurely reported; but from what is there mentioned, as well as from the cases mentioned by Lord Chief Justice Gibbs in *Smith v. Mercer*, 6 Taunt. Rep. 77, it must be distinguished on the same distinction as *Jones v. Ely*, and was not governed by *Price v. Neal*.

But if the present case is to be considered as the defendant's counsel is most anxious to consider it, not as a case where the notes have been paid, but as a case of credit, as was the receipt of them, it will not only be different from that point of view, but it will not be deemed to have been accepted by the defendants, as genuine notes, and payment to have been promised accordingly. Credit was given for them, as cash, by the defendants for nineteen days, and, during all this period, no right could exist in the plaintiffs to recover the amount against any other person, from whom they were received. By such delay, according to the doctrine of Lord Chief Justice Gibbs in *Smith v. Mercer*, 6 Taunt. Rep. 76, the promissory holders would be discharged; and the case of *The Gloucester Bank v. The Salem Bank*, 17 Mass. Rep. 33, adopts the same principle; so that there would be a loss produced by the negligence of the defendants. But, on a narrower view, we think the case may be justly placed upon the broad ground that there was an acceptance of the notes as genuine, and that it falls directly within the authorities which govern the cases of acceptances of forged drafts. If there be any difference between them, the principle is stronger here than there; for there, the acceptor is presumed to know the drawer's signature. Here, a fortiori, the maker must be presumed, and is bound to know his own notes. He cannot be heard to aver his ignorance; and when he receives notes, purporting to be his own, without objection, it is an adoption of them as his own.

The general question, as to the effect of acceptances, has repeatedly come under the consideration of the courts of common law. In the early case of *Wilkinson v. Luteridge*, 1 Str. 618, the Lord Chief Justice considered that the acceptance of the bill was, in an action against the acceptor, a sufficient proof of the handwriting of the drawer; but it was not conclusive. In the subsequent case of *Jenys v. Fanciller*, 2 Str. 946, the Lord Chief Justice would not suffer the acceptor to give the evidence of witnesses, that they did not believe in the drawer's handwriting, from the danger to negotiable notes; and he strongly inclined to think that actual forgery would be no defense, because the acceptance had given the bill a credit to the indorsee. Subsequent to this was the case of *Price v. Neal*, already commented on, in which it was thought that the acceptor ought to be conclusively bound by his acceptance. The correctness of this doctrine was recognized by Mr. Justice Buller in *Smith v. Chester*, 1 D. & E. 655; by Lord Kenyon, in *Barber v. Gilling*, 3 Esp. Rep. 60, where he extended it to an implied acceptance; and by Mr. Justice Dampier, in *Bass v. Cline*, 4 M. & Selw. 15; and it was acted upon by necessary implication by the court, in *Smith v. Mercer*, 6 Taunt. Rep.

70. In *Levy v. The Bank of the United States*, 1 Binn. 27, already referred to, where a forged check, drawn upon the bank, had been accepted by the latter, and carried to the credit of the plaintiff, and on the refusal of the bank afterwards to pay the amount, the suit was brought, the court expressly held the plaintiff entitled to recover, upon the ground that the acceptance concluded the defendant. The case was very strong, for the fraud was discovered a few hours only after the receipt of the check, and immediate notice given. But this was not thought in the slightest degree to vary the legal result. "Some of the cases," said the court, "decide that the acceptor is bound, because the acceptance gives a credit to the bill, etc. But the modern cases certainly notice another reason for his liability, which we think has much good sense in it, namely, that the acceptor is presumed to know the drawer's handwriting, and by his acceptance to take this knowledge upon himself." After some research, we have not been able to find a single case in which the general doctrine, thus asserted, has been shaken, or even doubted; and the diligence [*355] of the counsel for the defendants, on the present occasion, has not been more successful than our own. Considering then, as we do, that the doctrine is well established, that the acceptor is bound to know the handwriting of the drawer, and cannot defend himself from payment by a subsequent discovery of the forgery, we are of opinion that the present case falls directly within the same principle. We think the defendants were bound to know their own notes, and having once accepted the notes in question as their own, they are concluded by their acts of adoption, and cannot be permitted to set up the defense of forgery against the plaintiffs.

It is not thought necessary to go into a consideration of other cases cited at the bar, to establish that the acceptor may show that the accepted bill was void in its origin, as made in violation of the stamp act, etc.; for all these cases admit the genuineness of the notes, and turn upon questions of another nature, of public policy, and a violation of the laws of the land. Nor are the cases applicable, in which bills have been altered after they were drawn, or of forged indorsements, for these are not facts which an acceptor is presumed to know. Nor is it deemed material to consider in what cases receipts and stated accounts may be opened for surcharge and falsification. They depend upon other principles of general application. It is sufficient for us to declare that we place our judgment in the present case upon the ground that the defendants were bound to know their own notes, and having received them [*356] without objection, they cannot now recall their assent. We think this doctrine founded on public policy and convenience; and that actual loss is not necessary to be proved, for potential loss may exist, and the law will always presume a possible loss in cases of this nature.

The remaining consideration is, whether there has been a legal waiver of the rights of the plaintiffs derived under the cash deposit, or, in other words, whether they have consented to treat it as a nullity. There is nothing on which to rest such a defense, unless it is to be inferred from the letter of Mr. Early, the cashier of the Wheat. 10.

Bank of the United States, under date of the 17th of March, 1819, addressed to the cashier of the Bank of Huntsville. That letter contains information of the forgery of the notes, and then proceeds, "by the person which we shall in a few days send to your place, as heretofore intimated, we will forward these altered bills for the purpose of getting you to exchange them for other money." Now, there is no evidence that this letter was ever shown to the Bank of Georgia, or its contents ever brought to the cognizance of its officers. It states no agreement to take back the notes, or to transmit them, on account of the Bank of the United States, to Huntsville. For aught that appears, the intention may have been to transmit them on account of the Bank of Georgia, under the expectation that the latter might desire it. But what is almost conclusive on this point is, that on the same day the Bank of Georgia had made a tender of the notes to the plaintiffs, which had been refused. This is wholly inconsistent with the notion that they had agreed to take them back, or to treat the previous credit as a nullity. Assuming, therefore, that the cashier had a general or special authority for the purpose of extinguishing the rights of the plaintiffs, growing out of the prior transactions (which is not established in proof), it is sufficient to say that it is not shown that he exercised such an authority. And the case of *Levy v. The Bank of the United States* affords a very strong argument, that a waiver, without some new consideration, upon a sudden disclosure, and under a mistake of legal rights, ought not to be conclusive to the prejudice of the party, where, upon farther reflection, he refuses to acquiesce in it. The subsequent letter of the 25th of March, demonstrates that the intention of waiving the rights of the bank, if ever entertained, had been at that time entirely abandoned.

The letter from the Huntsville Bank, of the 4th of May, cannot vary the legal result. What might be the rights of the plaintiffs against that bank, in case of an unsuccessful issue of the present cause, it is unnecessary to determine. The contract, whatever it may be, is *res inter alios acta*, from which the defendants cannot, and ought not to derive any advantage.

It only remains to add, that if the plaintiffs are entitled to recover the principal, they are entitled to interest from the time of instituting the suit.

Upon the whole, it is the opinion of the court, that the Circuit Court erred in refusing the first and third instructions prayed for by the plaintiffs; and for these errors the judgment must be reversed, with directions to award a *venire facias de novo*. On the second instruction asked by the plaintiffs, it is unnecessary to express any opinion.

Judgment reversed accordingly.

[Patent.]

KEPLINGER v. DE YOUNG.

A, having obtained a patent for a new and useful improvement, to wit, a machine for making

watch chains, brought an action, under the 3d section of the patent act of 1800, c. 179 (XXVI.), for a violation of his patent-right against B; and on the trial, an agreement was proved, made by the defendant with C, to purchase of him all the watch chains, not exceeding five gross a week, which he might be able to manufacture within six months, and an agreement on the part of C to devote his whole time and attention to the manufacture of the watch chains, and not to sell or dispose of any of them, so as to interfere with the exclusive privilege secured to the defendant of purchasing the whole quantity which it might be practicable for C to make. And it was proved that the machine used by C with the knowledge and consent of the defendant in the manufacture, was the same with that invented by the plaintiff, and that all the watch chains thus made by C were delivered to the defendant according to the contract. Held, that if the contract was real and not colorable, and if the defendant had no other connection with C than that which grew out of the contract, it did not amount to a breach of the plaintiff's patent-right.

*Such a contract, connected with evidence from which the jury might legally infer, either that the machine which was to be employed in the manufacture of the patented article was owned wholly or in part by the defendant, or that it was hired to the defendant for six months, under color of a sale of the articles to be manufactured with it, and with intent to invade the plaintiff's patent-right, would amount to a breach of his right.

ERROR to the Circuit Court of Maryland.

This cause was argued by Mr. Webster and Mr. Sergeant for the plaintiff, and by the Attorney-General for the defendant.

Mr. Justice Washington delivered the opinion of the court:

This was a suit commenced by the plaintiff, Keplinger, in the fourth circuit for the district of Maryland, against the defendant, for the violation of the plaintiff's patent-right, secured to him according to law, in a certain new and useful improvement, to wit, a machine for making watch chains, etc. The third count in the declaration, upon which alone this cause has been argued, is in the usual form, charging the defendant with having unlawfully used the said improvement, without the consent of the plaintiff first had and obtained in writing. The defendant pleaded the general issue, and gave notice to the plaintiff that he should deny that the exclusive right of using the improvement mentioned in the declaration, was vested in the plaintiff, or that he was the original and first inventor of the said improvement, and that he should give evidence to establish those facts.

At the trial, the plaintiff read in evidence the letters patent duly granted, bearing date the 4th of May, 1820, and proved that he was the true and original inventor of the machine specified in the patent, and that the defendant, together with John Hatch and John C. Kirkner, did use the said machine in the making of watch chains from steel, from the 4th of May till some time in the month of December, 1820.

The defendant, in order to prove that any concern or connection which he had with the said Hatch & Kirkner, in the making of watch chains, by means of the said machine, was merely as a purchaser of watch chains from them under the following contract, produced and gave the same in evidence. The agreement referred to, bearing date the 3d of May, 1820, is between M. De Young, and J. Hatch and J.

[Promissory Note. Pleadings.]

THE PRESIDENT, DIRECTORS and COMPANY of THE BANK OF THE UNITED STATES.

v.
SMITH

On a demurrer to evidence, the judgment of the court stands in the place of the verdict of the jury; and the defendant may take advantage of any defects in the declaration, by motion in arrest of judgment, or by writ of error.

It seems that, as against the maker of a promissory note, or against the acceptor of a bill of exchange, payable at a particular place, no averment in the declaration, or proof at the trial, of a demand of payment at the place designated, is necessary.

But, as against the indorser of a bill or note, such an averment and proof is, in general, necessary.

Where the bill or note is made payable at a particular bank, and the bank itself is the holder, such averment and proof may be dispensed with; and all that is necessary is, for the bank to examine the account of the maker with them, in order to ascertain whether he has any funds in their hands.

On a demurrer to evidence, the court is substituted in the place of the jury as judges of the facts, and everything which the jury might reasonably infer from the evidence, is to be considered as admitted.

The practice of demurring to evidence is to be discouraged, and courts will be extremely liberal in their inferences where the party takes the question of fact from the appropriate tribunal.

Proof necessary to support an action against the indorser of a bill or note.

ERROR to the Circuit Court for the District of Columbia.

This cause was argued by Mr. Lear for the

with manors, and though hereditaments, which is the last word, would, singly, have been sufficient to have extended to this property, yet, coupled with the former words, it is not so. The 13 Eliz. cap. 10, s. 3, begins with enumerating deans, etc. and then adds, all others having spiritual or ecclesiastical promotions; but bishops and archbishops, being higher than deans, are not included. So, the statute of wills, beginning with manors, shall not extend to a higher dominion, such as proprietary government. Dependent kingdoms are not devisable without the consent of the superior prince. Dominion is not the subject of testamen-

NOTE—As against maker of note, or acceptor of bill, no proof of demand is necessary, but is against indorser.

In general, no demand of payment of a note is necessary in order to sustain an action against the maker. His undertaking is unconditional. Brent v. Bk. of Mett., 1 Pet. 80; Haxtun v. Smith, 3 Wend. 13.

Where a note is payable at a bank, it is not necessary to make a personal demand upon the maker or acceptor elsewhere. It is his duty to be at the bank within reasonable hours to pay the same. Bk. of U. S. v. Smith, 11 Wheat. 171; Fullerton v. Bk. of U. S., 1 Pet. 604; Bk. of U. S. v. Carnal, 2 Pet. 243; Covington v. Comstock, 14 Pet. 43; Hildeburn v. Turner, 5 How. 69; Bk. of Met. v. Brent, 2 Cranch, C. C. 530.

As against the maker of a note, or acceptor of a bill, payable at a specified place, it is not necessary for the holder to make a demand at such place, as a condition precedent to bringing the action, and, therefore, it is not necessary to aver such demand in the complaint, or prove it at the trial. As against them, an action is sufficient demand. If the maker or acceptor was at the place designated, ready to pay, and offered to pay the money, he may plead it as a tender in bar of damages and costs, by bringing the money into court. Foden v. Sharp, 4 John. 187; Walcott v. Van Santboord, 17 John. 218; Fairchild v. Ogden, 6 L. ed.

plaintiffs, and by Mr. Taylor for the defendant.

Mr. Justice Thompson delivered the judgment of the court:

This case comes before the court on a writ of error to the Circuit Court for the District of Columbia, and the questions presented for consideration grow out of a demurrer to the evidence, and out of exceptions taken to the declaration.

The action is by the plaintiffs, as indorsees, against the defendant, as indorser of [*173 a promissory note drawn by William Young. The note is made payable at the office of discount and deposit of the Bank of the United States, in the city of Washington. And the questions which have been raised and argued relate, in the first place, to the sufficiency of the averment in the declaration of a demand of payment of the drawer of the note; and, second, to the sufficiency of the evidence to sustain the plaintiffs' right of recovery. It is alleged, however, on the part of the plaintiffs, that this court cannot look beyond the demurrer, to the evidence, and inquire into defects in the declaration. This position cannot be sustained. The doctrine of the King's Bench, in England, in the case of *Cort v. Birkbeck*, Dougl. Rep. 208, that, upon a demurrer to evidence, the party cannot take advantage of any objections of the pleadings, does not ap-

1.—He cited 2 H. Bl. 509; 3 Mass. Rep. 403; 3 Mass. Rep. 521; 12 Mass. Rep. 403; 8 Mass. Rep. 480; 1 Wheat. Rep. 373; Dougl. Rep. 152; 218; 1 Johns. Rep. 211; 5 Johns. Rep. 1; 2 Wash. Rep. 253.

2.—He cited 2 Brod. & Ringb. 165; 17 Johns. Rep. 248; Chitty on Bills, 321.

plary disposition; and Craig says that all feudists agree in this. Nor are things given for the support of dominion, such as the port duties here, in their nature devisable. With us the King cannot devise the lands and revenues allotted for the support of his royal dignity. This, indeed, has not been the subject of judicial decision; and in *The Banker's case*, Lord Somers, though he reversed the judgment of the Court of Exchequer, avoided this point; but our Kings never attempted to exercise such a power. See 5 Mod. Rep. 46, and Lord Somers' argument in *The Banker's case*. The 9 and 10 Wm. III. cap. 23, which gave a revenue to King

denburgh R. Co. 1 E. P. Smith, N. Y. 317; Wallace v. McConnell, 13 Pet. 136; Caldwell v. Cassidy, 8 Cow. 271; Haxtun v. Bishop, 3 Wend. 13; Brubston v. Gibson, 9 How. 263; Green v. Younes, 7 Barb. 652; Silver v. Henderson, 3 McLean, 105; Kendall v. Badger, 1 McAll. 523; Brown v. Pratt, 2 Cranch, C. C. 253; Beverly v. Beverly, 2 Cranch, C. C. 470; Smith v. Johnson, 2 Cranch, C. C. 615; Bk. of U. S. v. Russard, 3 Cranch, C. C. 173; Caldwell v. Cassidy, 8 Cow. 271; Troy City Bank v. Grant, Hill & D. Supp. N. Y. 119.

The acceptor of a bill stands in same relation to the drawee as the maker of a note does to the payee; and the acceptor is the principal debtor. In the case of a bill, precisely like the maker of a note. The place of payment is of no more importance in the one case than in the other. Wallace v. McConnell, 13 Pet. 136.

No demand before suit necessary against maker of a note payable "at either of the banks of Boston." Brown v. Noyes, 1 Wood. & M. 75, 85.

As to presentation of bills for acceptance, see note to Brown v. Barry, 3 Dall. 365.

As to time of presentment of note or bill, and of notice of protest, see note, Fenwick v. Sears, 1 Cranch, 259.

As to time of demand and notice, and manner of giving notice of protest, see note to Russard v. Lovering, 6 Cranch, 102.

ply. By a demurrer to the evidence, the court in which the cause is tried is substituted in the place of the jury. And the only question is, whether the evidence is sufficient to maintain the issue. And the judgment of the court upon such evidence will stand in the place of the verdict of the jury. And after that, the defendant may take advantage of defects in the declaration, by motion in arrest of judgment, or by writ of error. But, the present case being brought here on writ of error, the whole record is under the consideration of the court; and the defendant, having the judgment of the court below in his favor, may avail himself of [171*] all defects in the declaration "that are not deemed to be cured by the verdict.

The objection to the declaration is, that it does not contain an averment that a demand of payment of the maker of the note was made at the place where it was made payable.

It is a general rule in pleading, that where any fact is necessary to be proved on the trial, in order to sustain the plaintiffs' right of recovery, the declaration must contain an averment substantially of such fact, in order to let in the proof. But the declaration need not contain any averment which it is not necessary to prove. For the purpose, therefore, of determining whether the declaration in this case is substantially defective, for want of an express averment that demand of payment of the maker was made at the office of discount and deposit of the Bank of the United States, in the city of Washington, it is proper to inquire whether proof of that fact was indispensably necessary to entitle the plaintiffs to recover.

Whether, where the suit is against the maker of a promissory note, or the acceptor of a bill

of exchange, payable at a particular place, it is necessary to aver a demand of payment at such place, and, upon the trial, to prove such demand, is a question upon which conflicting opinions have been entertained in the courts in Westminster Hall. But that question may, perhaps, be considered at rest in England, by the decision in the late case of *Rowe v. Young*, 2 Brod. & Bingh. 163 in the House of Lords. It was there held, that if a bill of exchange be accepted payable at a particular place, the declaration in an action on such bill against the acceptor, must aver presentment at that place, and the averment must be proved. A contrary opinion has been entertained by courts in this country, that a demand on the maker of a note, or the acceptor of a bill payable at a specific place, need not be averred in the declaration, or proved on the trial. That it is not a condition precedent to the plaintiffs' right of recovery. As matter of practice, application will generally be made at the place appointed, if it is believed that funds have been there placed to meet the note or bill. But, if the maker or acceptor has sustained any loss by the omission of the holder to make such application for payment at the place appointed, it is matter of defense to be set up by plea, and proof. (4 Johns. Rep., 183; 17 Johns. Rep. 248.)

This question, however, does not necessarily arise in the case now before the court, and we do not mean to be understood as expressing any decided opinion upon it, although we are strongly inclined to think that, as against the maker or acceptor of such a note or bill, no averment, or proof of demand of payment at the place designated, would be necessary.

William for his life, recites to be for his household and family expenses; and now, by the civil list act of Queen Ann, the alienation of the crown revenue is expressly provided against. But, even before the civil list act, there is no instance of a devise of the royal revenues. In the present case, it could not be intended that the port duties should be alienable. The port duties were created for the benefit of the subject, and they, and the proprietorship, were intended to go together. But, I insist further, that the lauds themselves are not alienable. Anciently, when the King made a duke, and gave possession to him, they were so annexed to the dignity as not to be transferable without a preceding act of parliament. See *Cothb. 307*. In *Dyer*, fol. 2, a. there is a case very analogous to the present; for there it is said, that if the King creates a duke and gives him £20 a year for the maintenance of his dignity, he cannot give it to another, because it is not incident to his dignity. Many things, of a special nature, are unalienable. [174*] Dignities are so, because they are personal, and in the blood. Offices of trust are not assignable unless by the original terms of the grant, or by prescription, which supposes such a grant. Ministerial offices are, indeed, assignable, and the power of appointing a deputy is incident where the office is assignable, but not vice versa. See *Bro. Abr. tit. Office*, pl. 103. The office of forester is of such a trust that it cannot be granted over without license. 4 Inst. 313. The Register and Fitzherbert, there cited, warrant Lord Coke in his doctrine. Baridons are not alienable. The case about the office of Great Chamberlain in *Sir W. Jones*, 26, and *Collins* Baronies, contain much learning on this subject, which applies strongly here. Holdridge, who was with the majority of the judges, states everything which made against his own opinion.

"Lord Mansfield: The case is very well reported both in *Sir W. Jones*, and in *Collins*; but there is a great difference between offices and territories.

"Mr. Serjeant Hill: The judges who held the office alienable, only held it partly so, that is, that it might be settled so as to keep it in the male

line; because males were more fit for the office than women. But they agreed that, though the office was granted in fee, it could not be disposed of from the blood of the first grantee. In the present case, it is observable that the charter makes a difference in the use of the word 'assigns.' That word is used in granting the laud, but is omitted where the charter gives the power of calling assemblies, and erecting laws, of appointing judges, and of pardoning crimes. Therefore, these powers, at least, were not intended to be alienable.

"2. If the whole of the property, or any part, is disposable by will, it must be so on this ground, that all the statutes and laws of England in force at the time of the settlement of Maryland, attached on the province, though subsequent statutes will not extend to it without express words. Then I have a right to assume that the property is callable; for the statute *De Donis* was an existing law at the time of the grant and settlement of the province, as well as the statute of wills, and so was the statute of uses. Now, the property was entailed, and, upon the supposition that the entail was within the statute *De Donis*, I argue that the entail was not well barred by the [175*] last Lord Baltimore, and that this gives a title to his sister, Mrs. Browning, all the entails being now spent for want of issue male, and she being the devisee of the reversioner in fee, by the will of her father.

"Lord Baltimore's mode of barring was by lease and release, a conveyance the weakest of all in its operation. Before *Machell & Clarke*, it was understood that such a conveyance, by tenant in tail, would only pass an estate during his life; and, even according to that case, the estate it passes is voidable on his death by entry of the issue in tail. See *Machell v. Clarke*, 3 Lord Raym. Rep. 678; 2 Salk. Rep. 619; 7 Mod. Rep. 18, and *Com. Rep.* 119. As against those in remainder, it still passes only an estate during the life of a tenant in tail. But a covenant, without warranty, would have been a discontinuance, and, with warranty, when it becomes collateral, it

But, when recourse is had to the indorser of a promissory note, as in the present case, very different considerations arise. He is not the original and real debtor, but only surety. His undertaking is not general, like that of the maker, but conditional, that if, upon due diligence having been used against the maker, payment is not received, then the indorser becomes liable to pay. This due diligence is a condition precedent, and an indispensable part of the plaintiffs' title, and right of recovery, against the indorser. And when, in the body of the note, a place of payment is designated, the indorser has a right to presume that the maker has provided funds at such place to pay the note, and has a right to require of the holder to apply for payment at such place. And whenever a note is made payable at a bank, and the bank itself is not the holder, an averment, and proof of the demand at the place appointed in the note, are indispensable. In the present case, the bank at which the note is made payable is the holder, and the question arises, whether, in such case, an averment and proof of a formal demand are necessary. If no such proof could be required, the averment would be immaterial, and the want of it could not be taken advantage of upon a writ of error.

In the case of *Saunderson et al. v. Judge*, 2 H. Bl. Rep. 509, the plaintiffs, at whose house the note was made payable, being themselves the holders of the note, it was held to be a sufficient demand for them to turn to their books and see the maker's account with them, and it was deemed a sufficient refusal to find that the maker had no effects in their hands. So, in the case of *The Berkshire Bank v. Jones*, 6

Mass. Rep. 521, decided in the Supreme Judicial Court of Massachusetts, Chief Justice Parsons, in delivering the opinion of [*177] the court, said that, "the plaintiffs being the holders of the note, we must presume it was in their bank, and there it was made payable. They were not bound to look up the maker, or to demand payment of him at any other place. The defendant, by his indorsement, guaranteed, that on the day of payment the maker would be at the bank and pay the note, and if he did not pay it there, he agreed he would be answerable for it without previous notice of the default of the maker." The rule here laid down has received the sanction of that court in subsequent cases (12 Mass. Rep. 401; 14 Mass. Rep. 556), and is founded in good sense and practical convenience, without in any manner prejudicing the rights of the maker, or the indorser of the note. The indorser, knowing that the maker has bound himself to pay the note at a place appointed, has a right to expect that he will provide funds at that place to take up the note; and he will be more likely to be exonerated from his liability, by having the demand made there, than upon the maker personally. But, if the bank where the note is made payable is the holder, and the maker neglects to appear there when the note falls due, a formal demand is impracticable by the default of the maker. All that can in fitness be done, or ought to be required, is, that the books of the bank should be examined, to ascertain whether the maker had any funds in their hands; and if not, there was a default, which gave to the holder a right to look to the indorser for payment. And even this [*178] examination of the books was not required in

would have become a bar at this day; for the statute of Ann doth not take away the effect of collateral warranty when it is by a tenant in tail in possession. See 4 and 5 Ann. c. 16. Therefore, I say that this was one mode by which Lord Baltimore might have barred the entail; because, if he had made a feoffment with warranty, the warranty would have been collateral to Mrs. Browning.

"But there was another mode of barring which might have been used. The province of Maryland is a fief holden of the King as of the castle of Windsor, for so the tenure is reserved. As, in the grant, is not similitudinary, but is the same as it is in pleading that one was seized ut de feodo, which, says Lord Coke, is to be understood positively that the party was seized in fee. Co. Litt. 17. d. The tenure, then, being as of the castle of Windsor, the province is to be considered in the same way as other lands originally holden of the castle, and, like other fiefs, is to be impleadable within the manor. A castle, or honor, is only a superior kind of manor. To every manor a court baron is necessarily incident, and, therefore, it is so to every castle. The jurisdiction of a court baron is well known. Without the King's writ, it holds plea of personal actions where the demand doth not amount to 40s. With the King's writ of right, it may hold plea of land. Writs of right are of two kinds, patent and close. If the writ is brought in the Lord's Court, it is directed to him, and is patent. If he holds no court, or waives, or the tenure is immediately of the King, it is brought in the King's Court, is directed to the sheriff, and is close. Magna Charta, c. 24, provides against the abuse of the writ of right in the latter case, by declaring, that privilege in capite shall not issue where the land is not holden in capite. But the practice is otherwise, and the writ of right has been usually brought in the Common Pleas in all these cases. Another writ of right close lies for lands in ancient demesne. This writ is well known, and recoveries are suffered upon it in the courts of ancient demesne. See Fitzh. Nat. Br. and Booth on Real Actions. 6 L. ed.

The general writ of right patent lies in the Court of the Manor, in all cases where the tenure is of the subject, or of the King, as of an honor; and where the estate lies, makes no difference. 4 Inst. 219, and Fitzh. Abr. Jurisdiction, pl. 81, there cited. If a man holds lands as of an honor, the bailiff may execute the process as of the court of the honor wherever the lands lie. In the case of Fitzh. Abr. it was objected, that the officers of the county palatine of Chester could not execute writs in a foreign county; but it was adjudged otherwise, because the lands were within a manor holden of the principality of Chester.

"There are many precedents of recoveries on writs of right patent. One is in N. Bendl, p. 4, pl. 4, on a writ of right patent directed to the bailiff of the castle of Rising. According to this ancient principle, that wherever a fief lies it is impleadable in the manor of which it is holden, the province of Maryland might have been impleaded in the Court of the Castle of Windsor, for it is clearly holden of the castle, and there is a court baron necessarily incident. True it is, that if the tenant pleads a foreign plea, or the issue is joined on the mere right to be tried by the Grand Assize, the cause must be removed into the Common Pleas. But, I insist that a writ of right patent might have been brought in the Court of the Castle of Windsor, and that a common recovery might have been suffered; because, then, neither foreign plea, nor joining of the issue, on the mere right by the grand assize is necessary. The precedent cited from N. Bendl, is in point, and conformable to the principles I am arguing upon. The writ of right patent was for a manor holden of Rising Castle, and was directed to the bailiffs of the castle. It appears clearly that there was a recovery in the Court of the Castle Rising. There was a plaint by the demandant, the tenant vouched to warranty, and the vouchee making default, judgment was given for demandant. Afterwards, a writ of false judgment was brought in the Common Pleas by the vouchee, and [*179] the error was, that the writ of right patent should have been directed to the suitors; but the court

the cases cited from the Massachusetts Reports. The maker was deemed in default by not appearing at the bank to take up his note when it fell due. We should incline, however, to think that the books of the bank ought to be examined, to ascertain whether the maker had any balance standing to his credit; for, if he had, the bank would have a right to apply it to the payment of the note; and no default would be incurred by the maker, which would give a right of action against the indorser.

The declaration in this case does contain an averment that the note was presented to the maker, that he refused to pay it, and that notice of the non-payment was given to the indorser. Whether this averment is broad enough to admit all the proof necessary to sustain the action against the indorser, is the question which arises upon the declaration. If, by reason that the bank where the note was made payable was the holder, no personal presentment or demand of the maker could be required, the averment, so far as it asserts such presentment, is surplusage, and no proof was necessary to support it. What, then, in such case, is a presentment of the note? It would be an idle ceremony to require the bank to take the note from its files, and lay it upon the counter, or make any other public exhibition of it. All that could be required is, that the note be there, ready to be delivered up if payment [179] should be offered. When the note is held by a third person, it is practicable, and there is a fitness in requiring the holder to inquire at the bank for the maker, and whether he has provided any funds there to pay the note. But when the bank itself is the holder, it would be impracticable for it to make such held that the bailiffs were the proper persons, and

inquiry in any other manner than by ascertaining that the note was there, and examining the books to see if the maker had any funds in the bank. If the note was there, it was a presentment, and if the maker had no funds in the bank, it was a refusal of payment, according to the legal acceptation of these terms under such circumstances.

The evidence upon the trial was introduced under this averment without objection, and if that is sufficient to entitle the plaintiff to recover, the court ought not readily to yield to technical objections, where the defendant has had the full benefit of whatever defense he had to make. Under this state of the case we think the exception taken to the declaration cannot prevail. And the next inquiry is, whether the evidence to which the defendant demurred was sufficient to sustain the action.

By this demurrer, the defendant has taken the questions of fact from the jury, where they properly belonged, and has substituted the court in the place of the jury, and everything which the jury could reasonably infer from the evidence demurred to, is to be considered as admitted. The language of adjudged cases on this subject is very strong to show that the court will be extremely liberal in their inferences, where the party, by demurring, [*130] will take the question from the proper tribunal. It is a course of practice, generally speaking, that is not calculated to promote the ends of justice. If the objection to the sufficiency of the evidence is made by way of motion for a nonsuit, it might be removed by testimony within the immediate command of the plaintiff. The deficiency very often arises from mere inadvertence, and omission to make inquiries, which the witnesses examined could probably answer.

the judgment was affirmed. See *Mod. 1*. Another instance of a like proceeding in the Court Baron of the Manor of Wolverhampton, is in *Robbins' Ent. 323*. There, false judgment was brought on this error, that the lands were not mentioned to be within the manor; but, the judgment was affirmed. In *Rastell* there are several instances of writs of false judgment on judgments in writs of right close in courts of ancient demesne. *Rast. Entr. 221, b*. Also, *Booth* states the manner of proceeding in the Court Baron on the writ of right patent, where the cause is not removed. *Booth on Real Actions, 59*. If, then, a recovery might be had on a writ of right in the Court Baron, when the proceeding is adverse, much more might a common recovery be suffered. Errors in common recoveries are aided by the statutes of Jeoffails, and no objection is fatal to them but such as might be pleaded to the jurisdiction of the court where they are suffered. But how could such an objection hold in this case? Every plea to the jurisdiction must state that there is another court in which the cause may be tried, and which that court is. Therefore, if want of jurisdiction is objected to the Court Baron of Windsor Castle, it should be stated where else the province of Maryland can be impended: for fines have been levied in the Court of Common Pleas here, of shares of a proprietorship in America. The only proprietorships at present are Pennsylvania and Maryland; but Carolina was once a proprietorship, and whilst it was so, fines were levied here of shares in it. The first grant of Carolina was to eight persons, and the word "assigns" was used throughout. *Scire facias* was brought to repeal the letters patent; but no judgment was ever given, for the proprietors were well advised, and agreed to surrender, and an act was made to confirm the agreement. See 2 *Geo. II. c. 34*. Though the proprietors were seized in fee, yet this act recites, that from the nature of the estates proposed to be surrendered, great difficulties might arise as to the manner of conveying. In the present

care, like difficulties induced the advisers of the last Lord Baltimore to recommend the applying to parliament; but no act was obtained.

Lord Mansfield: He was stopped by the difficulty of proceeding.

Mr. Serjeant Hill: The last thing I [*160] have to submit is, that if no recovery could be suffered, and seignior with warranty would not have been sufficient, then the entail was not barrable in any way, and the province of Maryland was in the same condition as land here, before the introduction of common recoveries, and of barring by fine under the statute of Hen. VII. Like an executory devise, the entail is not barrable, because a recovery cannot be suffered. See the case of *Scatterwood v. Edze*, 12 *Mod. Rep. 273*. The words of Lord Hardwicke, in 2 *Ves. Rep. 353*, are very applicable. In speaking of the limitations in the act of parliament, which made the Isle of Man unalienable, he says that if they were considered on the foot of the statute *De Donis*, and they were estates tail, there was no want of a restrictive clause; for, before *Taltarum's* case, which established the doctrine of recoveries, and the 4 of Hen. VII. of fines, these, by the statute *De Donis*, were unalienable, and of Man there could be neither fine nor recovery? Here, I say, that the property is not entailable; but, if it is, it must be because within the statute *De Donis*, and, if that statute operates upon Maryland, and no recovery could be suffered, there was a perpetuity. It is absurd to say that there must be the means of making property alienable because it is within that statute; for the statute was made to restrain alienation. A recovery might have been sufficient to bar; but the conveyance by lease and release is too mild in its operation, and on such a conveyance by tenant in tail, the old use reverts to the releasor.

The capability of losing in an action is a very different thing from the power of alienation. What is the objection to a perpetuity in such a case as this? Can any useful end be attained by

In order to determine whether the evidence was sufficient to support the action, it is proper to state what proof was necessary.

The plaintiffs, to entitle them to recover, were bound to show that they were the indorsers and holders of the note; that the note was at the bank, where it was made payable at the time it fell due; that the maker had no funds there to pay the note; and that due notice of the default of the maker was given to the defendant.

The indorsement of the note to the plaintiffs, and that it was discounted in the office of discount and deposit of the Bank of the United States at Washington, where it was made payable, was fully proved. And the jury would have had a right to presume that the note was then at the bank where it was discounted; and the bank being the holder and owner of the note, the presumption, at least prima facie, is, that it remained in the bank, to be delivered up when paid. This establishes the two first points; and, to show that the maker had no [181] funds in the bank, the book-keeper was examined as a witness, who swore, that on the 19th day of July, 1817, when the note fell due, there was no balance to the credit of the drawer, or either of the indorsers, on the books of the bank. And the remaining question is, whether due notice of the default of the maker was given to the defendant. The only objection to the sufficiency of the evidence on this point is, that the notice of non-payment was left at the post-office in the city of Washington, addressed to the defendant at Alexandria, without any evidence that that was his place of residence. The testimony on this point is that of Michael Nourse, a notary public, who swore, that on the date the note fell due, he presented it at the store of the defendant, and demanded payment

of his clerk, who replied that Mr. Young was not within, and he would not pay it. And that, on the same day, he put in the post-office notice of non-payment, addressed to the defendant at Alexandria. If the defendant's place of residence was Alexandria, it is not denied but that due and regular notice was given him. The notary was a sworn officer, officially employed to demand payment of this note, and it is no more than reasonable to presume that he was instructed to take all necessary steps to charge the indorsers. This must have been the object in view in demanding payment of the maker. And it is fair, also, to presume that he made inquiry for the residence of the defendant before he addressed a letter to him; for it is absurd to suppose he would direct to him at that place, without some knowledge or information that he lived there, this being the usual and ordinary course of such transactions, and with which the notary was, no doubt, acquainted. The jury would, undoubtedly, have been warranted to infer, from this evidence, that the defendant's residence was in Alexandria. If that was not the fact, this case is a striking example of the abuse which may grow out of demurrers to evidence. For, a single question to the witness would have put at rest that point, one way or the other, if the least intimation had been given of the objection. It was, manifestly, taken for granted by all parties, that the defendant lived at Alexandria. And if a party will, upon the trial, remain silent, and not suggest an inquiry, which was obviously a mere omission on the part of the plaintiff, a jury would be authorized to draw all inferences from the testimony given, that would not be against reason and probability; and the court, upon a demurrer to the evidence,

making a sovereignty alienable? The cases of copy-holds are not authorities in point, for they depend on custom. Here Mr. Serjeant Hill cited many authorities to confirm and illustrate some of the doctrine he had advanced in the previous part of his argument. He cited Co. Litt. 109, a; Dy. 44 a, and Bro. Abr. Tenure, 91 to show the difference between tenure ut de corona, and ut de honore, and that it was in the King's option to reserve either: Co. Litt. 17 a, and 1 Lev. 222, to prove the word ut, affirmative and not similitudinary; Co. Litt. 5a; 2 Inst. 31, and the Register, to prove a castle contains a manor; and 4 Inst. 20; Hob. 170, and 2 Bro. Abr. 45, to prove that a court Baron is incident to a manor, and that they are inseparable. For, the distinction [181] between writs of right patent, and writs of right close, and the causes of removal, and that where the former lie, they may be preferred to the latter, he cited Fitzh. Nat. Br. 1 to 9, and 11 to 14; Old Nat. Br. Fitzh. Abr. tit. Droit, pl. 45; Magna Charta, cap. 24 and Bro. Abr. To show that it was immaterial where the land happened to lie, he cited Fitzh. Abr. tit. Jurisdiction, pl. 91 and 4 Inst. 219. He then observed that the King might make a new island arising out of the sea part of a county, and for this he cited Collis on Sew. 45, and asked why he could not make a province part of an honor. He also cited from 1 Str. Rep. 177, the case of The King v. The City of Norwich (which was the case of an information against the latter for not repairing some bridges), to show that the King may enlarge, contract or vary the bounds of a county, for the purpose of jurisdiction. He next mentioned, a second time, that fines had been levied of shares of the Carolina proprietorship; and added, that error on a fine of land in America had been brought in B. R., and that it might be proper to search, in order to know what was done.

Lord Mansfield: Fines, and recoveries of plantations in America, with a viz. to bring them within a parish here, were frequent in the Court

6 L. ed.

of Common Pleas, till provincial laws were made to provide other modes of barring. But I do not know of any instance of such fines or recoveries in the case of a seignior.

Mr. Serjeant Hill: In 1 Ventr. Rep. 253, Lord Hale says that the writ of right close (for lands in ancient demesne) is not to be resembled to another principle, and that being directed half in manner, mention of the manor, without naming the will in which the lands lie, is sufficient. So, here, mention of the castle of Windsor in the writ of right patent, without a viz. to bring Maryland within England, would have been sufficient. Lord Chief Justice North, in 2 Mod. Rep. 49, observes that it had been long a dispute whether a fine of lands in lieu comas was good: that in King James' time it was settled to be so, and that, by the same reason, a recovery shall be good; for they are both amicable suits and common assurances, and as they grow more in practice the judges have extended them further. He adds, that a common recovery may be of an advowson, and that no reasons are to be drawn from the rise, or [182] execution of the writ of seisin, because it is not an adverse proceeding, but by agreement. This is immaterial, for common recoveries of advowsons were anciently in writs of right; and though writs of entry are now used, they are improper for an advowson, and they are only allowed because common recoveries are by agreement. The observation about the writ of seisin answers the reason in 1 Ventr. Rep. 59, why an ejectment of lands in Jamaica will not lie here, and shows that it is not applicable to the present case. That where one jurisdiction is pleaded to, another must be shown, I cite Barker v. Dormer, 1 Show. Rep. 191; and that a seignior out of England may be impleaded in the courts here, I cite 4 Inst. 213; Bro. Abr. Jurisdiction, 101; Lien, 73; Trial, 38; Fitzh. Abr. Assize, 282; Vaugh. Rep. 403. As to suing for ancient demesne lands, I cite 1 Salk. Rep. 56, and 1 Lord Raym. Rep. 43.

Upon the whole, the property in question is

will draw the same conclusions that the jury might have drawn.

We are, accordingly, of opinion that the evidence was sufficient to entitle the plaintiffs to recover; that the judgment of the court below must be reversed, and the cause sent back, with directions to enter judgment for the plaintiffs, upon the demurrer to evidence, for the amount of the note, and interest.

Judgment.—This cause came on, etc. On consideration whereof, it is ordered and adjudged that the judgment of the said Circuit [S³] Court, on the demurrer to evidence in the said cause, be reversed. And it is further ordered and adjudged that the said cause be remanded to the said Circuit Court, with instructions that judgment be entered there on said demurrer, for the plaintiffs in the cause; and, further, that the court there do render judgment on the contingent verdict found for the plaintiffs, according to the tenor thereof, with costs, etc.¹

1.—The demurrer to evidence is an unusual and antiquated practice, which this court, and other courts, have recently endeavored to discourage, as inconvenient, and calculated to suppress the truth and justice of the cause. It is allowed or denied by the court where the cause is tried, in the exercise of sound discretion, under all the circumstances of the case; and it seems that the exercise of this discretion cannot be made the foundation of a writ of error. The party demurring is bound to admit as true, not only all the facts proved by the evidence introduced by the other party, but also

neither alienable nor devisable, or, at least, the seigniority is not so. If the property is both alienable and devisable, then I insist that it is entailable, and that the entail is not barred.

"The supposed necessity of barring by lease and release, doth not exist; for,

"(1) There might have been a feoffment with warranty, and, (2) the province being holden of Windsor Castle, is implied in the Court Baron there, and a common recovery might have been suffered there. Besides the authorities already cited, to show that the bailiffs of that court were officers competent to hold plea of the province in a writ of right patent, there is one in Astor's Entz. 375. If a recovery could not be suffered in the Court of the Castle of Windsor, it might have been suffered on a precept quod residat in the Court of Common Pleas; and the property not being in England was no objection to a recovery, either in the Common Pleas, or the Court of Windsor Castle. If it is denied that a recovery could be suffered in either of these courts, it must be shown what court has the proper jurisdiction, or the objection cannot be taken. If a recovery could not be suffered anywhere, then I insist that the entail of the property made it unalienable, 1005" and that it descended as a perpetuity; of Lord Hardwicke in 2 Ves. Rep. 333, and of and that it might so descend, I cite the authority Jenkins in his Centuries, 250 and 257.

"Mr. Serjeant Hill concluded with citing a case about the writ of right patent in 6 Co. Litt. 11.

"Mr. Kenyon for Master Harford: The principal questions in this case, arise on the grant by the crown of the province of Maryland in the 4 Charles I. and the settlements made of it in 1700 and 1701. The grant by the crown being by letters patent under the great seal of England, the law of England is therefore the rule by which the property must be adjudged upon. It has been truly observed by the court, that no points could arise if the property was in England. If the property was situate here, it would be alienable, devisable and entailable, and the entail might be barred by common recovery. But the property lies in America, and thence arise the difficulties.

"The questions referred to this court concern 4-18

[*Surety. Construction of Statute.] [*184

THE UNITED STATES
v.
VANZANDT.

The case of *The United States v. Kirkpatrick*, 9 Wheat. Rep. 720, revised, its authority confirmed, and applied to the present case.

An omission of the proper officer to recall a delinquent paymaster under the injunctions of the 4th section of the act of the 21st of April, 1810, c. 69, does not discharge his surety.

The provisions requiring the delinquent paymaster to be recalled, and a new appointment to be made in his place, are merely directory, and intended for the security of the government; but form no part of the contract with the surety.

The statute not removing from office the delinquent paymaster, ipso facto, but only making it the duty of the proper officer to remove him, the circumstances of new funds being placed in his hands after his delinquency, does not discharge the surety.

THIS cause was argued by the Attorney-General and Mr. Swann for the plaintiffs, and by Mr. Jones and Mr. Key for the defendant. Mr. Justice Washington delivered the opinion of the court:

This was an action of debt brought in the

all the facts which that evidence legally may conduce to prove. It follows that it ought never to be admitted, where the party demurring refuses to admit the facts which the other side attempts to prove; nor where he offers contradictory evidence, or attempts to establish inconsistent propositions. *Young v. Black*, 7 Cranch's Rep. 365; see also, *Powling et al. v. The United States*, 4 Cranch's Rep. 219; *Phil. Evid.* 210, 217; *Bull. N. P. c.* 4, p. 313.

2.—They cited *The United States v. Kirkpatrick*, 9 Wheat. Rep. 720.

both the province and the port duties, and their value is great. But the great value and extent of the property will not make any difference in deciding upon it, though its situation will. The province of Maryland was settled by Englishmen, and these carried the law of England with them. In 2 P. Wms. 75, it is said to have been adjudged by the Privy Council, that if a new country is found out and settled by English subjects, they carry their laws with them, though subsequent acts of parliament, without naming, will not bind the plantation. The like doctrine is laid down in *Lea v. Baltimore*, 2 Ves. Rep. 349, with more precision; for, there it is said, that an English colony carries with them all the laws of England in being at the time of planting it, which are adapted to the situation; but that no statute, made afterwards, binds without naming them. Now, both the statute *De Donis*, and that of wills, were before the settlement of Maryland, and both have words sufficient to comprehend the proprietorship, the word "tenement" being used in the former, and "hereditament" in the latter. Therefore both statutes must extend to the property in question, unless it can be shown that there is something incongruous in applying them to Maryland. But they are necessary and concurrent laws for Maryland, nor is the law of descent more so. It is objected, that these statutes may extend to lands granted to the lord proprietor in the way of subinfeudation, but that [*184] they ought not to be applied to the seignior and proprietorship. But no reason is given for the distinction, except saying that the proprietorship is a transcendent property, and hath regalities and high powers annexed to it. Is an assignee or decedee less likely to be fit and able to govern it than the descendants of the first grantee, who may be infants? Higher property than this hath been the subject of wills; for kingdoms have been devised. Constantine devised an empire, and so did Charlemagne; and the same was done in our own country by Henry VIII. under an act of parliament. It is said that the property is not alienable, because it is annexed to an office of trust. But lands to which offices are annexed, may pass together with the office. When the champion of

ANDREW JACKSON'S

VETO MESSAGE,

JULY 10, 1832

"To Modify And Continue An Act To Incorporate
The Subscribers To The Bank Of The United States"

"THE MESSAGES AND PAPERS OF THE PRESIDENTS"

(Page 1139 - 1154)

By

James D. Richardson

1910 Edition

Published By

Bureau Of National Literature And Art

VETO MESSAGE

Washington, July 10, 1823.

To The Senate:

The bill "to modify and continue" the act entitled "An act to incorporate the subscribers to the Bank of the United States" was presented to me on the 4th July instant. Having considered it with solemn regard to the principles of the Constitution which the day was calculated to inspire, and come to the conclusion that it not to become a law, I herewith return it to the Senate, in which it originated, with my objections.

A bank of the United States is in many respects convenient for the Government and useful to the people. Entertaining this opinion, and deeply impressed with the belief that some of the powers and privileges possessed by the existing bank are unauthorized by the Constitution, subversive to the rights of the States, and dangerous to the liberties of the people, I felt it my duty at an early period of my Administration to call the attention of Congress to the practicability of organizing an institution combining all its advantages and obviating these objections. I sincerely regret that in the act before me I can perceive none of those modifications of the bank charter which are necessary, in my opinion, to make it compatible with justice, with sound policy, or with the Constitution of our country.

The present corporate body, denominated the president, directors, and company of the Bank of the United States, will have existed at the time this act is intended to take effect twenty years. It enjoys an exclusive privilege of banking under authority of the General Government, a monopoly of its favor and support, and, as a necessary consequence, almost a monopoly of the foreign and domestic exchange. The powers, privileges, and favors bestowed upon it in the original charter, by increasing the value of the stock far above its par value, operated as a gratuity of many millions to the stockholders.

An apology may be found for the failure to guard against this result in the consideration that the effect of the original act of incorporation could not be certainly foreseen at the time of its passage. The act before me proposes another gratuity to the holders of the same stock, and in many cases the same men, of at least seven millions more. This donation finds no apology in any uncertainty as to the effect of the act. On all hands it is conceded that its passage will increase at least 20 or 30 per cent more the market price of the stock, subject to the payment of the annuity of \$200,000 per year secured by the act, thus adding in a moment one-fourth to its par value. It is not our own citizens only who are to receive the bounty of our Government. More than eight millions of the stock of this bank are held by

foreigners. By this act the American Republic proposes virtually to make them a present of some millions of dollars. For these gratuities to foreigners and to some of our own opulent citizens the act secures no equivalent whatever. They are the certain gains of the present stockholders under the operation of this act, after making full allowance for the payment of the bonus.

Every monopoly and all exclusive privileges are granted at the expense of the public, which ought to receive a fair equivalent. The many millions which this act proposes to bestow on the stockholders of the existing bank must come directly or indirectly out of the earning of the American people. It is due to them, therefore, if their Government sell monopolies and exclusive privileges, that they should at least exact for them as much as they are worth in open market. The value of the monopoly in this case may be correctly ascertained. The twenty-eight millions of stock would probably be at the advance of 50 per cent, and command in market at least \$42,000,000, subject to the payment of the present bonus. The present value of the monopoly, therefore, is \$17,000,000, and this the act proposes to sell for three millions, payable in fifteen annual installments of \$200,000 each.

It is not conceivable how the present stockholders can have any claim to the special favor of the Government. The present corporation has enjoyed its monopoly during the period stipulated in the original contract. If we must have such a corporation, why should not the Government sell out the whole stock and thus secure to the people the full market value of the privileges granted? Why should not Congress create and sell twenty-eight millions of stock, incorporating the purchasers with all the powers and privileges secure in this act and putting the premium upon the sales into the Treasury?

But this act does not permit competition in the purchase of this monopoly. It seems to be predicated on the erroneous idea that the present stockholders have a prescriptive right not only to the favor but to the bounty of the Government. It appears that more than a fourth part of the stock is held by foreigners and the residue is held by a few hundred of our own citizens, chiefly of the richest class. For their benefit does this act exclude the whole American people from competition in the purchase of this monopoly and dispose of it for many millions less than its worth. This seems the less excusable because some of our citizens not now stockholders petitioned that the door of competition might be opened, and offered to take a charter on terms much more favorable to the Government and country.

But this proposition, although made by men whose aggregate wealth is believed to be equal to all the private stock in the existing bank, has been set aside, and the bounty of our Government is proposed to be again bestowed on the few who have been fortunate enough to secure the stock and at this moment

wield the power of the existing institution. I can not perceive the justice or policy of this course. If our Government must sell monopolies, it would seem its duty to take nothing less than their full value, and if gratuities must be made once in fifteen or twenty years let them not be bestowed on the subjects of a foreign government nor upon a designated and favored class of men in own country. It is but justice and good policy, as far as the nature of the case will admit, to confine our favors to our own fellow citizens, and let each in his turn enjoy an opportunity to profit by our bounty. In the bearings of the act before me upon these points I find ample reasons why it should not become a law.

~~It has been urged as an argument in favor of rechartering~~ the present bank that the calling in its loans will produce great embarrassment and distress. The time allowed to close its concerns is ample, and if it has been well managed its pressures will be light, and heavy only in case its management has been bad. If, therefore, it shall produce distress, the fault will be its own and it would furnish a reason against renewing a power ~~which has been so obviously abused.~~ But will there ever be a time when this reason will be less powerful? To acknowledge its force is to admit that the bank ought to be perpetual, and as a consequence the present stockholders and those inheriting their rights as successors be established a privileged order, clothed both with great political power and enjoying immense pecuniary advantages from their connection with the Government.

The modifications of the existing charter proposed by this act are not such. in my view, as make it consistent with the rights of the States or the liberties of the people. The qualification of the right of the bank to hold real estate, the limitation of its power to establish branches, and the power reserved to Congress to forbid the circulation of small notes are restrictions comparatively of little value or importance. All the objectionable principles of the existing corporation, and most of its odious feature, are retained without alleviation.

The fourth section provides "that the notes or bills of the said corporation, although the same be, on the faces thereof, respectively made payable at one place only, shall nevertheless be received by said corporation at the bank or at any of the offices of discount and deposit thereof if tendered in liquidation or payment of any balance or balances due to said corporation or to such office of discount and deposit from any other incorporated bank." This provision secures to the State banks a legal privilege in the Bank of the United States which is withheld from all private citizens. If a State bank in Philadelphia owe the Bank of the United States and have notes issued by the St. Louis branch, it can pay the debt with those notes, but if a merchant, mechanic, or other private citizen be in like circumstances he can not by law pay his debt with those notes, but must sell them at a discount or send them to St. Louis

to be cashed. This boon conceded to the State banks, though not unjust in itself, is most odious because it does not measure out equal justice to the high and low, the rich and the poor. To the extent of its practical effect it is a bond of union among the banking establishments of the nation, erecting them into an interest separate from that of the people, and its necessary tendency is to unite the Bank of the United States and the State banks in any measure which may be thought conducive to their common interest.

The ninth section of the act recognizes principles of worse tendency than any other provision of the present charter.

It enacts that "the cashier of the bank shall annually report to the Secretary of the Treasury the names of all stock holders who are not residents citizens of the United States, and on the application of the treasurer of any State shall make out and transmit to such treasurer a list of stockholders residing in or citizens of such State, with the amount of stock owned by each." Although this provision, taken in connection with a decision of the Supreme Court, surrenders, by its silence, the right of the State to tax the banking institutions created by this corporation under the name of branches throughout the Union, it is evidently intended to be construed as a concession of their right to tax that portion of the stock which may be held by their citizens and residents. In this light, if the act becomes law, it will be understood by the States, who will probably proceed to levy a tax equal to that paid upon the stock of banks incorporated by themselves. In some States that tax is now 1 per cent, either on the capital or on the shares, and that may be assumed as the amount which all citizen or resident stockholders would be taxed under the operation of this act. As it is only the stock held in the States and not that employed within them which would be subject to taxation, and as the names of foreign stockholders are not to be reported to the treasurer of the United States, it is obvious that the stocks held by them will be exempt from this burden. Their annual profits will therefore be 1 per cent more than the citizen stockholders and as the annual dividends of the bank may be safely estimated at 7 per cent, the stock will be worth 10 or 15 per cent more to foreigners than to citizens of the United States. To appreciate the effects which this state of things will produce, we must take brief review of the operations and present condition of the Bank of the United States.

By documents submitted to Congress at the present session it appears that on the 1st of January, 1832, of the twenty-eight millions of private stock in the corporation, \$8,405,500 were held by foreigners, mostly of Great Britain. The amount of stock held in the nine Western and Southwestern States is \$140,200, and in the four Southern States is \$5,623,100, and in the Middle and Eastern States is about \$13,522,000. The profits of the bank in

1831, as shown in the statement to Congress, were about \$3,455,598; of this there accrued in the nine Western States about \$1,640,048; in the four Southern States about \$352,507, and in the Middle and Eastern States about \$1,463,041. As little stock is held in the West, it is obvious that the debt of the people in that section to the bank is principally a debt to the Eastern and foreign stockholders; that the interest they pay upon it is carried into the Eastern States and into Europe, and that it is a burden upon their industry and a drain of their currency, which no country can bear without inconvenience and occasional distress. To meet this burden and equalize the exchange operations of the bank, the amount of specie drawn from those States through its branches within the last two years, as shown by its official reports, was about \$6,000,000. More than half a million of this amount does not stop in the Eastern States, but passes on to Europe to pay the dividends of the foreign stockholder. In the principle of taxation recognized by this act the Western States find no adequate compensation for this perpetual burden on their industry and drain of their currency. The branch bank at Mobile made last year \$95,140, yet under the provisions of this act the State of Alabama can raise no revenue from these profitable operations, because not a share of the stock is held by any of her citizens. Mississippi and Missouri are in the same condition in relation to the branches at Natchez and St. Louis, and such, in a greater or less degree, is the condition of every Western State. The tendency of the plan of taxation which this act proposes will be to place the whole United States in the same relation to foreign countries which the Western States now bear to the Eastern. When by a tax on resident stockholders the stock of this bank is made worth 10 to 15 per cent more to foreigners than to residents, most of it will inevitably leave the country.

Thus will this provision in its practicable effect deprive the Eastern as well as the Southern and Western States of the means of raising revenue from the extension of business and great profits of this institution. It will make the American people debtors to aliens in nearly the whole amount due this bank, and send across the Atlantic from two to five millions of specie every year to pay the bank dividends.

In another of its bearings this provision is fraught with danger. Of the twenty-five directors of this bank five are chosen by the Government and twenty by the citizen stockholders. From all voice in the elections the foreign stockholders are excluded by the charter. In proportion, therefore, as the stock is transferred to foreign holders the extent of suffrage in the choice of directors is curtailed. Already is almost as third of the stock in foreign hands and not represented in elections. It is constantly passing out of the country, and this act will accelerate its departure. The entire control of the institution

would necessarily fall into the hands of a few citizen stockholders, and the ease with which the object would be accomplished would be a temptation to designing men to secure that control in their own hands by monopolizing the remaining stock. There is danger that a president and directors would then be able to elect themselves from year to year, and without responsibility or control manage the whole concerns of the bank during the existence of its charter. It is easy to conceive that great evils to our country and its institutions might flow from such a concentration of power in the hands of a few irresponsible to the people.

Is there no danger to our liberty and independence in a bank that in its nature has so little to bind it to our country? The president of the bank has told us that most of the State banks exist by its forbearance. Should its influence become concentrated, as it may under the operation of such an act as this, in the hands of the self-elected directory whose interests are identified with those of foreign stockholders, will there not be cause to tremble for the purity of our elections in peace and for the independence of our country in war? Their power would be great whenever they might choose to exert it; but if this monopoly were regularly renewed every fifteen or twenty years on terms proposed by themselves, they might seldom in peace put forth their strength to influence elections or control the affairs of the nation. But if any private citizen or public functionary should interpose to curtail its powers or prevent a renewal of its privileges, it can not be doubted that he would be made to feel its influence.

~~Should the stock of the bank principally pass into the hands of the subjects of a foreign country, and we should unfortunately become involved in a war with that country, what would be our condition?~~ Of the course which be pursued by a bank almost wholly owned by the subjects of a foreign power, and managed by those interests, if not affections, would run in the same direction there can be no doubt. All its operations within would be in aid of the hostile fleets and armies without. Controlling our currency, receiving our public moneys, and holding thousands of our citizens in dependence, it would be more formidable and dangerous than the naval and military power of the enemy.

If we must have a bank with private stockholders, every consideration of sound policy and every impulse of American feeling admonishes that it should be purely American. Its stockholders should be composed exclusively of our own citizens, who at least ought to be friendly to our Government and willing to support it in times of difficulty and danger. So abundant is domestic capital that competition in subscribing for the stock of local banks has recently led almost to riots. To a bank exclusively of American stockholders, possessing the powers and privileges granted by this act, subscriptions for \$200,000,000

could be readily obtained. Instead of sending abroad the stock of the bank in which the Government must deposit its funds and on which it must rely to sustain its credit in times of emergency, it would rather seem to be expedient to prohibit its sale to aliens under penalty of absolute forfeiture.

~~It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent. Here precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress in 1791, decided in favor of a bank; another, in 1811, decided against it. One Congress, in 1815, decided against a bank; another, in 1816, decided in its favor. Prior to the present Congress, therefore, the precedents drawn from that source were equal. If we resort to the States, the expressions of legislative, judicial, and executive opinions against the bank have been probably to those in its favor as 4 to 1. There is nothing in precedent, therefore, which, if its authority were admitted, ought to weigh in favor of the act before me.~~

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

But in the case relied upon the Supreme Court have not decided that all the features of this corporation are compatible with the Constitution. It is true that the court have said that the law incorporating the bank is a constitutional exercise of power by Congress; but taking into view the whole opinion of the court and the reasoning by which they have come to that conclusion, I understand them to have decided that inasmuch as a bank is an appropriate means for carrying into effect the

enumerated powers of the General Government, therefore the law incorporating it is in accordance with that provision of the Constitution which declares that Congress shall have power 'to make all laws which shall be necessary and proper for carrying those powers into execution.' Having satisfied themselves that the word "necessary" in the Constitution means "needful," "requisite," "essential," "conducive to," and that "a bank" is a convenient, a useful, and essential instrument in the prosecution of the Government's "fiscal operations," they conclude that to "use one must be within the discretion of Congress" and that "the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution;" "but," say they, "where the law is not prohibited and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground."

The principle here affirmed is that the "degree of its necessity," involving all the details of a banking institution, is a question exclusively for legislative consideration. A bank is constitutional, but it is the province of the Legislature to determine whether this or that particular power, privilege, or exemption is "necessary and proper" to enable the bank to discharge its duties to the Government, and from their decision there is no appeal to the courts of justice. Under the decision of the Supreme Court, therefore, it is the exclusive province of Congress and the President to decide whether the particular features of this act are necessary and proper in order to enable the bank to perform conveniently and efficiently the public duties assigned to it as a fiscal agent, and therefore constitutional, or unnecessary and improper, and therefore unconstitutional.

Without commenting on the general principle affirmed by the Supreme Court, let us examine the details of this act in accordance with the rule of legislative action which they have laid down. It will be found that many of the powers and privileges conferred on it can not be supposed necessary for the purpose for which it is proposed to be created, and are not, therefore, means necessary to attain the end in view, and consequently not justified by the Constitution.

The original act of incorporation, section 21, enacts "that no other bank shall be established by any future law of the United States during the continuance of the corporation hereby created, for which the faith of the United States is hereby pledged: Provided, Congress may renew existing charters for banks within the District of Columbia not increasing the capital thereof, and may also establish any other bank or banks in said District with capitals not exceeding in the whole \$6,000,000 if they shall deem it expedient." This provision is continued in

force by the act before me fifteen years from the 3rd of March, 1836.

If Congress possesses the power to establish one bank, they had power to establish more than one if in their opinion two or more banks had been "necessary" to facilitate the execution of the powers delegated to them in the Constitution. If they possessed the power to establish a second bank, it was a power derived from the Constitution to be exercised from time to time, and at any time when the interest of the country or the emergencies of the Government might make it expedient. It was possessed by one Congress as well as another, and by all Congresses alike, and alike at every session. But the Congress of 1816 have taken it away from their successors for twenty years, and the Congress of 1832 proposes to abolish it for fifteen years more. It can not be "necessary" or "proper" for Congress to barter away or divest themselves of any of the powers vested in them by the Constitution to be exercised for the public good. It is not "necessary" to the efficiency of the bank, nor is it "proper" in relation to themselves and their successors. They may properly use the discretion vested in them, but they may not limit the discretion of their successors. This restriction on themselves and grant of a monopoly to the bank is therefore unconstitutional.

In another point of view this provision is a palpable attempt to amend the Constitution by an act of legislation. The Constitution declares that "the Congress shall have power to exercise exclusive legislation in all cases whatsoever" over the District of Columbia. Its constitutional power, therefore, to establish banks in the District of Columbia and increase their capital at will is unlimited and uncontrollable by any other power than that which gave authority to the Constitution. Yet this act declares that Congress shall not increase the capital of existing banks, nor create other banks with capitals exceeding in the whole \$6,000,000. The Constitution declares that Congress shall have power to exercise exclusive legislation over this District "in all cases whatsoever," and this act declares they shall not. Which is the supreme law of the land? This provision can not be "necessary" or "proper" or constitutional unless the absurdity be admitted that whenever it be "necessary and proper" in the opinion of Congress they have a right to barter away one portion of the powers vested in them by the Constitution as a means of executing the rest.

On two subjects only does the Constitution recognize in Congress the power to grant exclusive privileges or monopolies. It declares that "Congress shall have power to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Out of this express delegation of power have grown our laws of patents and copyrights. As the

Constitution expressly delegates to Congress the power to grant exclusive privileges in these cases as the means of executing the substantive power "to promote the progress of science and useful arts," it is consistent with the fair rules of construction to conclude that such a power was not intended to be granted as a means of accomplishing any other end. On every other subject which comes within the scope of Congressional power there is an ever-living discretion in the use of proper means, which can not be restricted or abolished without an amendment of the Constitution. Every act of Congress, therefore, which attempts by grants of monopolies or sale of exclusive privileges for a limited time, or a time without limit, to restrict or extinguish its own discretion in the choice of means to execute its delegated powers is equivalent to a legislative amendment of the Constitution, and palpably unconstitutional.

This act authorizes and encourages transfers of its stock to foreigners and grants them an exemption from all State and national taxation. So far from being "necessary and proper" that the bank should possess this power to make it a safe and efficient agent of the Government in its fiscal operations, it is calculated to convert the Bank of the United States into a foreign bank, to impoverish our people in time of peace, to disseminate a foreign influence through every section of the Republic, and in war endanger our independence.

The several States reserved the power at the formation of the Constitution to regulate and control titles and transfers of real property, and most, if not all, of them have laws disqualifying aliens from acquiring or holding lands within their limits. But this act, in disregard of the undoubted right of the States to prescribe such disqualifications, gives to aliens stockholders in this bank an interest and title, as members of the corporation, to all the real property it may acquire within any of the States of this Union. This privilege granted to aliens is not "necessary" to enable the bank to perform its public duties, nor in any sense "proper," because it is vitally subversive of the rights of the States.

The Government of the United States have no constitutional power to purchase lands within the States except "for the erection of forts, magazines, arsenals, dockyards, and other needful buildings," and even for these objects only "by consent of the legislature of the State in which the land shall be." By making themselves stockholders in the bank and granting to the corporation the power to purchase lands for other purposes they assume a power not granted in the Constitution and grant to others what they do not themselves possess. It is not necessary to the receiving, safe-keeping, or transmission of the funds of the Government that the bank should possess this power, and it is not proper that Congress should thus enlarge the powers delegated to them in the Constitution.

The old Bank of the United States possessed capital of only \$11,000,000, which was found fully sufficient to enable it with dispatch and safety to perform all the functions required of it by the Government. The capital of the present bank is \$35,000,000 - at least twenty-four more than experience has proved necessary to enable a bank to perform its public functions. The public debt which existed during the period of the old bank and on the establishment of the new has been nearly paid off, and our revenue will soon be reduced. This increase of capital is therefore not for public but private purposes.

The Government is the only "proper" judge where its agents should reside and keep their offices, because it best knows where their presence will be "necessary." It can not, therefore, be "necessary" or "proper" to authorize the bank to locate branches where it pleases to perform the public service, without consulting the Government, and contrary to its will. The principle laid down by the Supreme Court concedes that Congress can not establish a bank for purposes of private speculation and gain, but only as a means of executing the delegated powers of the General Government. By the same principle a branch bank can not constitutionally be established for other than public purposes. The power which this act gives to establish two branches in any State, without the injunction or request of the Government and for other than public purposes, is not "necessary" to the due execution of the powers delegated to Congress.

The bonus which is exacted from the bank is a confession upon the face of the act that the powers granted to it are greater than are "necessary" to its character of a fiscal agent. The Government does not tax its officers and agents for the privilege of serving it. The bonus of a million and a half required by the original charter and that of three millions proposed by this act are not exacted for the privilege of giving "the necessary facilities for transferring the public funds from place to place within the United States or the Territories thereof, and for distributing the same in payment of the public creditors without charging commission or claiming allowance on account of the difference of exchange," as required by the act of incorporation, but for something more beneficial to the stockholders. The original act declares that it (the bonus) is granted "in consideration of the exclusive privileges and benefits conferred by this act upon the said bank," and the act before me declares it to be "in consideration of the exclusive benefits and privileges continued by this act to the said corporation for fifteen years, as aforesaid." It is therefore for "exclusive privileges and benefits" conferred for their own use and emolument, and not for the advantage of the Government, that a bonus is exacted. These surplus powers for which the bank is required to pay can not surely be "necessary" to make it the fiscal agent of the Treasury. If they were, the exaction of a

Bonus for them would not be "proper."

It is maintained by some that the bank is a means of executing the constitutional power "to coin money and regulate the value thereof." Congress have established a mint to coin money and passed laws to regulate the value thereof. The money so coined, with its value so regulated, and such foreign coins as Congress may adopt are the only currency known to the Constitution. But if they have other power to regulate the currency, it was conferred to be exercised by themselves, and not to be transferred to a corporation. If the bank be established for that purpose, with a charter unalterable without its consent, Congress have parted with their power for a term of years, during which the Constitution is a dead letter. It is neither necessary nor proper to transfer its legislative power to such a bank, and therefore unconstitutional.

By its silence, considered in connection with the decision of the Supreme Court in the case of McCulloch against the State of Maryland, this act takes from the States the power to tax a portion of the banking business carried on within their limits, in subversion of one of the strongest barriers which secured them against Federal encroachment. Banking, like farming, manufacturing, or any other occupation or profession, is a business, the right to follow which is not originally derived from the laws. Every citizen and every company of citizens in all of our States possess the right until the State legislatures deemed it good policy to prohibit private banking by law. If the prohibitory State laws were now repealed, every citizen would again possess the right. The State banks are a qualified restoration of the right which has been taken away by the laws against banking, guarded by such provisions and limitations as in the opinion of the State legislatures the public interest requires. These corporations, unless there be an exemption in their charter, are, like private bankers and banking companies, subject to State taxation. The manner in which these taxes shall be laid depends wholly on legislative discretion. It may be upon the bank, upon the stock, upon the profits, or in any other mode which the sovereign power shall will.

Upon the formation of the Constitution the States guarded their taxing power with peculiar jealousy. They surrendered it only as it regards imports and exports. In relation to every other object with their jurisdiction, whether persons, property, business, or professions, it was secured in as ample a manner as it was before possessed. All persons, though United States officers, are liable to a poll tax by the States within which they reside. The lands of the United States are liable to the usual land tax, except in the new States, from whom agreements that they will not tax unsold lands are exacted when they are admitted into the Union. Horses, wagons, any beasts or vehicles, tools, or property belonging to private citizens, though employed

in the service of the United States, are subject to State taxation. Every private business, whether carried on by an officer of the General Government or not, whether it be mixed with public concerns or not, even if it be carried on by the Government of the United States itself, separately or in partnership, falls within the scope of the taxing power of the State. Nothing comes more fully within it than banks and the business of banking, by whomsoever instituted and carried on. Over this whole subject-matter it is just as absolute, unlimited, and uncontrollable as if the Constitution had never been adopted, because in the formation of that instrument it was reserved without qualification.

The principle is conceded that the States can not rightfully tax the operations of the General Government. They can not tax the money of the Government deposited in the State banks, nor the agency of those banks in remitting it; but will any man maintain that their mere selection to perform this public service for the General Government would exempt the State banks and their ordinary business from State taxation? Had the United States, instead of establishing a bank at Philadelphia, employed a private banker to keep and transmit their funds, would it have deprived Pennsylvania of the right to tax his bank and his usual banking operations? It will not be pretended. Upon what principle, then, are the banking establishments of the Bank of the United States and their usual banking operations to be exempted from taxation? It is not their public agency or the deposits of the Government which the States claim a right to tax, but their banks and their banking powers, instituted and exercised within State jurisdiction for their private emolument - those powers and privileges for which they pay a bonus, and which the States tax in their own banks. The exercise of these powers within a State, no matter by whom or under what authority, whether by private citizens in their original right, by corporate bodies created by the States, by foreigners or the agents of foreign governments located within their limits, forms a legitimate object of State taxation. From this and like sources, from the persons, property, and business that are found residing, located, or carried on under their jurisdiction, must the States, since the surrender of their right to raise a revenue from imports and exports, draw all the money necessary for the support of their governments and the maintenance of their independence. ~~There is no more appropriate subject of taxation than banks, banking, and bank stocks, and none to which the States ought more pertinaciously to cling.~~

It can not be necessary to the character of the bank as a fiscal agent of the Government that its private business should be exempted from that taxation to which all the State banks are liable, nor can I conceive it "proper" that the substantive and most essential powers reserved by the States shall be thus

attacked and annihilated as a means of executing the powers delegated to the General Government. It may be safely assumed that none of these sages who had an agency in forming or adopting our Constitution ever imagined that any portion of the taxing power of the States not prohibited to them nor delegated to Congress was to be swept away and annihilated as a means of executing certain powers delegated to Congress.

Our power over means is so absolute that the Supreme Court will not call in question the constitutionality of an act of Congress the subject of which "is not prohibited, and is really calculated to effect any of the objects intrusted to the Government," although, as in the case before me, it takes away powers expressly granted to Congress and rights scrupulously reserved to the States, it becomes us to proceed in our legislation with the utmost caution. Though not directly, our own powers and the rights of the States may be indirectly legislated away in the use of means to execute substantive powers. We may not enact that Congress shall not have the power of exclusive legislation over the District of Columbia, but we may pledge the faith of the United States that as a means of executing other powers it shall not be exercised for twenty years or forever. We may not pass an act prohibiting the States to tax the banking business carried on within their limits, but we may, as a means of executing our powers over other objects, place that business in the hands of our agents and then declare it exempt from State taxation in their hands. Thus may our own powers and the rights of the States, which we can not directly curtail or invade, be frittered away and extinguished in the use of means employed by us to execute other powers. That a bank of the United States, competent to all the duties which may be required by the Government, might be so organized as not to infringe on our own delegated powers or the reserved rights of the States I do not entertain a doubt. Had the Executive been called upon to furnish the project of such an institution, the duty would have been cheerfully performed. In the absence of such a call it was obviously proper that he should confine himself to pointing out those prominent features in the act presented which in his opinion make it incompatible with the Constitution and sound policy. A general discussion will now take place, eliciting new light and settling important principles; and a new Congress, elected in the midst of such discussion, and furnishing an equal representation of the people according to the last census, will bear to the Capitol the verdict of public opinion, and, I doubt not, bring this important question to a satisfactory result.

Under such circumstances the bank comes forward and asks a renewal of its charter for a term of fifteen years upon conditions which not only operate as a gratuity to the stockholders of many millions of dollars, but will sanction any abuses and legalize any encroachments.

Suspensions are entertained and charges are made of gross abuse and violation of its charter. An investigation unwillingly conceded and so restricted in time as necessarily to make it incomplete and unsatisfactory discloses enough to excite suspicion and alarm. In the practices of the principal bank partially unveiled, in the absence of important witnesses, and in numerous charges confidently made and as yet wholly uninvestigated there was enough to induce a majority of the committee of investigation - a committee which was selected from the most able and honorable members of the House of Representatives - to recommend a suspension of further action upon the bill and a prosecution of the inquiry. As the charter had yet four years to run, and as a renewal now was not necessary to the successful prosecution of its business, it was to have been expected the bank itself, conscious of its purity and proud of its character, would have withdrawn its application for the present, and demanded the severest scrutiny into all its transactions. In their declining to do so there seems to be an additional reason why the functionaries of the Government should proceed with less haste and more caution in the renewal of their monopoly.

The bank is professedly established as an agent of the executive branch of the Government, and its constitutionality is maintained on that ground. Neither upon the propriety of present action nor upon the provisions of this act was the Executive consulted. It has had no opportunity to say that it neither needs nor wants an agent clothed with such powers and favored by such exemptions. There is nothing in its legitimate functions which makes it necessary or proper. Whatever interests or influence, whether public or private, has given birth to this act, it can not be found either in the wishes or necessities of the executive department, by which present action is deemed premature, and the powers conferred upon its agent not only unnecessary, but dangerous to the Government and country.

It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. Distinctions in society will always exist under every just government. Equality of talents, of education, or of wealth can not be produced by human institutions. In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society - the farmers, mechanics, and laborers - who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government. There are no necessary evils in government. Its evils only exist in its

~~abuses~~. If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing. In the act before me there seems to be a wide and unnecessary departure from these just principles.

Nor is our Government to be maintained or our Union preserved by invasion of the rights and powers of the several States. In thus attempting to make our General Government strong we make it weak. Its true strength consists in leaving individuals and States as much as possible to themselves - in making itself felt, not in its power, but in its beneficence; not in its control, but in its protection; not in binding the States more closely to the center, but leaving each to move unobstructed in its proper orbit.

Experience should teach us wisdom. Most of the difficulties our Government now encounters and most of the dangers which impend over our Union have sprung from an abandonment of the legitimate objects of Government by our national legislation, and the adoption of such principles as are embodied in this act. Many of our rich men have not been content with equal protection and equal benefits, but have besought us to make them richer by act of Congress. By attempting to gratify their desires we have in the results of our legislation arrayed section against section, interest against interest, and man against man, in a fearful commotion which threatens to shake the foundations of our Union. It is time to pause in our career to review our principles, and if possible revive that devoted patriotism and spirit of compromise which distinguished the sages of the Revolution and the fathers of our Union. If we can not at once, in justice to interests vested under improvident legislation, make our Government what it ought to be, we can at least take a stand against all new grants of monopolies and exclusive privileges, against any prostitution of our Government to the advancement of the few at the expense of the many, and in favor of compromise and gradual reform in our code of laws and system of political economy.

I have now done my duty to my country. If sustained by my fellow-citizens, I shall be grateful and happy; if not, I shall find in the motives which impel me ample grounds for contentment and peace. In the difficulties which surround us and the dangers which threaten our institutions there is cause for neither dismay nor alarm. For relief and deliverance let us firmly rely on that kind Providence which I am sure watches with peculiar care over the destinies of our Republic, and on the intelligence and wisdom of our countrymen. Through His abundant goodness and their patriotic devotion our liberty and Union will be preserved.

ANDREW JACKSON.

ANDREW JACKSON

REMOVAL OF THE PUBLIC DEPOSITS

(READ TO THE CABINET SEPTEMBER 18, 1833)

"THE MESSAGES AND PAPERS OF THE PRESIDENT"
(Page 1224 - 1238)

By
James D. Richardson
1910 Edition

Published By
Bureau Of National Literature And Art

Having carefully and anxiously considered all the facts and arguments which have been submitted to him relative to a removal of the public deposits from the Bank of the United States, the President deems it his duty to communicate in this manner to his Cabinet the final conclusions of his own mind and the reasons on which they are founded, in order to put them in durable form and to prevent misconceptions.

The President's convictions of the dangerous tendencies of the Bank of the United States, since signally illustrated by its own acts, were so overpowering when he entered on the duties of Chief Magistrate that he felt it his duty, notwithstanding the objections of the friends by whom he was surrounded, to avail himself of the first occasion to call the attention of Congress and the people to the question of its recharter. The opinions expressed in his annual message of December, 1829, were reiterated in those of December, 1830 and 1831, and in that of 1830 he threw out for consideration some suggestions in relation to a substitute. At the session of 1831-32 an act was passed by a majority of both Houses of Congress rechartering the present bank, upon which the President felt it his duty to put his constitutional veto. In his message returning that act he repeated and enlarged upon the principles and views briefly asserted in his annual message, declaring the bank to be, in his opinion, both inexpedient and unconstitutional, and announcing to his countrymen very unequivocally his firm determination never to sanction by his approval the continuance of that institution or the establishment of any other upon similar principles.

There are strong reasons for believing that the motive of the bank in asking for a recharter at that session of Congress was to make it a leading question in the election of a President of the United States the ensuing November, and all steps deemed necessary were taken to procure from the people a reversal of the President's decision.

Although the charter was approaching its termination, and the bank was aware that it was the intention of the Government to use the public deposit as fast as it has accrued in the payment of the public debt, yet did it extend its loans from January, 1831, to May, 1832, from \$42,402,304.24 to \$70,428,070.72, being an increase of \$28,025,766.48 in sixteen months. It is confidently believed that the leading object of this immense extension of its loans was to bring as large a portion of the people as possible under its power and influence, and it has been disclosed that some of the largest sums were granted on very unusual terms to the conductors of the public press. In some of these cases the motive was made manifest by the nominal or insufficient security taken for the loans, by the large amounts

discounted, by the extraordinary time allowed for payment, and especially by the subsequent conduct of those receiving the accommodations.

Having taken these preliminary steps to obtain control over public opinion, the bank came into Congress and asked a new charter. The object avowed by many of the advocates of the bank was to put the President to the test, that the country might know his final determination relative to the bank prior to the ensuing election. Many documents and articles were printed and circulated at the expense of the bank to bring the people to a favorable decision upon its pretensions. Those whom the bank appears to have made its debtors for the special occasion were warned of the ruin which awaited them should the President be sustained, and attempts were made to alarm the whole people by painting the depression in the price of property and produce and the general loss, inconvenience, and distress which it was represented would immediately follow the reelection of the President in opposition to the bank.

Can it now be said that the question of a recharter of the bank was not decided at the election which ensued? Had the veto been equivocal, or had it not covered the whole ground; if it had merely taken exceptions to the details of the bill or to the time of its passage; if it had not met the whole ground of constitutionality and expedience, then there might have been some plausibility for the allegation that the question was not decided by the people. It was to compel the President to take his stand that the question was brought forward at that particular time. He met the challenge, willingly took the position into which his adversaries sought to force him, and frankly declared his unalterable opposition to the bank as being both unconstitutional and inexpedient. On that ground the case was argued to the people; and now that the people have sustained the President, notwithstanding the array of influence and power which was brought to bear upon him, it is too late, he confidently thinks, to say that the question has not been decided. Whatever may be the opinions of others, the President considers his reelection as a decision of the people against the bank. In the concluding paragraph of his veto message he said:

"I have now done my duty to my country. If sustained by my fellow-citizens, I shall be grateful and happy; if not, I shall find in the motives which impel me ample grounds for contentment and peace."

He was sustained by a just people, and he desires to evince his gratitude by carrying into effect their decision so far as it depends upon him.

~~Of all~~ the substitutes for the present bank which have been suggested, none seems to have united any considerable portion of the public in its favor. Most of them are liable to the same constitutional objections for which the present bank has been condemned, and perhaps to all there are strong objections on the score of expediency. In ridding the country of an irresponsible power which has attempted to control the Government, care must be taken not to unite the same power with the executive branch. To give a President the control over the currency and the power over individuals now possessed by the Bank of the United States, even with the material difference that he is responsible to the people would be as objectionable and as dangerous as to leave it as it is. Neither one nor the other is necessary, and therefore ought not to be resorted to.

On the whole, the President considers it as conclusively settled that the charter of the Bank of the United States will not be renewed, and he has no reasonable ground to believe that any substitute will be established. Being bound to regulate his course by the laws as they exist, and not to anticipate the interference of the legislative power for the purpose of framing new systems, it is proper for him seasonably to consider the means by which the services rendered by the Bank of the United States are to be performed after its charter shall expire.

The existing laws declare that--

"The deposits of the money of the United States in places in which the said bank and branches thereof may be established shall be made in said bank or branches thereof unless the Secretary of the Treasury shall at any time otherwise order and direct, in which case the Secretary of the Treasury shall immediately lay before Congress, if in session, and, if not, immediately after the commencement of the next session, the reasons of such order or direction."

The power of the Secretary of the Treasury over the deposits is unqualified. The provision that he shall report his reasons to Congress is not limitation. Had it not been inserted he would have been responsible to Congress had he made a removal for any other than good reasons, and his responsibility now ceases upon the rendition of sufficient ones to Congress. The only object of the provision is to make his reasons accessible to Congress and enable that body the more readily to judge of their soundness and purity, and thereupon to make such further provision by law as the legislative power may think proper in relation to the deposit of the public money. Those reasons may be very diversified. It was asserted by the Secretary of the Treasury, without

contradiction, as early as 1817, that he had power "to control the proceedings" of the Bank of the United States at any moment "by changing the deposits to the State banks" should it pursue an illiberal course toward those institutions; that "the Secretary of the Treasury will always be disposed to support the credit of the State banks, and will invariably direct transfers from the deposits of the public money in aid of their legitimate exertions to maintain their credit;" and he asserted a right to employ the State banks when the Bank of the United States should refuse to receive on deposit the notes of such State banks as the public interest required should be received in payment of the public dues. In several instances he did transfer the public deposits to State banks in the immediate vicinity of branches, for reasons connected only with the safety of those banks, the public convenience, and the interests of the Treasury.

If it was lawful for Mr. Crawford, the Secretary of the Treasury at that time, to act on these principles, it will be difficult to discover any sound reason against the application of similar principles in still stronger cases. And it is a matter of surprise that a power which in the infancy of the bank was freely asserted as one of the ordinary and familiar duties of the Secretary of the Treasury should now be gravely questioned, and attempts made to excite and alarm the public mind as if some new and unheard-of power was about to be usurped by the executive branch of the Government.

It is but a little more than two and a half years to the termination of the charter of the present bank. It is considered as the decision of the country that it shall then cease to exist, and no man, the President believes, has reasonable ground for expectation that any other Bank of the United States will be created by Congress.

To the Treasury Department is entrusted the safe-keeping and faithful application of the public moneys. A plan of collection different from the present must therefore be introduced and put in complete operation before the dissolution of the present bank. When shall it be commenced? Shall no step be taken in this essential concern until the charter expires and the Treasury finds itself without an agent, its accounts in confusion, with no depository for its funds, and the whole business of the Government deranged, or shall it be delayed until six months, or a year, or two years before the expiration of the charter? It is obvious that any new system which may be substituted in the place of the Bank of the United States could not be suddenly carried into effect on the termination of its existence without serious inconvenience to the Government and the people. Its vast amount of notes are then to be redeemed and withdrawn from circulation

and its immense debt collected. These operations must be gradual, otherwise much suffering and distress will be brought upon the community.

It ought to be not a work of months only, but of years, and the President thinks it can not, with due attention to the interests of the people, be longer postponed. It is safer to begin it too soon than to delay it too long.

It is for the wisdom of Congress to decide upon the best substitute to be adopted in the place of the Bank of the United States, and the President would have felt himself relieved from a heavy and painful responsibility if in the charter to the bank Congress had reserved to itself the power of directing at its pleasure the public money to be elsewhere deposited, and had not devolved that power exclusively on one of the Executive Departments. It is useless now to inquire why this high and important power was surrendered by those who are peculiarly and appropriately the guardians of the public money. Perhaps it was an oversight. But as the President presumes that the charter to the bank is to be considered as a contract on the part of the Government, it is not now in the power of Congress to disregard its stipulations; and by the terms of that contract the public money is to be deposited in the bank during the continuance of its charter unless the Secretary of the Treasury shall otherwise direct. Unless, therefore, the Secretary of the Treasury first acts, Congress have no power over the subject, for they can not add a new clause to the charter or strike one out of it without the consent of the bank, and consequently the public money must remain in that institution to the last hour of its existence unless the Secretary of the Treasury shall remove it at an earlier day. The responsibility is thus thrown upon the executive branch of the Government of deciding how long before the expiration of the charter the public interest will require the deposits to be placed elsewhere; and although according to the frame and principle of our Government this decision would seem more properly to belong to the legislative power, yet as the law has imposed it upon the executive department the duty ought to be faithfully and firmly met, and the decision made and executed upon the best lights that can be obtained and the best judgment that can be formed. It would ill become the executive branch of the Government to shrink from any duty which the law imposes on it, to fix upon others the responsibility which justly belongs to itself. And while the President anxiously wishes to abstain from the exercise of doubtful powers and to avoid all interference with the rights and duties of others, he must yet with unshaken constancy discharge his own obligations, and can not allow himself to turn aside in order to avoid any responsibility which the high trust with which he has been

honored requires him to encounter; and it being the duty of one of the Executive Departments to decide in the first instance, subject to the future action of the legislative power, whether the public deposits shall remain in the Bank of the United States until the end of its existence or be withdrawn some time before, the President has felt himself bound to examine the question carefully and deliberately in order to make up his judgment on the subject, and in his opinion the near approach of the termination of the charter and the public considerations heretofore mentioned are of themselves amply sufficient to justify the removal of the deposits, without reference to the conduct of the bank or their safety in its keeping.

But in the conduct of the bank may be found other reasons, very imperative in their character, and which require prompt action. Developments have been made from time to time of its faithlessness as a public agent, its misapplication of public funds, its interference in elections, its efforts by the machinery of committees to deprive the government directors of a full knowledge of its concerns, and, above all, its flagrant misconduct as recently and unexpectedly disclosed in placing all the funds of the bank, including the money of the Government, at the disposition of the president of the bank as means of operating upon public opinion and procuring a new charter, without requiring him to render a voucher for their disbursement. A brief recapitulation of the facts which justify these charges, and which have come to the knowledge of the public and the President, will, he thinks, remove every reasonable doubt as to the course which it is now the duty of the President to pursue.

We have seen that in sixteen months ending in May, 1832, the bank had extended its loans more than \$28,000,000, although it knew the Government intended to appropriate most of its large deposit during that year in payment of the public debt. It was in May, 1832, that its loans arrived at the maximum, and in the preceding March so sensible was the bank that it would not be able to pay over the public deposit when it would be required by the Government that it commenced a secret negotiation, without the approbation or knowledge of the Government, with the agents for about \$2,700,000 of the 3 per cent stocks held in Holland, with a view of inducing them not to come forward for payment for one or more years after notice should be given by the Treasury Department. This arrangement would have enabled the bank to keep and use during that time the public money set apart for the payment of these stocks.

After this negotiation had commenced, the Secretary of the Treasury informed the bank that it was his intention to pay off one-half of the 3 percents on the 1st of the succeeding July,

which amounted to about \$6,500,000. The president of the bank, although the committee of investigation was then looking into its affairs at Philadelphia, came immediately to Washington, and upon representing that the bank was desirous of accommodating the importing merchants at New York (which it failed to do) and undertaking to pay the interest itself, procured the consent of the Secretary, after consultation with the President, to postpone the payment until the succeeding 1st of October.

Conscious that at the end of that quarter the bank would not be able to pay over the deposits, and that further indulgence was not to be expected of the Government, an agent was dispatched to England secretly to negotiate with the holders of the public debt in Europe and induce them by the offer of an equal or higher interest than that paid of the Government to hold back their claims for one year, during which the bank expected thus to retain the use of \$5,000,000 of the public money, which the Government should set apart for the payment of that debt. The agent made an arrangement on terms, in part, which were in direct violation of the charter of the bank, and when some incidents connected with this secret negotiation accidentally came to the knowledge of the public and the Government, then, and not before, so much of it as was palpably in violation of the charter was disavowed. A modification of the rest was attempted with the view of getting the certificates without payment of the money, and thus absolving the Government from its liability to the holders. In this scheme the bank was partially successful, but to this day the certificates of a portion of these stocks have not been paid and the bank retains the use of the money.

This effort to thwart the Government in the payment of the public debt that it might retain the public money to be used for their private interests, palliated by pretenses notoriously unfounded and insincere, would have justified the instant withdrawal of the public deposits. The negotiation itself rendered doubtful the ability of the bank to meet the demands of the Treasury, and the misrepresentations by which it was attempted to be justified proved that no reliance could be placed upon its allegations.

If the question of a removal of the deposits presented itself to the Executive in the same attitude that it appeared before the House of Representatives at their last session, their resolution in relation to the safety of the deposits would be entitled to more weight, although the decision of the question of removal as been confided by law to another department of the Government. But the question now occurs attended by other circumstances and new disclosures of the most serious import. It is true that in the message of the President which produced this

inquiry and resolution on the part of the House of Representatives it was his object to obtain the aid of that body in making a thorough examination into the conduct and condition of the bank and its branches in order to enable the executive department to decide whether the public money was longer safe in its hands. The limited power of the Secretary of the Treasury over the subject disabled him from making the investigation as fully and satisfactorily as it could be done by a committee of the House of Representatives, and hence the President desired the assistance of Congress to obtain for the Treasury Department a full knowledge of all the facts which were necessary to guide his judgment. But it was not his purpose, as the language of his message will show, to ask the representatives of the people to assume a responsibility which did not belong to them and relieve the executive branch of the Government from the duty which the law had imposed upon it. It is due to the President that his object in that proceeding should be distinctly understood, and that he should acquit himself of all suspicion of seeking to escape from the performance of his own duties or of desiring to interpose another body between himself and the people in order to avoid a measure which he is called upon to meet. But although as an act of justice to himself he disclaims any design of soliciting the opinion of the House of Representatives in relation to his own duties in order to shelter himself from responsibility under the sanction of their counsel, yet he is at all times ready to listen to the suggestions of the representatives of the people, whether given voluntarily or upon solicitation, and to consider them with the profound respect to which all will admit that they are justly entitled. Whatever may be the consequences, however, to himself, he must finally form his own judgment where the Constitution and the law make it his duty to decide, and must act accordingly; and he is bound to suppose that such a course on his part will never be regarded by that elevated body as a mark of disrespect to itself, but that they will, on the contrary, esteem it the strongest evidence he can give of his fixed resolution conscientiously to discharge his duty to them and the country.

A new state of things has, however, arisen since the close of the last session of Congress, and evidence has since been laid before the President which he is persuaded would have led the House of Representatives to a different conclusion if it had come to their knowledge. The fact that the bank controls, and some cases substantially owns, and by its money supports some of the leading presses of the country is now more clearly established. Editors to whom it loaned extravagant sums in 1831 and 1832, on unusual time and nominal security, have since turned out to be insolvent, and to others apparently in no better condition accommodations still more extravagant, on terms more unusual, and

some without any security, have also been heedlessly granted.

The allegation which has so often circulated through these channels that the Treasury was bankrupt and the bank was sustaining it, when for many years there has not been less, on an average, than six millions of public money in that institution, might be passed over as a harmless misrepresentation; but when it is attempted by substantial acts to impair the credit of the Government and tarnish the honor of the country, such charges require more serious attention. With six millions of public money in its vaults, after having had the use of from five to twelve millions for nine years without interest, it became the purchaser of a bill drawn by our Government on that of France for about \$900,000, being the first installment of the French indemnity. The purchase money was left in the use of the bank, being simply added to the Treasury deposit. The bank sold the bill in England, and the holder sent it to France for collection, and arrangements not having been made by the French Government for its payment, it was taken up by the agents of the bank in Paris with the funds of the bank in their hands. Under these circumstances it has through its organs openly assailed the credit of the Government, and has actually made and persists in a demand of 15 per cent, or \$158,842.77, as damages, when no damage, or none beyond some trifling expense, has in fact been sustained, and when the bank had in its own possession on deposit several millions of the public money which it was then using for its own profit. Is a fiscal agent of the Government which thus seeks to enrich itself at the expense of the public worthy of further trust?

There are other important facts not in the contemplation of the House of Representatives or not known to the members at the time they voted for the resolution.

Although the charter and the rules of the bank both declare that "not less than seven directors" shall be necessary to the transaction of business, yet the most important business, even that of granting discounts to any extent, is intrusted to a committee of five members, who do not report to the board.

To cut off all means of communication with the Government in relation to its most important acts at the commencement of the present year, not one of the Government directors was placed on any one committee; and although since, by an unusual remodeling of those bodies, some of those directors have been placed on some of the committees, they are yet entirely excluded from the committee of exchange, through which the greatest and most objectionable loans have been made.

~~When the Government directors made an effort to bring back~~

the business of the bank to the board in obedience to the charter and the existing regulations, the board not only overruled their attempt, but altered the rule so as to make it conform to the practice, in direct violation of one of the most important provisions of the charter which gave them existence.

It has long been known that the president of the bank, by his single will, originates and executes many of the most important measures connected with the management and credit of the bank, and that the committee as well as the board of directors are left in entire ignorance of many acts done and correspondence carried on in their names, and apparently under their authority. The fact has been recently disclosed that an unlimited discretion has been and is now vested in the president of the bank to expend its funds in payment for preparing and circulating articles and purchasing pamphlets and newspapers, calculated by their contents to operate on elections and secure a renewal of its charter. It appears from the official report of the public directors that on the 30th November, 1830, the president submitted to the board an article published in the American Quarterly Review containing favorable notices of the bank, and suggested the expediency of giving it a wider circulation at the expense of the bank; whereupon the board passed the following resolution, viz:

"Resolved, That the president be authorized to take such measures in regard to the circulation of the contents of the said article, either in whole or in part, as he may deem most for the interest of the bank."

By an entry in the minutes of the bank dated March 11, 1831, it appears that the president had not only caused a large edition of that article to be issued, but had also, before the resolution of the 30th November as adopted, procured to be printed and widely circulated numerous copies of the reports of General Smith and Mr. McDuffie in favor of the bank; and on that day he suggested the expediency of extending his power to the printing of other articles which might subserve the purposes of the institution, whereupon the following resolution was adopted, viz:

"Resolved, That the president is hereby authorized to cause to be prepared and circulated such documents and papers as may communicate to the people information in regard to the nature and operations of the bank."

The expenditures purporting to have been made under authority of these resolutions during the years 1831 and 1832 were about \$80,000. For a portion of these expenditures vouchers were rendered, from which it appears that they were incurred in

the purchase of some hundred thousand copies of newspapers, reports and speeches made in Congress, reviews of the veto message and reviews of speeches against the bank, etc. For another large portion no vouchers whatever were rendered, but the various sums were paid on orders of the president of the bank, making reference to the resolution of the 11th of March, 1831.

On ascertaining these facts and perceiving that expenditures of a similar character were still continued, the Government directors a few weeks ago offered a resolution in the board calling for a specific account of these expenditures, showing the objects to which they had been applied and the persons to whom the money had been paid. This reasonable proposition was voted down.

They also offered a resolution rescinding the resolutions of November, 1830, and March, 1831. This also was rejected.

Not content with thus refusing to recall the obnoxious power or even to require such an account of the expenditure as would show whether the money of the bank had in fact been applied to the objects contemplated by these resolutions, as obnoxious as they were, the board renewed the power already conferred, and even enjoined renewed attention to its exercise by adopting the following in lieu of the propositions submitted by the Government directors, viz:

"Resolved, That the board have confidence in the wisdom and integrity of the president and in the propriety of the resolutions of 30th November, 1830, and 11th March, 1831. and entertain a full conviction of the necessity of a renewed attention to the object of those resolutions, and that the president be authorized and requested to continue his exertions for the promotion of said object."

Taken in connection with the nature of the expenditures heretofore made, as recently disclosed, which the board not only tolerate, but approve, this resolution puts the funds of the bank at the disposition of the president for the purpose of employing the whole press of the country in the service of the bank, to hire writers and newspapers, and to pay out such sums as he pleases to what person and for what services he pleases without the responsibility of rendering any specific account. The bank is thus converted into a vast electioneering engine, with means to embroil the country in deadly feuds, and, under cover of expenditures in themselves improper, extend its corruption through all the ramifications of society.

Some of the items for which accounts have been rendered show

the construction which has been given to the resolutions and the way in which the power it confers has been exerted. The money has not been expended merely in the publication and distribution of speeches, reports of committees, or articles written for the purpose of showing the constitutionality or usefulness of the bank, but publications have been prepared and extensively circulated containing the grossest invectives against the officers of the Government, and the money which belongs to the stockholders and to the public has been freely applied in efforts to degrade in public estimation those who were supposed to be instrumental in resisting the wishes of this grasping and dangerous institution. As the president of the bank has not been required to settle his accounts, no one but himself knows how much more than the sum already mentioned may have been squandered; and for which a credit may hereafter be claimed in his account under this most extraordinary resolution. With these facts before us can we be surprised at the torrent of abuse incessantly poured out against all who are supposed to stand in the way of the cupidity or ambition of the Bank of the United States? Can we be surprised at sudden and unexpected changes of opinion in favor of an institution which has millions to lavish and avows its determination not to spare its means when they are necessary to accomplish its purposes? The refusal to render an account of the manner in which a part of the money expended has been applied gives just cause for the suspicion that it has been used for purposes which it is not deemed prudent to expose to the eyes of an intelligent and virtuous people. Those who act justly do not shun the light, nor do they refuse explanations when the propriety of their conduct is brought into question.

With these facts before him in an official report from the Government directors, the President would feel that he was not only responsible for all the abuses and corruptions the bank has committed or may commit, but almost an accomplice in a conspiracy against that Government which he has sworn honestly to administer, if he did not take every step within his constitutional and legal power likely to be efficient in putting an end to these enormities. If it be possible within the scope of human affairs to find a reason for removing the Government deposits and leaving the bank to its own resource for the means of effecting its criminal designs, we have it here. Was it expected when the moneys of the United States were directed to be placed in that bank that they would be put under the control of one man empowered to spend millions without rendering a voucher or specifying the object? Can they be considered safe with the evidence before us that tens of thousands have been spent for highly improper, if not corrupt, purposes, and that the same motive may lead to the expenditure of hundreds of thousands, and even millions, more? And can we justify ourselves to the people

by longer lending to it the money and power of the Government to be employed for such purposes?

It has been alleged by some as an objection to the removal of the deposits that the bank has the power, and in that event will have the disposition, to destroy the State banks employed by the Government, and bring distress upon the country. It has been the fortune of the President to encounter dangers which were represented as equally alarming, and he has seen them vanish before resolution and energy. Pictures equally appalling were paraded before him when this bank came to demand a new charter. But what was the result? Has the country been ruined, or even distressed? Was it ever more prosperous than since that act? The President verily believes the bank has not the power to produce the calamities its friends threaten. The funds of the Government will not be annihilated by being transferred. They will immediately be issued for the benefit of trade, and if the Bank of the United States curtails its loans the State banks, strengthened by the public deposits, will extend theirs. What comes in through one bank will go out through others, and the equilibrium will be preserved. Should the bank, for the mere purpose of producing distress, press its debtors more heavily than some of them can bear, the consequences will recoil upon itself, and in the attempts to embarrass the country it will only bring loss and ruin upon the holders of its own stock. But if the President believed the bank possessed all the power which has been attributed to it, his determination would only be rendered the more inflexible. If, indeed, this corporation now holds in its hands the happiness and prosperity of the American people, it is high time to take the alarm. If the despotism be already upon us and our only safety is in the mercy of the despot, recent developments in relation to his designs and the means he employs show how necessary it is to shake it off. The struggle can never come with less distress to the people or under more favorable auspices than at the present moment.

All doubt as to the willingness of the State banks to undertake the service of the Government to the same extent and on the same terms as it is now performed by the Bank of the United States is put to rest by the report of the agent recently employed to collect information, and from that willingness their own safety in the operation may be confidently inferred. Knowing their own resources better than they can be known by others, it is not to be supposed that they would be willing to place themselves in a situation which they can not occupy without danger of annihilation or embarrassment. The only consideration applies to the safety of the public funds if deposited in those institutions, and when it is seen that the directors of many of them are not only willing to pledge the character and capital of

the corporations in giving success to this measure, but also their own property and reputation, we can not doubt that they at least believe the public deposits would be safe in their management. The President thinks that these facts and circumstances afford as strong a guaranty as can be had in human affairs for the safety of the public funds and the practicability of a new system of collection and disbursement through the agency of the State banks.

From all these considerations the President thinks that the State banks ought immediately to be employed in the collection and disbursement of the public revenue, and the funds now in the Bank of the United States drawn out with all convenient dispatch. The safety of the public moneys if deposited in the State banks must be secured beyond all reasonable doubts; but the extent and nature of the security, in addition to their capital, if any be deemed necessary, is a subject of detail to which the Treasury Department will undoubtedly give its anxious attention. The banks to be employed must remit the moneys of the Government without charge, as the Bank of the United States now does; must render all the services which that bank now performs; must keep the Government advised of their situation by periodical returns; in fine, in any arrangement with the State banks the Government must not in any respect be placed on a worse footing than it now is. The President is happy to perceive by the report of the agent that the banks which he has consulted have, in general, consented to perform the service on these terms, and that those in New York have further agreed to make payments in London without other charge than the mere cost of the bills of exchange.

It should also be enjoined upon any banks which may be employed that it will be expected of them to facilitate domestic exchanges for the benefit of internal commerce; to grant all reasonable facilities to the payers of the revenue; to exercise the utmost liberality toward the other State banks, and do nothing uselessly to embarrass the Bank of the United States.

As one of the most serious objections to the Bank of the United States is the power which it concentrates, care must be taken in finding other agents for the service of the Treasury not to raise up another power equally formidable. Although it would probably be impossible to produce such a result by any organization of the State banks which could be devised, yet it is desirable to avoid even the appearance. To this end it would be expedient to assume no more power over them and interfere no more in their affairs than might be absolutely necessary to the security of the public deposit and the faithful performance of their duties as agents of the Treasury. Any interference by them in the political contests of the country with a view to influence

elections ought, in the opinion of the President, to be followed by an immediate discharge from the public service.

It is the desire of the President that the control of the banks and the currency shall, as far as possible, be entirely separated from the political power of the country as well as wrested from an institution which has already attempted to subject the Government to its will. In his opinion the action of the General Government on this subject ought not to extend beyond the grant in the Constitution, which only authorizes Congress "to coin money and regulate the value thereof;" all else belongs to the States and the people, and must be regulated by public opinion and the interest of trade.

In conclusion, the President must be permitted to remark that he looks upon the pending question as of higher consideration than the mere transfer of a sum of money from one bank to another. Its decision may affect the character of our Government for ages to come. Should the bank be suffered longer to use the public moneys in the accomplishment of its purposes, with the proofs of its faithlessness and corruption before our eyes, the patriotic among our citizens will despair of success in struggling against its power, and we shall be responsible for entailing it upon our country forever. Viewing it as a question of transcendent importance, both in the principles and consequences it involves, the President could not, in justice to the responsibility which he owes to the country, refrain from pressing upon the Secretary of the Treasury his view of the considerations which impel to immediate action. Upon him has been devolved by the Constitution and the suffrages of the American people the duty of superintending the operation of the Executive Departments of the Government and seeing that the laws are faithfully executed. In the performance of this high trust it is his undoubted right to express to those whom the laws and his own choice have made his associates in the administration of the Government his opinion of their duties under circumstances as they arise. It is this right which he now exercises. Far be it from him to expect or require that any member of the Cabinet should at his request, order, or dictation, do any act which he believes unlawful or in his conscience condemns. From them and from his fellow-citizens in general he desires only that aid and support which their reason approves and their conscience sanctions.

In the remarks he has made on this all-important question he trusts the Secretary of the Treasury will see only the frank and respectful declarations of the opinions which the President has formed on a measure of great national interest deeply affecting the character and usefulness of his Administration, and not a

spirit of dictation, which the President would be as careful to avoid as ready to resist. Happy will he be if the facts now disclosed produce uniformity of opinion and unity of action among the members of the Administration.

The President again repeats that he begs his Cabinet to consider the proposed measure as his own, in the support of which he shall require no one of them to make a sacrifice of opinion or principle. Its responsibility has been assumed after the most mature deliberation and reflection as necessary to preserve the morals of the people, the freedom of the press, and the purity of the elective franchise, without which all will unite in saying that the blood and treasure expended by our forefathers in the establishment of our happy system of government will have been vain and fruitless. Under these convictions he feels that a measure so important to the American people can not be commenced too soon, and he therefore names the 1st day of October next as a period proper for the change of the deposits, or sooner, provided the necessary arrangements with the State banks can be made.

ANDREW JACKSON.

ANDREW JACKSON'S

FAREWELL ADDRESS

MARCH 4, 1837

PRESIDENT OF THE UNITED STATES
1828-1836

"THE MESSAGES AND PAPERS OF THE PRESIDENTS"
(Page 1511 - 1527)

By
James D. Richardson
1910 Edition

Published By
Bureau Of National Literature And Art

"FELLOW-CITIZENS, Being about to retire finally from public life, I beg leave to offer you my grateful thanks for the many proofs of kindness and confidence which I have received at your hands. It has been my fortune in the discharge of public duties, civil and military, frequently to have found myself in difficult and trying situations, where prompt decisions and energetic action were necessary, and where the interest of the country required that high responsibilities should be fearlessly encountered; and it is with the deepest emotions of gratitude that I acknowledge the continued and unbroken confidence with which you have sustained me in every trial. My public life has been a long one, and I can not hope that it has at all times been free from errors; but I have the consolation of knowing that if mistakes have been committed they have not seriously injured the country I so anxiously endeavored to serve, and at the moment when I surrender my last public trust I leave this great people prosperous and happy, in the full enjoyment of liberty and peace, and honored and respected by every nation of the world.

If my humble efforts have in any degree contributed to preserve to you these blessings, I have been more than rewarded by the honors you have heaped upon me, and, above all, by the generous confidence with which you have supported me in every peril and with which you have continued to animate and cheer my path to the closing hour of my political life. The time has now come when advanced age and a broken frame warn me to retire from public concerns, but the recollection of the many favors you have bestowed upon me is engraved upon my heart, and I have felt that I could not part from your service without making this public acknowledgment of the gratitude I owe you. And if I use the occasion to offer to you the counsels of age and experience, you will, I trust, receive them with the same indulgent kindness which you have so often extended to me, and will at least see in them an earnest desire to perpetuate in this favored land the blessings of liberty and equal law.

We have now lived almost fifty years under the Constitution framed by the sages and patriots of the Revolution. The conflicts in which the nations of Europe were engaged during a great part of this period, the spirit in which they waged war against each other, and our intimate commercial connections with every part of the civilized world rendered it a time of much difficulty for the Government of the United States. We have had our seasons of peace and of war, with all the evils which precede or follow a state of hostility with powerful nations. We encountered these trials with our Constitution yet in its infancy, and under the disadvantages which a new and untried government must always feel when it is called upon to put forth its whole strength without the lights of experience to guide it or the weight of precedents to justify its measures. But we have passed triumphantly through all these difficulties. Our

Constitution is no longer a doubtful experiment, and at the end of nearly half a century we find that it has preserved unimpaired the liberties of the people, secured the rights of property, and that our country has improved and is flourishing beyond any former example in the history of nations.

In our domestic concerns there is everything to encourage us, and if you are true to yourselves nothing can impede your march to the highest point of national prosperity. The States which had so long been retarded in their improvement by the Indian tribes residing in the midst of them are at length relieved from the evil, and this unhappy race - the original dwellers in our land - are now placed in a situation where we may well hope that they will share in the blessings of civilization and be saved from that degradation and destruction to which they were rapidly hastening while they remained in the States; and while the safety and comfort of our own citizens have been greatly promoted by their removal, the philanthropist will rejoice that the remnant of that ill-fated race has been at length placed beyond the reach of injury or oppression, and that the paternal care of the General Government will hereafter watch over them and protect them.

If we turn to our relations with foreign powers, we find our condition equally gratifying. Actuated by the sincere desire to do justice to every nation and to preserve the blessings of peace, our intercourse with them has been conducted on the part of this Government in the spirit of frankness; and I take pleasure in saying that it has generally been met in a corresponding temper. Difficulties of old standings have been surmounted by friendly discussion and the mutual desire to be just, and the claims of our citizens, which have long been withheld, have at length been acknowledged and adjusted and satisfactory arrangements made for their final payment; and with a limited, and I trust a temporary, exception, our relations with every foreign power are now of the most friendly character, our commerce continually expanding, and our flag respected in every quarter of the world.

These cheering and grateful prospects and these multiplied favors we owe, under Providence, to the adoption of the Federal Constitution. It is no longer a question whether this great country can remain happily united and flourish under our present form of government. Experience, the unerring test of all human undertakings, has shown the wisdom and foresight of those who formed it, and has proved that in the union of these States there is a sure foundation for the brightest hopes of freedom and for the happiness of the people. At every hazard and by every sacrifice this Union must be preserved.

The necessity of watching with jealous anxiety for the preservation of the Union was earnestly pressed upon his fellow citizens by the Father of his Country in his Farewell

Address. He has there told us that "while experience shall not have demonstrated its impracticability, there will always be reason to distrust the patriotism of those who in any quarter may endeavor to weaken its bands;" and he has cautioned us in the strongest terms against the formation of parties on geographical discriminations, as one of the means which might disturb our Union and to which designing men would be likely to resort.

The lessons contained in this invaluable legacy of Washington to his countrymen should be cherished in the heart of every citizen to the latest generation; and perhaps at no period of time could they be more usefully remembered than at the present moment; for when we look upon the scenes that are passing around us and dwell upon the pages of his parting address, his paternal counsels would seem to be not merely the offspring of wisdom and foresight, but the voice of prophecy, foretelling events and warning us of the evil to come. Forty years have passed since this imperishable document was given to his countrymen. The Federal Constitution was then regarded by him as an experiment - and he so speaks of it in his Address - but an experiment upon the success of which the best hopes of his country depended; and we all know that he was prepared to lay down his life, if necessary, to secure to it a full and a fair trial. The trial has been made. It has succeeded beyond the proudest hopes of those who framed it. Every quarter of this widely extended nation has felt its blessings and shared in the general prosperity produced by its adoption. But amid this general prosperity and splendid success the dangers of which he warned us are becoming every day more evident, and the signs of evil are sufficiently apparent to awaken the deepest anxiety in the bosom of the patriot. We behold systematic efforts publicly made to sow the seeds of discord between different parts of the United States and to place party divisions directly upon geographical distinctions; to excite the South against the North and the North against the South, and to force into the controversy the most delicate and exciting topics - topics upon which it is impossible that a large portion of the Union can ever speak without strong emotion. Appeals, too, are constantly made to sectional interests in order to influence the election of the Chief Magistrate, as if it were desired that he should favor a particular quarter of the country instead of fulfilling the duties of his station with impartial justice to all; and the possible dissolution of the Union has at length become an ordinary and familiar subject of discussion. Has the warning voice of Washington been forgotten, or have designs already been formed to sever the Union? Let it not be supposed that I impute to all of those who have taken an active part in these unwise and unprofitable discussions a want of patriotism or of public virtue. The honorable feeling of State pride and local attachments finds a place in the bosoms of the most enlightened

and pure. But while such men are conscious of their own integrity and honesty of purpose, they ought never to forget that the citizens of other States are their political brethren, and that however mistaken they may be in their views, the great body of them are equally honest and upright with themselves. Mutual suspicions and reproaches may in time create mutual hostility, and artful and designing men will always be found who are ready to foment these fatal divisions and to inflame the natural jealousies of different sections of the country. The history of the world is full of such examples, and especially the history of republics.

What have you to gain by division and dissension? Delude not yourselves with the belief that a breach once made may be afterwards repaired. If the Union is once severed, the line of separation will grow wider and wider, and the controversies which are now debated and settled in the halls of legislation will then be tried in fields of battle and determined by the sword. Neither should you deceive yourselves with the hope that the first line of separation would be the permanent one, and that nothing but harmony and concord would be found in the new association formed upon the dissolution of this Union. Local interests would still be found there, and unchastened ambition. And if the recollection of common dangers, in which the people of these United States stood side by side against the common foe, the memory of victories won by their united valor, the prosperity and happiness they have enjoyed under the present Constitution, the proud name they bear as citizens of this great Republic - if all these recollections and proofs of common interest are not strong enough to bind us together as one people, what tie will hold united the new divisions of empire when these bonds have been broken and this Union dissevered? The first line of separation would not last for a single generation; new fragments would be torn off, new leaders would spring up, and this great and glorious Republic would soon be broken into a multitude of petty States, without commerce, without credit, jealous of one another, armed for mutual aggression, loaded with taxes to pay armies and leaders, seeking aid against each other from foreign powers, insulted and trampled upon by the nations of Europe, until, harassed with conflicts and humbled and debased in spirit, they would be ready to submit to the absolute dominion of any military adventurer and to surrender their liberty for the sake of repose. It is impossible to look on the consequences that would inevitably follow the destruction of this Government and not feel indignant when we hear cold calculations about the value of the Union and have so constantly before us a line of conduct so well calculated to weaken its ties.

There is too much at stake to allow pride or passion to influence your decision. Never for a moment believe that the great body of the citizens of any State or States can

foundations must be laid in the affections of the people, in the security it gives to life, liberty, character, and property in every quarter of the country, and in the fraternal attachment which the citizens of the several States bear to one another as members of one political family, mutually contributing to promote the happiness of each other. Hence the citizens of every State should studiously avoid everything calculated to wound the sensibility or offend the just pride of the people of other States, and they should frown upon any proceeding within their own borders likely to disturb the tranquillity of their political brethren in other portions of the Union. In a country so extensive as the United States, and with pursuits so varied, the internal regulations of the several States must frequently differ from one another in important particulars, and this difference is unavoidably increased by the varying principles upon which the American colonies were originally planted - principles which had taken deep root in their social relations before the Revolution, and therefore of necessity influencing their policy since they became free and independent States. But each State has the unquestionable right to regulate its own internal concerns according to its own pleasure, and while it does not interfere with the rights of the people of other States or the rights of the Union, every State must be the sole judge of the measures proper to secure the safety of its citizens and promote their happiness; and all efforts on the part of the people of other States to cast odium upon their institutions, and all measures calculated to disturb their rights of property or to put in jeopardy their peace and internal tranquillity, are in direct opposition to the spirit in which the Union was formed, and must endanger its safety. Motives of philanthropy may be assigned for this unwarrantable interference, and weak men may persuade themselves for a moment that they are laboring in the cause of humanity and asserting the rights of the human race; but everyone, upon sober reflection, will see that nothing but mischief can come from these improper assaults upon the feelings and rights of others. Rest assured that the men found busy in this work of discord are not worthy of your confidence, and deserve your strongest reprobation.

In the legislation of Congress, also, and in every measure of the General Government, justice to every portion of the United States should be faithfully observed. No free government can stand without virtue in the people and a lofty spirit of patriotism, and if the sordid feelings of mere selfishness shall usurp the place which ought to be filled by public spirit, the legislation of Congress will soon be converted into a scramble for personal and sectional advantages. Under our free institutions the citizens of every quarter of our country are capable of attaining a high degree of prosperity and happiness without seeking to profit themselves at the expense of others;

and every such attempt must in the end fail to succeed, for the people in every part of the United States are too enlightened not to understand their own rights and interests and to detect and defeat every effort to gain undue advantages over them; and when such designs are discovered it naturally provokes resentments which can not always be easily allayed. Justice - full and ample justice - to every portion of the United States should be the ruling principle of every freeman, and should guide the deliberations of every public body, whether it be State or national.

It is well known that there have always been those amongst us who wish to enlarge the powers of the General Government, and experience would seem to indicate that there is a tendency on the part of this Government to overstep the boundaries marked out for it by the Constitution. Its legitimate authority is abundantly sufficient for all the purposes for which it was created, and its powers being expressly enumerated, there can be no justification for claiming anything beyond them. Every attempt to exercise power beyond these limits should be promptly and firmly opposed, for one evil example will lead to other measures still more mischievous; and if the principle of constructive powers or supposed advantages or temporary circumstances shall ever be permitted to justify the assumption of a power not given by the Constitution, the General Government will before long absorb all the powers of legislation, and you will have in effect but one consolidated government. From the extent of our Country, its diversified interests, different pursuits, and different habits, it is too obvious for argument that a single consolidated government would be wholly inadequate to watch over and protect its interests; and every friend of our free institutions should be always prepared to maintain unimpaired and in full vigor the rights and sovereignty of the States and to confine the action of the General Government strictly to the sphere of its appropriate duties.

There is, perhaps, no one of the powers conferred on the Federal Government so liable to abuse than the taxing power. The productive and convenient source of revenue were necessarily given to it, that it might be able to perform the important duties imposed upon it; and the taxes which it lays upon commerce being concealed from the real tax payer in the price of the article, they do not so readily attract the attention of the people as smaller sums demanded from them directly by the tax gatherer. But the tax imposed on goods enhances by so much the price of the commodity to the consumer, and as many of these duties are imposed on articles of necessity which are daily used by the great body of the people, the money raised by these imports is drawn from their pockets. Congress has no right under the Constitution to take money from the people unless it is required to execute some one of the specific powers entrusted to

the Government; and if they raise more than is necessary for such purposes, it is an abuse of the power of taxation, and unjust and oppressive. It may indeed happen that the revenue will sometimes exceed the amount anticipated when the taxes were laid. When, however, this is ascertained, it is easy to reduce them, and in such a case it is unquestionably the duty of the Government to reduce them, for no circumstances can justify it in assuming a power not given to it by the Constitution nor taking away the money of the people when it is not needed for the legitimate wants of the Government.

Plain as these principles appear to be, you will yet find there is a constant effort to induce the General Government to go beyond the limits of its taxing power and to impose unnecessary burdens upon the people. Many powerful interests are continually at work to produce heavy duties on commerce and to swell the revenue beyond the real necessities of the public service, and the country has already felt the injurious effects of their combined influence. They succeeded in obtaining a tariff of duties bearing most oppressively on the agriculture and laboring classes of society and producing a revenue that could not be usefully employed within the range of the powers conferred upon Congress, and in order to fasten upon the people this unjust and unequal system of taxation extravagant schemes of internal improvement were got up in various quarters to squander the money and to purchase support. Thus one unconstitutional measure was intended to be upheld by another, and the abuse of the power of taxation was to be maintained by usurping the power of expending the money in internal improvements. You cannot have forgotten the severe and doubtful struggle through which we passed when the executive department of the Government by its veto endeavored to arrest this prodigal scheme of injustice and to bring back the legislation of Congress to the boundaries prescribed by the Constitution. The good sense and practical judgment of the people when the subject was brought before them sustained the course of the Executive, and this plan of unconstitutional expenditures for the purpose of corrupt influence, is I trust, finally overthrown.

The result of this decision has been felt in the rapid extinguishment of the public debt and the large accumulation of a surplus in the Treasury, notwithstanding the tariff was reduced and is now very far below the amount originally contemplated by its advocates. But, rely upon it, the design to collect an extravagant revenue and burden you with taxes beyond the economical wants of the Government is not yet abandoned. The various interests which have combined together to impose a heavy tariff and to produce an overflowing Treasury are too strong and have too much at stake to surrender the contest. The corporations and wealthy individuals who are engaged in large manufacturing establishments desire a high tariff to increase

Revenue
State - must

their gains. Designing politicians will support it to conciliate their favor and to obtain the means of profuse expenditure for the purpose of purchasing influence in other quarters; and since the people have decided that the Federal Government cannot be permitted to employ its income in internal improvements, efforts will be made to seduce and mislead the citizens of the several States by holding out to them the deceitful prospect of benefits to be derived from a surplus revenue collected by the General Government and annually divided among the States; and if, encouraged by these fallacious hopes, the States should disregard the principles of economy which ought to characterize every republican government, and should indulge in lavish expenditures exceeding their resources, they will before long find themselves oppressed with debts which they are simply unable to pay, and the temptation will become irresistible to support high tariff in order to obtain a surplus for distribution. Do not allow yourselves, my fellow-citizens, to be misled on this subject. The Federal Government can not collect a surplus for such purposes without violating the principles of the Constitution and assuming powers which have not been granted. It is, moreover, a system of injustice, and if persisted in will inevitably lead to corruption, and must end in ruin. The surplus revenue will be drawn from the pockets of the people - from the farmer, the mechanic, the laboring classes of society; but who will receive it when distributed among the States, where it is to be disposed of by leading State politicians, who have friends of favor and political partisans to gratify? It will certainly not be returned to those who paid it and who have most need of it and are honestly entitled to it. There is but one safe rule, and that is to confine the General Government rigidly within the sphere of its appropriate duties. It has no power to raise a revenue or impose taxes except for those purposes enumerated in the Constitution, and if its income is found to exceed these wants it should be forthwith reduced and the burden of the people so far lightened.

In reviewing the conflicts which have taken place between different interests in the United States and the policy pursued since the adoption of our present form of Government, we find nothing that has produced such deep-seated evil as the course of legislation in relation to the currency. The Constitution of the United States unquestionably intended to secure to the people a circulating medium of gold and silver; But the establishment of a national bank by Congress, with the privilege of issuing paper money receivable in the payment of the public dues, and the unfortunate course of legislation in the several States upon the same subject, drove from circulation the constitutional currency and substituted one of paper in its place.

It was not easy for men engaged in the ordinary pursuits of business, whose attention had not been particularly drawn to the

subject, to foresee all the consequences of a currency exclusively of paper, and we ought not on that account to be surprised at the facility with which laws were obtained to carry into effect the paper system. Honest and even enlightened men are sometimes misled by the specious and plausible statements of the designing. But experience has now proved the mischiefs and dangers of a paper currency, and it rests with you to determine whether the proper remedy shall be applied.

The paper system being founded on public confidence and having of itself no intrinsic value, it is liable to great and sudden fluctuations, thereby rendering property insecure and the wages of labor unsteady and uncertain. The corporations which create the paper money can not be relied upon to keep the circulating medium uniform in amount. In times of prosperity, when confidence is high, they are tempted by the prospect of gain or by influence of those who hope to profit by it to extend their issue of paper beyond the bounds of discretion and the reasonable demands of business; and when these issues have been pushed on from day to day, until the public confidence is at length shaken, then a reaction takes place, and they immediately withdraw the credits they have given, suddenly curtail their issues, and produce an unexpected and ruinous contraction of the circulating medium, which is felt by the whole community. The banks by this means save themselves, and the mischievous consequences of their imprudence or cupidity are visited upon the public. Nor does the evil stop here. These ebbs and flows in the currency and these indiscreet extensions of credit naturally engender a spirit of speculation injurious to the habits and character of the people. We have already seen its effects in the wild spirit of speculation in the public lands and various kinds of stock which within the last year or two seized upon such a multitude of our citizens and threatened to pervade all classes of society and to withdraw their attention from the sober pursuits of honest industry. It is not by encouraging this spirit that we shall best preserve public virtue and promote the true interests of our country; but if your currency continues as exclusively paper as it now is, it will foster this eager desire to amass wealth without labor; it will multiply the number of dependents on bank accommodations and bank favors; the temptation to obtain money at any sacrifice will become stronger and stronger, and inevitably lead to corruption, which will find its way into your public councils and destroy at no distant day the purity of your Government. Some of the evils which arise from this system of paper press with peculiar hardship upon the class of society least able to bear it. A portion of this currency frequently becomes depreciated or worthless, and all of it is easily counterfeited in such a manner as to require peculiar skill and much experience to distinguish the counterfeit from the genuine note. These frauds are most generally perpetrated in the smaller

notes, which are used in the daily transactions of ordinary business, and the losses occasioned by them are commonly thrown upon the laboring classes of society, whose situation and pursuits put it out of their power to guard themselves from its impositions, and whose daily wages are necessary for their subsistence. It is the duty of every government so to regulate its currency as to protect this numerous class, as far as practicable, from the imposition of avarice and fraud. It is more especially the duty of the United States, where the Government is emphatically the Government of the people, and where this respectable portion of our citizens are so proudly distinguished from the laboring classes of all other nations by their independent spirit, their love of liberty, their intelligence, and their high tone of moral character. Their industry in peace is the source of our wealth and their bravery in war has covered us with glory; and the Government of the United States will but ill discharge its duties if it leaves them a prey to such dishonest impositions. Yet it is evident that their interest can not be effectually protected unless silver and gold are restored to circulation.

These views alone of the paper currency are sufficient to call for immediate reform; but there is another consideration which should still more strongly press it upon your attention.

Recent events have proved that the paper-money system of this country may be used as an engine to undermine your free institutions, and that those who desire to engross all power in the hands of a few and to govern by corruption or force are aware of its power and prepared to employ it. Your banks now furnish your only circulating medium, and money is plenty or scarce according to the quantity of notes issued by them. While they have capitals not greatly disproportioned to each other, they are competitors in business, and no one of them can exercise dominion over the rest; and although in the present state of the currency these banks may and do operate injuriously upon the habits of business, the pecuniary concerns, and the moral tone of society, yet, from their number and dispersed situation, they cannot combine for the purposes of political influence, and whatever may be the dispositions of some of their power of mischief must necessarily be confined to a narrow space and felt only in their immediate neighborhoods.

But when the charter of the Bank of the United States was obtained from Congress it perfected the schemes of the paper system and gave its advocates the position they have struggled to obtain from the commencement of the Federal Government to the present hour. The immense capital and peculiar privileges bestowed upon it enabled it to exercise despotic sway over the other banks in every part of the country. From its superior strength it could seriously injure, if not destroy, the business of any one of them which might incur its resentment; and it

openly claimed for itself the power of regulating the currency throughout the United States. In other words, it asserted (and undoubtedly possessed) the power to make money plenty or scarce at its pleasure, at any time and in any quarter of the Union, by controlling the issues of other banks and permitting an expansion or compelling a general contraction of the circulating medium, according to its own will. The other banking institutions were sensible of its strength, and they soon generally became its obedient instruments, ready at all times to execute its mandates; and with the banks necessarily went also that numerous class of persons in our commercial cities who depend altogether on bank credits for their solvency and means of business, and who are therefore obliged, for their own safety, to propitiate the favor of the money power by distinguished zeal and devotion in its service. The result of the ill-advised legislation which established this great monopoly was to concentrate the whole money power of the Union, with its boundless means of corruption and its numerous dependents, under the direction and command of one acknowledged head, thus organizing this particular interest as one body and securing to it unity and concert of action throughout the United States, and enabling it to bring forward upon any occasion its entire and undivided strength to support or defeat any measure of the Government. In the hands of this formidable power, thus perfectly organized, was also placed unlimited dominion over the amount of the circulating medium, giving it the power to regulate the amount of the circulating medium, giving it the power to regulate the value of property and the fruits of labor in every quarter of the Union, and to bestow prosperity or bring ruin upon any city or section of the country as might best comport with its own interest or policy.

We are not left to conjecture how the moneyed power, thus organized and with such a weapon in its hands, would likely to use it. The distress and alarm which pervaded and agitated the whole country when the Bank of the United States waged war upon the people in order to compel them to submit to its demands can not yet be forgotten. The ruthless and unsparing temper with which whole cities and communities were oppressed, individuals impoverished and ruined, and a scene of cheerful prosperity suddenly changed into one of gloom and despondency ought to be indelibly impressed on the memory of the people of the United States. If such was its power in a time of peace, what would it not have been in a season of war, with an enemy at your doors? No nation but the freemen of the United States could have come out victorious from such a contest; yet, if you had not conquered, the Government would have passed from the hands of the many to the hands of the few, and this organized money power from its secret conclave would have directed the choice of your highest officers and compelled you to make peace or war, as best suited their own wishes. The forms of your Government might for

a time have remained, but its living spirit would have departed from it.

The distress and sufferings inflicted on the people by the bank are some of the fruits of that system of policy which is continually striving to enlarge the authority of the Federal Government beyond the limits fixed by the Constitution. The powers enumerated in that instrument do not confer on Congress the right to establish such a corporation as the Bank of the United States, and the evil consequences which followed may warn us of the danger of departing from the true rule of construction and of permitting temporary circumstances or the hope of better promoting the public welfare to influence in any degree our decisions upon the extent of the authority of the General Government. Let us abide by the Constitution as it is written, or amend it in the constitutional mode if it is found defective.

The severe lessons of experience will, I doubt not, be sufficient to prevent Congress from again chartering such a monopoly, even if the Constitution did not present an insuperable objection to it. But you must remember, my fellow-citizens, that eternal vigilance by the people is the price of liberty, and that you must pay the price if you wish to secure the blessing. It behooves you, therefore, to be watchful in your States as well as in the Federal Government. The power which the moneyed interest can exercise, when concentrated under a single head and with our present system of currency, was sufficiently demonstrated in the struggle made by the Bank of the United States. Defeated in the General Government, the same class of intriguers and politicians will resort to the States and endeavor to obtain there the same organization which they failed to perpetuate in the Union; and with specious and deceitful plans of public advantages and State interests and State pride they will endeavor to establish in the different States one moneyed institution with overgrown capital and exclusive privileges sufficient to enable it to control the operations of the other banks. Such an institution will be pregnant with the same evils produced by the Bank of the United States, although its sphere of action is more confined, and in the State in which it is chartered the money power will be able to embody its whole strength and to move together with undivided force to accomplish any object it may wish to attain. You have already had abundant evidence of its power to inflict injury upon agricultural, mechanical, and laboring classes of society, and over whose engagements in trade or speculation render them dependent on bank facilities the dominion of the State monopoly will be absolute and their obedience unlimited. With such a bank and a paper currency the money power would in a few years govern the State and control its measures, and if a sufficient number of States can be induced to create such establishments the time will soon come when it will again take the field against the United States and succeed in perfecting and perpetuating its

organization by a charter from Congress.

It is one of the serious evils of our present system of banking that it enables one class of society - and that by no means a numerous one - by its control over the currency, to act injuriously upon the interests of all the others and to exercise more than its just proportion of influence in political affairs. The agricultural, the mechanical, and the laboring classes have little or no share in the direction of the great moneyed corporations, and from their habits and the nature of their pursuits they are incapable of forming extensive combinations to act together with united force. Such concert of action may sometimes be produced in a single city or in a small district of country by means of personal communications with each other, but they have no regular or active correspondence with those who are engaged in similar pursuits in distant places; they have but little patronage to give the press, and exercise but a small share of influence over it; they have no crowd of dependents about them who hope to grow rich without labor by their countenance and favor, and who are therefore always ready to execute their wishes. The planter, the farmer, the mechanic, and the laborer all know that their success depends upon their own industry and economy, and that they must not expect to become suddenly rich by the fruits of their toil. Yet these classes of society form the great body of the people of the United States; they are the bone and sinew of the country - men who love liberty and desire nothing but equal rights and equal laws, and who, moreover, hold the great mass of our national wealth, although it is distributed in moderate amounts among the millions of freemen who possess it. But with overwhelming numbers and wealth on their side they are in constant danger of losing their fair influence in the Government, and with difficulty maintain their just rights against the incessant efforts daily made to encroach upon them. The mischief springs from the power which the moneyed interest derives from a paper currency which they are able to control, from the multitude of corporations with exclusive privileges which they have succeeded in obtaining in the different States, and which are employed altogether for their benefit; and unless you become more watchful in your States and check this spirit of monopoly and thirst for exclusive privileges you will in the end find that the most important powers of Government have been given or bartered away, and the control over your dearest interests has passed into the hands of these corporations.

The paper money system and its natural association - monopoly and exclusive privilege - have already struck their roots too deep in the soil, and will require all your efforts to check its further growth and to eradicate the evil. The men who profit by these abuses and desire to perpetuate them will continue to besiege the halls of legislation in the General

Government as well as in the States, and will seek by every artifice to mislead and deceive the public servants. It is to yourselves that you must look for safety and the means of guarding and perpetuating your free institutions. In your hands is rightfully placed the sovereignty of the country, and to you everyone placed in authority is ultimately responsible. It is always in your power to see that the wishes of the people are carried into faithful execution, and their will, when once made known, must sooner or later be obeyed; and while the people remain, as I trust they ever will, uncorrupted and incorruptible, and continue watchful and jealous of their rights, the Government is safe, and the cause of freedom will continue to triumph over all its enemies.

But it will require steady and persevering exertions on your part to rid yourselves of the iniquities and mischiefs of the paper system and to check the spirit of monopoly and other abuses which have sprung up with it, and of which it is the main support. So many interests are united to resist all reform on this subject that you must not hope the conflict will be a short one nor success easy. My humble efforts have not been spared during my administration of the Government to restore the constitutional currency of gold and silver, and something, I trust, has been done toward the accomplishment of this most desirable object; but enough yet remains to require all your energy and perseverance. The power, however, is in your hands, and the remedy must and will be applied if you determine upon it.

While I am thus endeavoring to press upon your attention the principles which I deem of vital importance in the domestic concerns of the country, I ought not to pass over without notice the important considerations which should govern your policy toward foreign powers. It is unquestionably our true interest to cultivate the most friendly understanding with every nation and to avoid by every honorable means the calamities of war, and we shall best attain this object by frankness and sincerity in our foreign intercourse, by the prompt and faithful execution of treaties, and by justice and impartiality in our conduct to all. But no nation, however desirous of peace, can hope to escape occasional collisions with other powers, and the soundest dictates of policy require that we should place ourselves in a condition to assert our rights if a resort to force should ever become necessary. Our local situation, our long line of seacoast, indented by numerous bays, with deep rivers opening into the interior, as well as our extended and still increasing commerce, point to the Navy as our natural means of defense. It will in the end be found to be the cheapest and most effectual, and now is the time, in a season of peace and with an overflowing revenue, that we can year after year add to its strength without increasing the burdens of the people. It is your true policy, for your Navy will not only protect your rich and flourishing

commerce in distant seas, but will enable you to reach and annoy the enemy and will give to defense its greatest efficiency by meeting danger at a distance from home. It is impossible by any line of fortifications to guard every point from attack against a hostile force advancing from the ocean and selecting its object, but they are indispensable to protect cities from bombardment, dockyards and naval arsenals from destruction, to give shelter to merchant vessels in time of war and to single ships or weaker squadrons when pressed by superior force. Fortifications of this description can not be too soon completed and armed and placed in a condition of the most perfect preparation. The abundant means we now possess can not be applied in any manner more useful to the country, and when this is done and our naval force sufficiently strengthened and our militia armed we need not fear that any nation will wantonly insult us or needlessly provoke hostilities. We shall more certainly preserve peace when it is well understood that we are prepared for war.

In presenting to you, my fellow-citizens, these parting counsels, I have brought before you the leading principles upon which I endeavored to administer the Government in the high office with which you twice honored me. Knowing that the path of freedom is continually beset by enemies who often assume the disguise of friends, I have devoted the last hours of my public life to warn you of the dangers. The progress of the United States under our free and happy institutions has surpassed the most sanguine hopes of the founders of the Republic. Our growth has been rapid beyond all former example in numbers, in wealth, in knowledge, and all the useful arts which contribute to the comforts and convenience of man, and from the earliest ages of history to the present day there never have been thirteen millions of people associated in one political body who enjoyed so much freedom and happiness as the people of these United States. You have no longer any cause to fear danger from abroad; your strength and power are well known throughout the civilized world, as well as the high and gallant bearing of your sons. It is from within, among yourselves - from cupidity, from corruption, from disappointed ambition and inordinate thirst for power - that factions will be formed and liberty endangered. It is against such designs, whatever disguise the actors may assume, that you have especially to guard yourselves. You have the highest of human trusts committed to your care. Providence has showered on this favored land blessings without number, and has chosen you as the guardians of freedom, to preserve it for the benefit of the human race. May He who holds in His hands the destinies of nations make you worthy of the favors He has bestowed and enable you, with pure hearts and pure hands and sleepless vigilance, to guard and defend to the end of time the great charge He has committed to your keeping.

My own race is nearly run; advanced age and failing health

warn me that before long I must pass beyond the reach of human events and cease to feel the vicissitudes of human affairs. I thank God that my life has been spent in a land of liberty and that He has given me a heart to love my country with the affection of a son. And filled with gratitude for your constant and unwavering kindness, I bid you a last and affectionate farewell.

ANDREW JACKSON.

UNITED STATES CODES

TITLE 26

INTERNAL REVENUE CODE

MESSAGES AND PAPERS OF THE PRESIDENTS

By James D. Richardson
A Representative From The State Of Tennessee

Published by
Bureau Of National Literature And Art
(1910 Edition)

INCOME TAX

Index, pages 358 through 360, supra:

~~Income Tax. - A form of direct tax upon annual incomes in excess of a specified sum.~~ According to the doctrine of Adam Smith "the subjects of every State ought to contribute to the support of the government as nearly as possible in proportion to their respective abilities - that is, in proportion to revenues which they respectively enjoy under the protection of the State." In pursuance of this principle all incomes should be taxed, but it is generally conceded among the advocates of such a tax that incomes below a certain amount should be exempt. An income tax has been levied by the United States Government but twice in its history. August 5, 1861, Congress authorized a tax of 3 per cent. on all incomes under \$5,000 and less than \$10,000 were taxed 2 1/2 per cent. additional, and on incomes of more than \$10,000 5 per cent. additional with no exemptions. A tax of 5 per cent. on incomes of Americans living abroad and of 1 1/2 per cent. on incomes from United States securities was levied, expiring in 1865. In 1864 a special tax of 5 per cent. was imposed on all incomes between \$600 and \$5,000 and 10 per cent. on incomes of more than \$5,000. This law was repealed in 1872. The amount collected under it was \$346,911,760.48. In August, 1894, the Wilson tariff law imposed a tax of 2 per cent. on all incomes in excess of \$4000. The Supreme Court in 1895 declared this law unconstitutional.

Income taxes have been collected in England since 1799, when Mr. Pitt carried a proposition through Parliament for a graduated tax on all incomes in excess of L60 per annum. In 1803 the rate was fixed at 5 per cent. on all incomes above L150. Sir Robert Peel's bill, passed in 1842, imposed a tax of 7d. per pound on annual incomes of L150 and upward, for three years. This law has since been extended at each period of its expiration, and the rate and exemptions frequently changed, but the law remains essentially the same in principle today as passed in the early forties. The rate has varied from 4d. the pound (in 1865-67-70) to 1s. the pound (in 1904); yielded a revenue increasing irregularly from L571,055 in 1842, to L38,000,000 in 1903, and falling back to L31,860,000 in 1908. The immediate effect of Sir

Robert Peel's measure was to cause the repeal of about \$12,000,000 of direct taxes.

Income Tax:

Constitutional Amendment proposed, 7761, 7762.

Doubtful Constitutionality of, 7761.

Power to levy without apportionment among States in proportion population sought by constitutional amendment, 7761, 7762.

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Grant, 3984.

Roosevelt, 7424, 7463.

Taft, 7761. - *had to do w/ corporate income tax 16th amendment w/ a result*

Upon certain corporate investments discussed, 5892.

Upon consuls to United States discussed, 3383.

Upon corporations, 7762.

Income-Tax Cases. - Famous cases involving the income tax provisions of the tariff law of August 28, 1894. The first to come before the Supreme Court was that of Pollock vs. Farmers' Loan and Trust Co., on appeal from the Circuit Court of the United States for the southern district of New York, decided April 8, 1895. The suit arose on a bill filed by Charles Pollock, a citizen of Massachusetts, on behalf of himself and all other stockholders of the defendant company similarly situated, against the Farmers' Loan and Trust Co., of the State of New York, and its directors.

Omitting the mere technical points involved in this case, the Supreme Court held that in the adjudicated cases referred to in this case, beginning with Hylton vs. United States, February, 1796, and ending with Springer vs. United States, October, 1880, taxes on land are conceded to be direct taxes, and in none of them is it determined that a tax on rent or income derived from land is not a tax on land. A tax on the rents or income of real estate is a direct tax within the meaning of the Constitution. A tax upon income derived from the interest of bonds issued by a municipal corporation is a tax upon the power of the State and its instrumentalities, and is consequently repugnant to the Constitution of the United States.

So much of the act cited as provides for levying taxes upon rents or income derived from real estate or from the interest on municipal bonds is repugnant to the Constitution and is invalid.

The justices who heard the argument were divided upon each of the other questions, as follows, and rendered no opinion as to them: (1) Whether the void provision as to rents and income from real estate invalidates the whole act; (2) whether as to the income from personal property as such the act is unconstitutional as levying direct taxes; and (3) whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on either of the grounds suggested.

Chief Justice Fuller delivered the opinion. Justice Field's opinion went further. He said: "The present assault upon capital is but the beginning. * * * Our political contests will become a war of the poor against the rich - a war constantly growing in intensity and bitterness. * * * I am of opinion that the whole law of 1894 should be declared void and without any force." Justice White and Harlan dissented. The former spoke of "the injustice and harm which must always result from overthrowing a long and settled practice sanctioned by the decisions of this court. Under the income-tax laws which prevailed in the past for many years, and which covered every conceivable source of income - rentals from real estate and everything else - vast sums were collected from the people of the United States. The decision here rendered announces that those sums were wrongfully taken, and thereby, it seems to me, creates a claim in equity and good conscience against the government for an enormous amount of money."

The Supreme Court made the same decree and the justices were aligned just as in the case of Hyde vs. Continental Trust Co., This also was an appeal from the circuit court of the United States for the southern district of New York. This case, with Pollock vs. Farmers' Loan and Trust Co., was accorded a rehearing and was decided May 20, 1895. In delivering the opinion of the court the Chief Justice alluded to the broadening of the field of inquiry. The whole case was reviewed, but the court did not retravel the entire ground covered in the former decision. It was held that taxes on rents or income of real estate are direct taxes. Taxes on personal property are likewise direct taxes. The tax imposed by sections 27 to 37 inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and therefore unconstitutional and void, because not apportioned according to representation, all those sections, constituting an entire scheme of taxation, are necessarily invalid. Dissenting opinions were rendered by Justices Harlan, Brown, Jackson and White.

NOTES AND MESSAGES OF THE PRESIDENTS:

CHAPTER 79—DEFINITIONS

- Sec. 7701. Definitions.
- Sec. 7702. Life insurance contract defined.
- Sec. 7703. Determination of marital status.

SEC. 7701. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

(1) ~~Person.—The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.~~

all artificial entities

(2) Partnership and partner.—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

(3) Corporation.—The term "corporation" includes associations, joint-stock companies, and insurance companies.

(4) Domestic.—The term "domestic" when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or any State.

(5) Foreign.—The term "foreign" when applied to a corporation or partnership means a corporation or partnership which is not domestic.

(6) Fiduciary.—The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

(7) Stock.—The term "stock" includes shares in an association, joint-stock company, or insurance company.

(8) Shareholder.—The term "shareholder" includes a member in an association, joint-stock company, or insurance company.

(9) United States.—The term "United States" when used in a geographical sense includes only the States and the District of Columbia.

Last amendment.—Sec. 7701(a)(9) appears above as amended by Sec. 18(i), (j) of Public Law 86-624, July 12, 1960, effective (Sec. 18(k) of P.L. 86-624) Aug. 21, 1959.

Prior amendment.—Sec. 7701(9) was previously amended by Sec. 22(g) of Public Law 86-70, June 25, 1959, Sec. 7701(9) as so amended is in P-H Cumulative Changes.

(10) State.—The term "State" shall be construed to include the District of Columbia, where such construction is necessary to carry out provisions of this title.

Last amendment.—Sec. 7701(a)(10) appears above as amended by Sec. 18(j) of Public Law 86-624, July 12, 1960, effective (Sec. 18(k) of P.L. 86-624) Aug. 21, 1959.

amended by Sec. 22(h) of Public Law 86-70, June 25, 1959, Sec. 7701(10) as so amended is in P-H Cumulative Changes.

Prior amendment.—Sec. 7701(10) was previously

(11) Secretary of the Treasury and Secretary.—

(A) Secretary of the Treasury.—The term "Secretary of the Treasury" means the Secretary of the Treasury, personally, and shall not include any delegate of his.

(B) Secretary.—The term "Secretary" means the Secretary of the Treasury or his delegate.

(12) Delegate.—

(A) In general.—The term "or his delegate"—

(i) when used with reference to the Secretary of the Treasury, means any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context; and

(ii) when used with reference to any other official of the United States, shall be similarly construed.

(B) Performance of certain functions in Guam or American Samoa.—The term "delegate", in relation to the performance of functions in Guam or American Samoa with respect to the taxes imposed by chapters 1, 2 and 21, also includes any officer or employee of any other department or agency of the United States, or of any possession thereof, duly authorized by the Secretary (directly, or indirectly by one or more redelegations of authority) to perform such functions.

*Prior amendments.—Sec. 7701(a)(12) was previously amended by the following:
Sec. 1(f)(4) of Public Law 92-606, Oct. 31, 1972, effective (Sec. 2 of P.L. 92-660) with respect to taxable years*

*beginning after Dec. 31, 1972.**

*Sec. 103(i) of Public Law 86-778, Sept. 13, 1960 (qualified effective date rule in Sec. 103(v) of P.L. 86-778).**

*Sec. 7701(a)(12) as so amended is in P-H Cumulative Changes.

(13) Commissioner.—The term "Commissioner" means the Commissioner of Internal Revenue.

(14) Taxpayer.—The term "taxpayer" means any person subject to any internal revenue tax.

(15) Military or naval forces and Armed Forces of the United States.—The term "military or naval forces of the United States" and the term "Armed Forces of the United States" each includes all regular and reserve components of the uniformed services which are subject to the jurisdiction of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force, and each term also includes the Coast Guard. The members of such forces include commissioned officers and personnel below the grade of commissioned officers in such forces.

(16) Withholding agent.—The term "withholding agent" means any person required to deduct and withhold any tax under the provisions of sections 1441, 1442, 1443, or 1461.

Last amendment.—Sec. 7701(a)(16) appears above as amended by Sec. 474(r)(29)(K) of Public Law 98-369, July 18, 1984, effective (Sec. 473(a) of P.L. 98-369) for taxable years beginning after Dec. 31, 1984, and to carrybacks from such years.

of Public Law 97-248, Sept. 3, 1982. This amendment was retroactively repealed by Sec. 102 of Public Law 98-67, Aug. 5, 1983, effective (Sec. 110(a) of P.L. 98-67) as of close of June 30, 1983, as if prior amendment had not been made.

Prior amendment—later retroactively repealed.—Sec. 7701(a)(16) was previously amended by Sec. 307(a)(17)

Implied amendment of Sec. 7701(a)(16) was made by Sec. 473(b) of Public Law 98-369, July 18, 1984.

(17) Husband and wife.—As used in sections 152(b)(4), 632 and 2516, if the husband and wife therein referred to are divorced, wherever appropriate to the meaning of such sections, the term "wife" shall be read "former wife" and the term "husband" shall be read "former husband"; and, if the payments described in such sections are made by or on behalf of the wife or former wife to the husband or former husband instead of vice versa, wherever appropriate to the meaning of such sections, the term "husband" shall be read "wife" and the term "wife" shall be read "husband."

Last amendment.—Sec. 7701(a)(17) appears above as amended by Sec. 1842(d) of Public Law 99-514, Oct. 22, 1986, effective (Sec. 1881 of P.L. 99-514 and Sec. 421(d) P.L. 98-369, July 18, 1984) generally applies to transfers after July 18, 1984, in taxable years ending after July 18, 1984. This amendment added "2516".

Prior amendment.—Sec. 7701(a)(17) was amended by Sec. 422(d)(3) of Public Law 98-369, July 18, 1984, effective (Sec. 422(e)(1) of P.L. 98-369) generally for divorce or separation instruments executed after Dec. 31, 1984. Sec. 7701(a)(17) as it read before this amendment is in P-H Cumulative Changes.

(18) International organization.—The term "international organization" means a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288-288f).

(19) Domestic building and loan association.—The term "domestic building and loan association" means a domestic building and loan association, a domestic savings and loan association, and a Federal savings and loan association—

(A) which either (i) is an insured institution within the meaning of section 401(a) of the National Housing Act (12 U.S.C., sec. 1724(a)), or (ii) is subject by law to supervision and examination by State or Federal authority having supervision over such associations;

(B) the business of which consists principally of acquiring the savings of the public and investing in loans; and

26,366 (I.R.C.)

Code § 7701(a)(19)

Prior amendments.—Sec. 7701(a)(19) was previously amended by the following:
Sec. 432(c) of Public Law 91-172, Dec. 30, 1969, effective (Sec. 432(e) of P.L. 91-172) with respect to tax-

able years beginning after July 11, 1969.*
Sec. 6(c) of Public Law 87-834, Oct. 16, 1962, effective (Sec. 6(g)(3) of P.L. 87-834) for taxable years beginning after the date of enactment of this Act.*

*Sec. 7701(a)(19) as it read before these amendments is in P-H Cumulative Changes.

(20) Employee.—For the purpose of applying the provisions of section 79 with respect to group-term life insurance purchased for employees, for the purpose of applying the provisions of sections 104, 105, 106, and 125 with respect to accident and health insurance or accident and health plans, for the purpose of applying the provisions of section 101(b) with respect to employees' death benefits, and for the purpose of applying the provisions of subtitle A with respect to contributions to or under a stock bonus, pension, profit-sharing, or annuity plan, and with respect to distributions under such a plan, or by a trust forming part of such a plan, the term "employee" shall include a full-time life insurance salesman who is considered an employee for the purpose of chapter 21, or in the case of services performed before January 1, 1951, who would be considered an employee if his services were performed during 1951.

Last amendment.—Sec. 7701(a)(20) appears above as amended by Sec. 1166(a) of Public Law 99-514, Oct. 22, 1986, effective (Sec. 1166(b) of P.L. 99-514) for years beginning after Dec. 31, 1985. This amendment added "125".

26, 1964 (qualified effective date rule in Sec. 204(d) of P.L. 88-272). Sec. 7701(a)(20) as it read before this amendment is in P-H Cumulative Changes.

Implied amendment of Sec. 7701(a)(20) was made by Sec. 402(a), (b) of Public Law 96-603, Dec. 28, 1980, effective (Sec. 402(c) of P.L. 96-603) for taxable years ending after Dec. 31, 1980.

Prior amendment.—Sec. 7701(a)(20) was previously amended by Sec. 204(a)(3) of Public Law 88-272, Feb.

(21) Levy.—The term "levy" includes the power of distraint and seizure by any means.

(22) Attorney General.—The term "Attorney General" means the Attorney General of the United States.

(23) Taxable year.—The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the taxable income is computed under subtitle A. "Taxable year" means, in case of a return made for a fractional part of a year under the provisions of subtitle A or under regulations prescribed by the Secretary, the period for which such return is made.

(24) Fiscal year.—The term "fiscal year" means an accounting period of 12 months ending on the last day of any month other than December.

(25) Paid or incurred, paid or accrued.—The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the taxable income is computed under subtitle A.

(26) Trade or business.—The term "trade or business" includes the performance of the functions of a public office.

(27) Tax Court.—The term "Tax Court" means the United States Tax Court.

Last amendment.—Sec. 7701(a)(27) appears above as amended by Sec. 960(j) of Public Law 91-172, Dec. 30, 1969, effective (Sec. 962(a) of P.L. 91-172) Dec. 30,

1969. Sec. 7701(a)(27) as it read before this amendment is in P-H Cumulative Changes.

(28) Other terms.—Any term used in this subtitle with respect to the application of, or in connection with, the provisions of any other subtitle of this title shall have the same meaning as in such provisions.

(29) Internal Revenue Code.—The term "Internal Revenue Code of 1954" means this title, and the term "Internal Revenue Code of 1939" means the Internal Revenue Code enacted February 10, 1939, as amended.

(30) United States person.—The term "United States person" means—

- (A) a citizen or resident of the United States,
- (B) a domestic partnership,
- (C) a domestic corporation, and
- (D) any estate or trust (other than a foreign estate or foreign trust, within the meaning of section 7701(a)(31)).

all insurance in Maryland 9 USC 1

**FORMER SEC. 7328. [CONFISCATION OF MATCHES EXPORTED.]
REPEALED.**

Repealer.—Sec. 7328 was repealed by Sec. 1904(d) of P.L. 94-453 Feb. 1, 1977.
1904(b)(3)(11)(i) of Public Law 94-453, Oct. 4, 1976.

**SUBCHAPTER D—MISCELLANEOUS PENALTY AND FORFEITURE
PROVISIONS**

- Sec. 7341. Penalty for sales to evade tax.
- Sec. 7342. Penalty for refusal to permit entry or examination.
- Sec. 7343. Definition of term "person".
- Sec. 7344. Extended application of penalties relating to officers of the Treasury Department.

SEC. 7341. PENALTY FOR SALES TO EVADE TAX.

(a) **Nonenforceability of Contract.**—Whenever any person who is liable to pay any tax imposed by this title upon, for, or in respect of, any property sells or causes or allows the same to be sold before such tax is paid, with intent to avoid such tax, or in fraud of the internal revenue laws, any debt contracted in such sale, and any security given therefor, unless the same shall have been bona fide transferred to an innocent holder, shall be void, and the collection thereof shall not be enforced in any court.

(b) **Forfeiture of Sum Paid on Contract.**—If such property has been paid for, in whole or in part, the sum so paid shall be deemed forfeited.

(c) **Moiety.**—Any person who shall sue for the sum so paid (in an action of debt) shall recover from the seller the amount so paid, one-half to his own use and the other half to the use of the United States.

SEC. 7342. PENALTY FOR REFUSAL TO PERMIT ENTRY OR EXAMINATION.

Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of section 7606 (relating to entry of premises for examination of taxable articles) or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit \$500.

SEC. 7343. DEFINITION OF TERM "PERSON".

The term "person" as used in this chapter includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

SEC. 7344. EXTENDED APPLICATION OF PENALTIES RELATING TO OFFICERS OF THE TREASURY DEPARTMENT.

All provisions of law imposing fines, penalties, or other punishment for offenses committed by an internal revenue officer or other officer of the Department of the Treasury, or under any agency or office thereof, shall apply to all persons whomsoever, employed, appointed, or acting under the authority of any internal revenue law, or any revenue provision of any law of the United States, when such persons are designated or acting as officers or employees in connection with such law, or are persons having the custody or disposition of any public money.

[The page following this is (I.R.C.) 26.235]

20,518 (I.R.C.)

Code § 165

SEC. 165. LOSSES.

(a) General Rule.—There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

(b) Amount of Deduction.—For purposes of subsection (a), the basis for determining the amount of the deduction for any loss shall be the adjusted basis provided in section 1011 for determining the loss from the sale or other disposition of property.

(c) Limitation on Losses of Individuals.—In the case of an individual, the deduction under subsection (a) shall be limited to—

- (1) losses incurred in a trade or business;
- (2) losses incurred in any transaction entered into for profit, though not connected with a trade or business; and
- (3) except as provided in subsection (b), losses of property not connected with a trade or business or a transaction entered into for profit, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft.

Last amendment.—Sec. 165(c) appears above as amended by Sec. 711(c)(2)(A)(i) of Public Law 98-369, July 18, 1984, effective (Sec. 711(c)(2)(A)(v) of P.L. 98-369) generally for taxable years beginning after Dec. 31, 1983.

Prior amendment.—Sec. 165(c) was previously

amended by the following:

Sec. 203(b) of Public Law 97-248, Sept. 3, 1982, effective (Sec. 203(c) of P.L. 97-248) generally for taxable years beginning after Dec. 31, 1982.*

Sec. 203(a) of Public Law 88-272, Feb. 26, 1964 (qualified effective date rule in Sec. 205(b) of P.L. 88-272).*

*Sec. 165(c) as so amended is in P-H Cumulative Changes.

(d) Wagering Losses.—Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions.

(e) Theft Losses.—For purposes of subsection (a), any loss arising from theft shall be treated as sustained during the taxable year in which the taxpayer discovers such loss.

(f) Capital Losses.—Losses from sales or exchanges of capital assets shall be allowed only to the extent allowed in sections 1211 and 1212.

(g) Worthless Securities.—

(1) General rule.—If any security which is a capital asset becomes worthless during the taxable year, the loss resulting therefrom shall, for purposes of this subtitle, be treated as a loss from the sale or exchange, on the last day of the taxable year, of a capital asset.

(2) Security defined.—For purposes of this subsection, the term "security" means—

- (A) a share of stock in a corporation;
- (B) a right to subscribe for, or to receive, a share of stock in a corporation; or
- (C) a bond, debenture, note, or certificate or other evidence of indebtedness issued by a corporation or by a government or political subdivision thereof, with interest coupons or in registered form.

(3) Securities in affiliated corporation.—For purposes of paragraph (1), any security in a corporation affiliated with a taxpayer which is a domestic corporation shall not be treated as a capital asset. For purposes of the preceding sentence, a corporation shall be treated as affiliated with the taxpayer only if—

- (A) stock possessing at least 80 percent of the voting power of all classes of its stock and at least 80 percent of each class of its nonvoting stock is owned directly by the taxpayer, and
- (B) more than 90 percent of the aggregate of its gross receipts for all taxable years has been from sources other than royalties, rents (except rents derived from rental of properties to employees of the corporation in the ordinary course of its operating business), dividends, interest (except interest received on deferred purchase price of operating assets sold), annuities, and gains from sales or exchanges of stocks and securities.

In computing gross receipts for purposes of the preceding sentence, gross receipts from sales or exchanges of stocks and securities shall be taken into account only to the extent of gains therefrom. As used in subparagraph (A), the term "stock" does not include nonvoting stock which is limited and preferred as to dividends.

ALSO SEE:
1351(a) & (b)
FOREIGN EXPROPRIATION
LOSS



You don't have to be an immigrant to be affected by the New Immigration Law.

It doesn't matter who you are or where you came from.

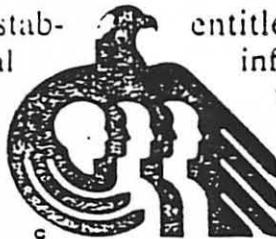
If you start your first job or if you change to a new one, there's a simple procedure you and your employer need to follow. Even if you are an American citizen.

It's an easy, one-page form called the I-9 that you and your employer fill out together. As an employee, you complete the top portion. Then you show documents such as a state driver's license to establish your identity, an original Social Security Number Card to establish your right to work, or a U.S. Passport or Alien Registration Card to establish both at once.

Many other documents are also acceptable.

After checking that your documents appear to be genuine and relate to you, your employer signs the form and keeps it on file. It's that simple. In addition, employers may not fire or fail to hire anyone based on foreign name, appearance or accent.

The New Immigration Law is intended to preserve jobs in the United States for those individuals who are legally entitled to them. If you'd like more information on what to expect, call toll-free: 1 (800) 777-7700. Help make the New Immigration Law a success. Working for a better America is everyone's job.



**Working for a Better America
Immigration and Naturalization Service**

Procedure and Administration (I.R.C.) 26,115

(b) Excessive Amount Defined.—For purposes of this section, the term "excessive amount" means in the case of any person the amount by which—

- (1) the amount claimed under section 6420, 6421, or 6427, as the case may be, for any period, exceeds
- (2) the amount allowable under such section for such period.

Last amendment.—Sec. 6675(b) appears above as amended by Sec. 515(b)(1)(B) of Public Law 97-424, Jan. 6, 1983, effective (Sec. 515(e) of P.L. 97-424) for articles sold after January 6, 1983.

Prior amendments.—Sec. 6675(b) was previously amended by the following:

Sec. 207(d)(8) of Public Law 91-258, May 21, 1970, effective (Sec. 211(a) of P.L. 91-258) July 1, 1970.

Sec. 202(c)(3)(A) of Public Law 89-44, June 21, 1965 (qualified effective date rule in Sec. 701(a)(2), (3) of P.L. 89-44).

Sec. 208(d)(2) of Public Law 627, June 29, 1956, effective (Sec. 211 of P.L. 627) June 29, 1956.

Addition.—Sec. 6675(b) was added by Sec. 3 of Public Law 466, Apr. 2, 1956.

(c) Assessment and Collection of Penalty.—

For assessment and collection of penalty provided by subsection (a), see section 6206.

Addition.—Sec. 6675(c) was added by Sec. 3 of Public Law 466, Apr. 2, 1956.

SEC. 6676 FAILURE TO FURNISH IDENTIFYING NUMBERS

In General.—If any person who is required by regulations prescribed under section 6109—

- (1) to include his TIN in any return, statement, or other document,
- (2) to furnish his TIN to another person, or
- (3) except in the case of a return or statement required to be filed under section 6042, 6044, 6049, or 6050N, to include in any return, statement, or other document made with respect to another person the TIN of such other person,

fails to comply with such requirement at the time prescribed by such regulations, such person shall, unless it is shown that such failure is due to reasonable cause and not to willful neglect, pay a penalty of \$5 for each such failure described in paragraph (1) and \$50 for each such failure described in paragraph (2) or (3), except that the total amount imposed on such person for all such failures during any calendar year shall not exceed \$100,000.

Last amendments.—Sec. 6676(a) (formerly (a)(1)) appears above as amended by the following:

Sec. 1523(b)(3)(A) of Public Law 99-514, Oct. 22, 1986, effective (Sec. 1523(c) of P.L. 99-514) for payments made after Dec. 31, 1984. This amendment inserted "or 6050N" in Sec. 6676(a)(3).

Sec. 1501(b) of Public Law 99-514, Oct. 22, 1986, effective (Sec. 1501(c) of P.L. 99-514) for returns due (without regard to extensions) after Dec. 31, 1986. This amendment struck out "250,000" and inserted "\$100,000" in place.

Prior amendments.—Sec. 6676(a) (formerly (a)(1)) previously amended by the following:

Sec. 105(a) of Public Law 98-67, Aug. 5, 1983, effective

(Sec. 110(a) of P.L. 98-67) for payments made after Dec. 31, 1983.*

Sec. 316(a) of Public Law 97-248, Sept. 3, 1982, effective (Sec. 316(b) of P.L. 97-248) for returns the due date for filing of which (regardless of extensions) is after Dec. 31, 1982.*

Addition.—Sec. 6676(a) (formerly (a)(1)) was added by Sec. 11(c) of Public Law 87-397, Oct. 5, 1961.

Implied amendment of Sec. 6676(a) (formerly (a)(1)) was made by Sec. 145(2)(2) of Public Law 98-369, July 18, 1984, amended by Sec. 1811(a)(2), P.L. 99-514, Oct. 22, 1986.

*Sec. 6676(a) (formerly (a)(1)) as so amended is in P-11 Cumulative Changes.

(2) [Repealed]

Repealer.—Sec. 6676(a)(2) was repealed by Sec. 105(a) of Public Law 98-67, Aug. 5, 1983, effective (Sec. 110(a) of P.L. 98-67) for payments made after Dec. 31, 1983. See 6676(a)(2) as it read before this repealer is in P-11 Cumulative Changes.

Addition.—Former Sec. 6676(a)(2) was added by Sec. 316(a) of Public Law 97-248, Sept. 3, 1982, effective (Sec. 316(b) of P.L. 97-248) for returns the due date for filing of which (regardless of extensions) is after Dec. 31, 1982.

(b) Penalties Involving Failures on Interest, Dividends, and Royalties Returns.—

(1) In general.—If any payor—

- (A) is required to include in any return or statement required to be filed under section 6042, 6044, 6049, or 6050N with respect to any payee the TIN of such payee, and

under section 402

For legislative history

3, see 1972 U.S.C. p. 4989.

y Insurance

20 CFR 404.1001

and Public Welfare

Information returns under subtitle F of Title 26 and subchapter XI of the Internal Revenue Code and Treasury are authorized.

Secretary of the Treasury shall make available to the Secretary of the Treasury the provisions of this section as being necessary to process any withdrawal to him by the agreement made at until modified by and the Secretary.

L. 94-202, § 8(b)

ion, shall be effective as its reporting income

For legislative history L. 94-202, see 1975 U.S.C. p. 2347.

nce with this section revenue Code.

433. International agreements

Article 5 of the Atlantic Charter SS Act
is an international agreement

Held by the IMF

(a) Purpose of agreement:

The President is authorized (subject to the succeeding provisions of this section) to enter into agreements establishing totalization arrangements between the social security system established by this subchapter and the social security system of any foreign country, for the purposes of establishing entitlement to and the amount of old-age, survivors, disability, or derivative benefits based on a combination of an individual's periods of coverage under the social security system established by this subchapter and the social security system of such foreign country.

(b) Definitions

F.D.R. 1944
1935
SS Act

for the purposes of this section—

(1) the term "social security system" means, with respect to a foreign country, a social insurance or pension system which is of general application in the country and under which periodic benefits, or the actuarial equivalent thereof, are paid on account of old age, death, or disability; and

(2) the term "period of coverage" means a period of payment of contributions or a period of earnings based on wages for employment or on self-employment income, or any similar period recognized as equivalent thereto under this subchapter or under the social security system of a country which is a party to an agreement entered into under this section.

(c) Crediting periods of coverage; conditions of payment of benefits

(1) Any agreement establishing a totalization arrangement pursuant to this section shall provide—

(A) that in the case of an individual who has at least 6 quarters of coverage as defined in section 413 of this title and periods of coverage under the social security system of a foreign country which is a party to such agreement, periods of coverage of such individual under such social security system of such foreign country may be combined with periods of coverage under this subchapter and otherwise considered for the purposes of establishing entitlement to and the amount of old-age, survivors, and disability insurance benefits under this subchapter;

(B)(i) that employment or self-employment, or any service which is recognized as equivalent to employment or self-employment under this subchapter or the social security system of a foreign country which is a party to such agreement, shall, on or after the effective date of such agreement, result in a period of coverage under the system established under this subchapter or under the system established under the laws of such foreign country, but not under both, and (ii) the methods and conditions for determining under which system employment, self-employment, or other service shall result in a period of coverage; and

(C) that where an individual's periods of coverage are combined, the benefit amount payable under this subchapter shall be based on the

PECK & CO. VS. LOWE

62 L. Ed. 1049
(1918)

"16th Amendment Did Not Enlarge Taxing Power"

1947. av. 00 & 1047

of . . . I. S.
1947

1947. av. 00 & 1047

this case the defense was a valid one,—I think the judgment of the Dakota court should be affirmed, and therefore dissent from the decision of the court.

Mr. Justice Pitney and Mr. Justice Brandeis concur in this dissent.

WILLIAM E. PECK & COMPANY, Inc.,
Plff. in Err.,

JOHN Z. LOWE, Jr., Collector, etc.

(See S. C. Reporter's ed. 165-175.)

Internal revenue — income tax on corporations — receipts from sales of foreign shipments.

1. Income of a domestic corporation derived from the business of shipping goods to foreign countries and there selling them is comprehended by the provisions of the Act of October 3, 1913 (35 Stat. at L. 666, chap. 16), § 11, subjecting every corporation to the payment of a tax of a specified per cent of its "entire net income arising or accruing from all sources during the preceding calendar year."

[For other cases, see Internal Revenue, II. b. in Digest Sup. Ct. 1915 Supp.]

Internal revenue — power of Congress — income tax.

2. The taxing power was not extended to new or excepted subjects by the provision of U. S. Const. 16th Amend., giving Congress the power to levy an income tax, but such amendment merely removes all occasion which otherwise might exist for an apportionment among the states of taxes laid on income, from whatever source derived.

[For other cases, see Internal Revenue, II. b. in Digest Sup. Ct. 1918 Supp.]

Commerce — Federal income tax — exports.

3. A tax on the net income of a domestic corporation derived from the business of shipping goods to foreign countries and there selling them is not forbidden by the provision of U. S. Const. art. 1, § 9, that "no tax or duty shall be laid on articles exported from any state."

[For other cases, see Commerce, V. in Digest Sup. Ct. 1908.]

[No. 234.]

Argued December 10 and 11, 1917. Decided May 20, 1918.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment in favor of a collector of internal revenue

Note.—As to constitutionality of income tax—see notes to Alderman v. Wells, 27 L.R.A. (N.S.) 864, and State ex rel. Boiens v. Frear, L.R.A. 1915B, 569, 62 L. ed.

in an action by a corporation to recover an income tax paid under protest. Affirmed.

See same case below, 234 Fed. 125.

The facts are stated in the opinion.

Messrs. Charles P. Spooner and Richard V. Lindabury argued the cause, and, with Messrs. John C. Spooner and Ralph T. Keyser, filed a brief for plaintiff in error:

When a tax is adjudged to fall upon exports, or to be a tax on exports or relating to exports, it is prohibited, no matter what the kind, class, quality, or method of the tax may be, whether direct or indirect, personal or excise, income or stamp tax, privilege or property tax, or whether levied on gross receipts or net receipts, or on the goods exported or the documents representing the goods, or on the transactions as a whole, or on any part or customary incident thereof.

Fairbank v. United States, 151 U. S. 293, 299, 45 L. ed. 862, 965, 21 Sup. Ct. Rep. 643, 15 Am. Crim. Rep. 135; United States v. Hvoslef, 237 U. S. 1, 59 L. ed. 813, 35 Sup. Ct. Rep. 459, Ann. Cas. 1915A, 286; Thames & M. M. Ins. Co. v. United States, 237 U. S. 19, 59 L. ed. 821, 35 Sup. Ct. Rep. 496, Ann. Cas. 1915D, 1087.

~~The 16th Amendment to the Constitution has not enlarged the taxing power of Congress or affected the prohibition against its burdening exports.~~

Brushaber v. Union P. R. Co. 240 U. S. 1, 18, 60 L. ed. 493, 501, L.R.A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; Stanton v. Baltic Min. Co. 240 U. S. 103, 112, 60 L. ed. 546, 553, 36 Sup. Ct. Rep. 278.

Congress may no more burden exports and exportation by indirection than by a tax directly upon the article exported; the substance and effect, and not the form, of a tax, controls.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 673; Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Leloup v. Mobile, 127 U. S. 640, 645, 32 L. ed. 311, 313, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Fairbank v. United States, 151 U. S. 293, 45 L. ed. 862, 21 Sup. Ct. Rep. 643, 15 Am. Crim. Rep. 135; United States v. New York & C. Mail S. S. Co. 200 U. S. 488, 50 L. ed. 569, 26 Sup. Ct. Rep. 327; United States v. Hvoslef, 237 U. S. 1, 59 L. ed. 813, 35 Sup. Ct. Rep. 459.

Ann. Cas. 1916A, 286; *Thames & M. M. Ins. Co. v. United States*, 237 U. S. 19, 59 L. ed. 821, 35 Sup. Ct. Rep. 496, Ann. Cas. 1915D, 1087; *State v. Allgeyer*, 110 La. 839, 34 So. 793; *Low v. Austin*, 13 Wall. 29, 20 L. ed. 517; *Passenger Cases*, 7 How. 293, 12 L. ed. 702; *Crandall v. Nevada*, 6 Wall. 35, 18 L. ed. 745; *State Freight Tax Case*, 15 Wall. 232, 21 L. ed. 146; *Henderson v. New York* (*Henderson v. Wickham*) 92 U. S. 259, 23 L. ed. 543; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Waring v. Mobile*, 8 Wall. 110, 19 L. ed. 342.

A tax on income is a tax on the source from which the income is derived.

Pollock v. Farmers' Loan & T. Co. 158 U. S. 630, 39 L. ed. 1123, 15 Sup. Ct. Rep. 912; *Collector v. Day* (*Buffington v. Day*) 11 Wall. 113, 20 L. ed. 122; *Dobbins v. Erie County*, 16 Pet. 435, 10 L. ed. 1022.

The completion of the act of exportation does not permit taxation of its proceeds.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; *Selliger v. Kentucky*, 213 U. S. 200, 53 L. ed. 761, 29 Sup. Ct. Rep. 449; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118.

It is one thing to tax property which, although derived as income from a non-taxable source, has become an indistinguishable part of the taxpayer's general funds, and quite a different thing to tax a person on account of his receipt of an income from such source. The former casts no direct or measurable burden upon the exempted office, property, or occupation, because the income has been separated therefrom and no longer has any connection therewith; while the latter directly burdens such office, property, or occupation, because to tax income as such is the same in substance and effect as to tax the source from which it is derived.

Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 341, 30 L. ed. 1200, 1203, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481; *Dobbins v. Erie County*, 16 Pet. 435, 10 L. ed. 1022; *Collector v. Day* (*Buffington v. Day*) 11 Wall. 113, 20 L. ed. 122; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 750, 15 Sup. Ct. Rep. 673.

The constitutional prohibition against the taxation of exports was not designed to give immunity from taxation only to property that is in the actual course of exportation.

1030

United States v. Hvoslef, 237 U. S. 1, 13, 59 L. ed. 813, 919, 35 Sup. Ct. Rep. 450, Ann. Cas. 1916A, 286; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Leloup v. Mobile*, 127 U. S. 640, 648, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 3 Sup. Ct. Rep. 1380.

Mere names, forms, or classifications cannot be employed to override constitutional limitations.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; *Dobbins v. Erie County*, 16 Pet. 435, 10 L. ed. 1022; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Leloup v. Mobile*, supra; *State v. Allgeyer*, 110 La. 839, 34 So. 793; *Fairbank v. United States*, 131 U. S. 293, 45 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135.

Assistant Attorney General Fitts argued the cause and filed a brief for defendant in error:

A general tax laid upon all persons with respect to their income does not become a tax upon articles exported, because the income is derived from an export business.

Cornell v. Coyne, 192 U. S. 418, 426, 48 L. ed. 504, 507, 24 Sup. Ct. Rep. 383; *Brown v. Houston*, 114 U. S. 622, 629, 29 L. ed. 257, 259, 5 Sup. Ct. Rep. 1091; *Turpin v. Burgess*, 117 U. S. 504, 29 L. ed. 988, 6 Sup. Ct. Rep. 835; *State Tax on R. Gross Receipts*, 15 Wall. 284, 292, 296, 21 L. ed. 164, 167, 168; *Brady v. Anderson*, 153 C. C. A. 463, 240 Fed. 665.

The case is completely governed by the decisions of this court in the Corporation Tax and Income Tax Cases.

Flint v. Stone Tracy Co. 220 U. S. 107, 165, 55 L. ed. 389, 419, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; *Brushaber v. Union P. R. Co.* 240 U. S. 1, 60 L. ed. 493, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; *Stanton v. Baltic Min. Co.* 240 U. S. 103, 60 L. ed. 546, 36 Sup. Ct. Rep. 278; *Brady v. Anderson*, 153 C. C. A. 463, 240 Fed. 665, certiorari denied in 244 U. S. 654, 61 L. ed. 1073, 37 Sup. Ct. Rep. 652.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action to recover a tax paid under protest and alleged to have been imposed contrary to the constitution [172] provision (art. 1, § 9, cl. 5) that "no tax or duty shall be laid on articles exported from any state." The

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judgment below was for the defendant. 234 Fed. 125.

The plaintiff is a domestic corporation chiefly engaged in buying goods in the several states, shipping them to foreign countries, and there selling them. In 1914 its net income from this business was \$30,173.66, and from other sources \$12,436.24. An income tax for that year, computed on the aggregate of these sums, was assessed against it and paid under compulsion. It is conceded that so much of the tax as was based on the income from other sources was valid, and the controversy is over so much of it as was attributable to the income from shipping goods to foreign countries and there selling them.

The tax was levied under the Act of October 3, 1913, chap. 16, § II. 33 Stat. at L. 166, 172, which provided for annually subjecting every domestic corporation to the payment of a tax of a specified per centum of its "entire net income arising or accruing from all sources during the preceding calendar year." Certain fraternal and other corporations, as also income from certain enumerated sources, were specifically excepted, but none of the exceptions included the plaintiff or any part of its income. So, tested merely by the terms of the act, the tax collected from the plaintiff was rightly computed on its total net income.

~~It is not necessary to consider whether the tax is validly levied under the constitutional provision on which the plaintiff relies.~~

~~The 10th Amendment, although relevant to the argument, has no real bearing on the issue. It is not a limitation on the taxing power of Congress. It merely removes an occasion which otherwise might exist for an appropriation among the states of taxes laid on income, which is to be derived from one source or another.~~

Brushaber v. Union P. R. Co. 240 U. S. 1, 17-19, 60 L. ed. 493, 501, 502, L.R.A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; *Stanton v. Baltic Min. Co.* 240 U. S. 103, 112, 113, 60 L. ed. 546, 553, 554, 36 Sup. Ct. Rep. 278.

The Constitution broadly empowers Congress not only "to lay and collect taxes, duties, imposts, and excises," but also "to regulate commerce with foreign nations." So, if the prohibitory clause invoked by the plaintiff be not in the way, Congress undoubtedly has power to lay and collect such a tax as is here in
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question. That clause says, "No tax or duty shall be laid on articles exported from any state." Of course it qualifies and restricts the power to tax as broadly conferred. But to what extent? The decisions of this court answer that it excepts from the range of that power articles in course of exportation (*Turpin v. Burgess*, 117 U. S. 504, 507, 29 L. ed. 988, 989, 6 Sup. Ct. Rep. 835); the act or occupation of exporting (*Brown v. Maryland*, 12 Wheat. 419, 445, 6 L. ed. 678, 687); bills of lading for articles being exported (*Fairbank v. United States*, 181 U. S. 283, 43 L. ed. 862, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135); charter parties for the carriage of cargoes from state to foreign ports (*United States v. Iivoslef*, 237 U. S. 1, 59 L. ed. 813, 35 Sup. Ct. Rep. 459, Ann. Cas. 1916A, 286); and policies of marine insurance on articles being exported,—such insurance being uniformly regarded as "an integral part of the exportation," and the policy as "one of the ordinary shipping documents" (*Thames & M. M. Ins. Co. v. United States*, 237 U. S. 19, 59 L. ed. 821, 35 Sup. Ct. Rep. 496, Ann. Cas. 1915D, 1087). In short, the court has interpreted the clause as meaning that exportation must be free from taxation, and therefore as requiring "not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation." *Fairbank v. United States*, 181 U. S. 292, 293, 45 L. ed. 866, 867, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135. And the court has indicated that where the tax is not laid on the articles themselves while in course of exportation the true test of its validity is whether it "so directly and closely" bears on the "process of exporting" as to be in substance a tax on the exportation. *Thames & M. M. Ins. [174] Co. v. United States*, 237 U. S. 25, 59 L. ed. 823, 35 Sup. Ct. Rep. 496, Ann. Cas. 1915D, 1087. In this view it has been held that the clause does not condemn or invalidate charges or taxes not laid on property while being exported, merely because they affect exportation indirectly or remotely. Thus, a charge for stamps which each package of manufactured tobacco intended for export was required to bear before removal from the factory was upheld in *Pace v. Burgess*, 92 U. S. 372, 23 L. ed. 657, and *Turpin v. Burgess*, 117 U. S. 504, 29 L. ed. 983, 6 Sup. Ct. Rep. 835, and the application of a manufacturing tax on all filled cheese to cheese manufactured under contract for export, and actually exported, was upheld in *Cor-*
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nell v. Coyne, 192 U. S. 418, 48 L. ed. 504, 24 Sup. Ct. Rep. 383. In that case it was said, p. 427: "The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export, and not to the article before its exportation."

While fully assenting and adhering to the interpretation which has been put on the clause in giving effect to its spirit as well as its letter, we are of opinion that to broaden that interpretation would be to depart from both the spirit and letter.

The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation, or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax (see *Stanton v. Baltic Min. Co.* 240 U. S. 113, 60 L. ed. 554, 36 Sup. Ct. Rep., 279), it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. The words of the act are "net income arising or accruing [175] from all sources." There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins. If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws. In that respect the status of the income is not different from that of the exported articles prior to the exportation.

For these reasons we hold that the objection urged against the tax is not well grounded.

Judgment affirmed.

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UNITED STATES, Appl.,

WALTER FERGUSON et al.

(See S. C. Reporter's ed. 175-179.)

Indians — restrictions on alienation — mixed or full blood — conclusiveness of citizenship roll.

The approved Seminole citizenship roll must be deemed conclusive as to the amount of Indian blood of an enrolled member of that tribe when testing his right under the Act of April 26, 1906 (34 Stat. at L. 145, chap. 1876), § 22, to convey his lands, in view of the various acts of Congress providing for the preparation and perpetuation of citizenship rolls of the Five Civilized Tribes, and especially of a provision in said Act of April 26, 1906, which, besides making the presence or absence of restrictions on the alienation of allotments dependent on the quantum of Indian blood possessed by the allottee or heir, declared that the quantum of Indian blood shall "be determined" by the approved rolls, and of a provision in the Act of May 27, 1908 (35 Stat. at L. 312, chap. 199), that the approved rolls "shall be conclusive as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this act." [For other cases, see *Indians*, VIII. in *Digest* Sup. Ct. 1908.]

[No. 238.]

Submitted May 1, 1918. Decided May 20, 1918.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the District Court for the Eastern District of Oklahoma in favor of defendants in a suit to cancel conveyances of allotted Indian lands made by the heir of the deceased allottee. Affirmed.

See same case below, 141 C. C. A. 96, 225 Fed. 974.

The facts are stated in the opinion.

Assistant Attorney General Kearful submitted the cause for appellant.

Messrs. Harry H. Rogers, Joseph L. Hull, and Nathan A. Gibson submitted the cause for appellees.

Mr. Justice Van Devanter delivered the opinion of the court:

This is a suit to cancel certain conveyances of allotted Indian lands, made by the heir of the deceased allottee. In the district court there was a decree for the defendants, which was affirmed by the circuit court of appeals. 141 C. C. A. 96, 225 Fed. 974.

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SOUTHERN PACIFIC CO. vs. LOWE

247 U.S. 1142
(1918)

"Not Everything Is Income - Only Profit & Gain"

SOUTHERN PACIFIC CO. vs. LOWE

200 U.S. 143
(1916)

of Everything is Income - Only Profit is Gain

[330] SOUTHERN PACIFIC COMPANY,
Plff. in Err.,

JOHN Z. LOWE, Jr., United States Collector of Internal Revenue for the Second District of New York.

(See S. C. Reporter's ed. 330-339.)

Internal revenue — income tax — accumulations accruing before effective date of act.

1. Accumulations accruing to a corporation prior to the effective date of the Income Tax Act of October 3, 1913 (38 Stat. at L. 114, chap. 16), whether surplus earnings or the increment due to an appreciation in value of the corporate assets, are capital, not income, for the purpose of the act. [For other cases, see Internal Revenue, 77-54, in Digest Sup. Ct. 1908.]

Internal revenue — income tax — prior accumulations — dividends — stock ownership and control.

2. Dividends which a railway company whose entire capital stock is owned by another railway company in actual physical possession of the former company's railways and other assets, and in charge of its operations, conducting them under lease, declared and paid out of surplus accumulated prior to the effective date of the Income Tax Act of October 3, 1913 (38 Stat. at L. 114, chap. 16, Comp. Stat. 1916, § 5291), the payment being only constructive, effectuated by book-keeping entries which simply reduced the apparent surplus of the controlled railway company, and reduced the apparent indebtedness of the controlling company to the other company by precisely the amount of the dividends, are not taxable as income of the controlling corporation arising or accruing within the year.

[For other cases, see Internal Revenue, 77-54, 123-129, in Digest Sup. Ct. 1908.]

[No. 452.]

Argued March 4, 5, and 6, 1918. Decided June 3, 1918.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment

Note.—As to income tax on dividends declared after, but paid from earnings accrued before, the act went into effect—see note to Trefry v. Putnam, L.R.A. 1917F, 814.

The question whether extraordinary dividends, declared in cash or stock, including stock rights, constitute income or capital, as affecting the respective rights of life tenants and remaindermen, is considered at length in the notes to Holbrook v. Holbrook, 12 L.R.A. (N.S.) 708; Newport Trust Co. v. Van Rensselaer, 35 L.R.A. (N.S.) 563; and Re Osborne, 50 L.R.A. (N.S.) 510.

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in favor of defendant in a suit to recover back an income tax paid under protest. Reversed and remanded for further proceedings.

See same case below, 238 Fed. 847.

The facts are stated in the opinion.

Mr. Gordon M. Buck argued the cause and filed a brief for plaintiff in error:

As the constitutionality of a law of the United States is drawn in question, and the construction or application of the Constitution of the United States is involved, the writ of error properly ran from this court to the district court direct.

Towne v. Eisner, 245 U. S. 413, ante, 372, L.R.A. 1918D, 254, 38 Sup. Ct. Rep. 159; Stanton v. Baltic Min. Co. 240 U. S. 103, 60 L. ed. 546, 36 Sup. Ct. Rep. 278; Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 493, L.R.A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713.

~~Some of the cases must be stated against the~~

Gould v. Gould, 245 U. S. 151, ante, 211, 38 Sup. Ct. Rep. 53; Eidman v. Martinez, 134 U. S. 578, 583, 46 L. ed. 697, 701, 22 Sup. Ct. Rep. 515.

~~Some of the cases must be stated against the~~

Foster, Income Tax, § 46; Black, Income Tax, 2d ed. § 219; Gray v. Darlington, 15 Wall. 63, 21 L. ed. 45; Gauley Mountain Coal Co. v. Hays, 144 C. C. A. 408, 230 Fed. 110; Doyle v. Mitchell Bros. Co. L.R.A. 1917E, 568, 149 C. C. A. 106, 235 Fed. 686; Baldwin Locomotive Works v. McCoach, 136 C. C. A. 660, 221 Fed. 59; Industrial Trust Co. v. Walsh, 222 Fed. 437; People ex rel. Cornell University v. Davenport, 30 Hun, 177; Thorn v. De Breteuil, 86 App. Div. 415, 83 N. Y. Supp. 849; Lawless v. Sullivan, L. R. 6 App. Cas. 379, 50 L. J. P. C. N. S. 33, 44 L. T. N. S. 597, 29 Week. Rep. 917; Bailey v. New York C. & H. R. R. Co. 106 U. S. 109, 27 L. ed. 51, 1 Sup. Ct. Rep. 62; Lynch v. Turrish, 149 C. C. A. 649, 236 Fed. 653; Lynch v. Hornby, 149 C. C. A. 657, 236 Fed. 661; Reynolds v. Williams, 4 Biss. 108, Fed. Cas. No. 11,734; Merchants' Ins. Co. v. McCartney, 1 Low. Dec. 447, Fed. Cas. No. 9,443.

To construe the act as imposing a tax on dividends from a surplus accruing prior to January, 1913, would result in giving the act a retroactive effect, and would violate a cardinal rule of statutory construction.

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United States v. Burr, 159 U. S. 78, 40 L. ed. 82, 15 Sup. Ct. Rep. 1002; United States v. American Sugar Ref. Co. 202 U. S. 563, 50 L. ed. 1149, 26 Sup. Ct. Rep. 717; Lynch v. Turrish, 149 C. C. A. 649, 236 Fed. 653.

It is not enough that gains or profits were received within the year, but they must have been gains or profits arising or accruing during such year.

Anderson v. Richards, 99 Ky. 661, 37 S. W. 62; Bouvier's Law Dict. Rawle's Rev. Concise Oxford Dict. "Accrue;" Strasser v. Staats, 59 Hun, 143, 13 N. Y. Supp. 167; Ercanbrack v. Faris, 10 Idaho, 584, 79 Pac. 817; Carley v. Liberty Mfg. Co. 81 N. J. L. 508, 33 L.R.A.(N.S.) 545, 79 Atl. 447; Leman v. Chipman, 52 Neb. 306, 117 N. W. 865; Millin's Estate, 232 Pa. 25, 51 Atl. 129; 2 Perry, Trusts, 6th ed. 556; Bridgeport Trust Co. v. Marsh, 87 Conn. 398, 87 Atl. 865.

As between life tenants and remaindermen, dissolution dividends constitute capital.

Gifford v. Thompson, 115 Mass. 478; Brownell v. Anthony, 189 Mass. 442, 75 N. E. 746; Second Universalist Church v. Colegrove, 74 Conn. 79, 49 Atl. 902; Curtis v. Osborn, 79 Conn. 555, 63 Atl. 968; Wheeler v. Perry, 18 N. H. 307; Wilberding v. Miller, 90 Ohio St. 28, L.R.A. 1916A, 718, 106 N. E. 666.

Dividends from a surplus accrued prior to the 16th Amendment are not taxable under the act.

Lynch v. Turrish, 149 C. C. A. 649, 236 Fed. 653; Lynch v. Hornby, 149 C. C. A. 657, 236 Fed. 661; Union Pacific Coal Co. v. Skinner (March 2, 1917: U. S. D. C. Colo.); Gulf Oil Corp. v. Lewellyn, 242 Fed. 709; Peabody v. Eisner, 247 U. S. 347, post, 1152, 33 Sup. Ct. Rep. 546.

Statutes in pari materia are to be read and construed together as the development of a uniform and consistent legislative design, or else as the modification of the original design to adapt it to changing conditions.

Black, Income Tax, 2d ed. § 218; United States v. Collier, 3 Blatchf. 325, Fed. Cas. No. 14,833; Rex v. Loxdale, 1 Burr. 445, 97 Eng. Reprint, 394; Southern R. Co. v. McNeill, 155 Fed. 756; United States v. Smith, 1 Sawy. 277, Fed. Cas. No. 16,341; Bailey v. New York C. & H. R. R. Co. 106 U. S. 109, 116, 27 L. ed. 81, 84, 1 Sup. Ct. Rep. 62; Reynolds v. Williams, 4 Biss. 108, Fed. Cas. No. 11,734; Merchants' Ins. Co. v. McCartney, 1 Low. Dec. 447, Fed. Cas. No. 9,443; Gray v. Darlington, 15 Wall. 63, 21 L. ed. 45; Doyle v. Mitchell Bros. Co. 62 L. ed.

L.R.A.1917E, 568, 149 C. C. A. 106, 235 Fed. 636.

As between life tenant and remainderman, an extraordinary cash dividend constitutes capital, if paid from surplus accruing prior to the establishment of the trust.

2 Cook, Corp. 7th ed. § 554; Morawetz, Priv. Corp. 2d ed. § 467; 5 Thomp. Corp. 2d ed. § 5414; Stokes's Estate, 240 Pa. 277, 87 Atl. 971; Earp's Appeal, 23 Pa. 368; Re Osborne, 209 N. Y. 450, 50 L.R.A.(N.S.) 510, 103 N. E. 723, 923, Ann. Cas. 1915A, 298; Re Harteau, 204 N. Y. 292, 97 N. E. 726; Thayer v. Burr, 201 N. Y. 155, 94 N. E. 604; Ballantine v. Young, 79 N. J. Eq. 73, 81 Atl. 119; Lang v. Lang, 57 N. J. Eq. 325, 41 Atl. 705; Van Doren v. Olden, 19 N. J. Eq. 176, 97 Am. Dec. 650; Bishop v. Bishop, 81 Conn. 509, 71 Atl. 583; Second Universalist Church v. Colegrove, 74 Conn. 79, 49 Atl. 902; Holbrook v. Holbrook, 74 N. H. 201, 12 L.R.A.(N.S.) 768, 66 Atl. 124; Peirce v. Burroughs, 58 N. H. 302; Miller v. Payne, 150 Wis. 354, 136 N. W. 811; Lord v. Brooks, 52 N. H. 72; Soehnelien v. Soehnelien, 146 Wis. 340, 131 N. W. 739; Gilkey v. Paine, 50 Me. 319, 14 Atl. 205; Ex parte Rutledge, 1 Harp. Eq. 65, 14 Am. Dec. 696; Cobb v. Fant, 36 S. C. 1, 14 S. E. 959; Goodwin v. McGaughey, 108 Minn. 255, 122 N. W. 6, 26 Am. L. Rev. 18; Mercer v. Buchanan, 132 Fed. 501, 70 C. C. A. 650, 137 Fed. 1019; Lang v. Lang, 57 N. J. Eq. 325, 41 Atl. 705.

The act should be so construed as to avoid raising any question as to its constitutionality.

Harriman v. Interstate Commerce Commission, 211 U. S. 407, 422, 53 L. ed. 253, 264, 29 Sup. Ct. Rep. 115; United States v. Jin Fuey Moy, 241 U. S. 394, 401, 60 L. ed. 1061, 1064, 36 Sup. Ct. Rep. 658.

The act is unconstitutional if construed as imposing a tax on dividends paid to one corporation by another, out of a surplus that accrued prior to the 16th Amendment.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; 3 Cyc. 731, 745; Shreveport v. Cole, 129 U. S. 36, 43, 32 L. ed. 559, 591, 9 Sup. Ct. Rep. 210; United States v. Burr, 159 U. S. 78, 40 L. ed. 82, 15 Sup. Ct. Rep. 1002; United States v. American Sugar Ref. Co. 202 U. S. 563, 50 L. ed. 1149, 26 Sup. Ct. Rep. 717; Reynolds v. McArthur, 2 Pet. 417, 434, 7 L. ed. 470, 476; Brushaber v. Union P. R. Co. 240 U. S. 1, 18, 60 L. ed. 493, 501, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 1143

236, Ann. Cas. 1917B, 713; Tyee Realty Co. v. Anderson, 240 U. S. 115, 117, 60 L. ed. 554, 557, 36 Sup. Ct. Rep. 281; Black, Income Tax, 2d ed. § 212.

The spirit of the act as a tax on net income should prevail.

Stratton's Independence v. Howbert, 231 U. S. 399, 414, 58 L. ed. 235, 291, 34 Sup. Ct. Rep. 136.

A construction of the act producing inequality and hardship should be avoided.

Knowlton v. Moore, 173 U. S. 41; 77, 44 L. ed. 969, 984, 20 Sup. Ct. Rep. 747.

Moreover, a construction producing inequality and hardship would render the act unconstitutional.

Society for Savings v. Coite, 6 Wall. 594, 609, 13 L. ed. 397, 903; Gray, Limitations of Taxing Power; p. 353; Brushaber v. Union P. R. Co. 240 U. S. 1, 24, 60 L. ed. 493, 504, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 599, 39 L. ed. 759, 825, 15 Sup. Ct. Rep. 673; Southern R. Co. v. Greene, 216 U. S. 400, 417, 54 L. ed. 536, 541, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; San Mateo County v. Southern P. R. Co. 7 Sawy. 517, 13 Fed. 145.

The plaintiff and its subsidiary corporations form a unified transportation system, and well illustrate the injustice that would result from a refusal to go behind the legal fiction of a distinct corporate entity.

United States v. Southern P. Co. 230 Fed. 1000; Collector v. Hubbard (Brainard v. Hubbard) 12 Wall. 1, 17, 20 L. ed. 272, 273; Bailey v. New York C. & H. R. R. Co. 106 U. S. 109, 27 L. ed. 81, 1 Sup. Ct. Rep. 62; Lynch v. Turrish, 149 C. C. A. 649, 236 Fed. 653; Reynolds v. Williams, 4 Biss. 103, Fed. Cas. No. 11,734; Lynch v. Hornby, 149 C. C. A. 657, 236 Fed. 661; Northern Securities Co. v. United States, 193 U. S. 197, 43 L. ed. 679, 24 Sup. Ct. Rep. 436; Smith v. Moore, 118 C. C. A. 127, 199 Fed. 689; Spencer v. Lowe, 117 C. C. A. 497, 198 Fed. 961; Linn & L. Timber Co. v. United States, 116 C. C. A. 267, 196 Fed. 593; United States v. Milwaukee Refrigerator Transit Co. 142 Fed. 247; Cook, Corp. 7th ed. §§ 663, 664; Morawetz, Priv. Corp. 2d ed. § 227.

Dividends paid from the sale of capital assets do not constitute income.

Lynch v. Turrish, 149 C. C. A. 649, 236 Fed. 653; Foster, Income Tax, § 46; Gauley Mountain Coal Co. v. Hays, 144 C. C. A. 408, 230 Fed. 110; Doyle v. Mitchell Bros. Co. L.R.A.1917E, 568, 149 C. C. A. 106, 235 Fed. 686; Industrial Trust Co. v. Walsh, 222 Fed. 436; Bald-

win Locomotive Works v. McCoach, 136 C. C. A. 660, 221 Fed. 59; Miller v. Payne, 150 Wis. 373, 136 N. W. 511; Thayer v. Burr, 201 N. Y. 155, 94 N. E. 604; Heard v. Eldredge, 109 Mass. 253, 12 Am. Rep. 657; Kalbach v. Clark, 133 Iowa, 220, 12 L.R.A.(N.S.) 801, 110 N. W. 509; Holbrook v. Holbrook, 74 N. H. 201, 12 L.R.A.(N.S.) 768, 66 Atl. 124; Mercer v. Buchanan, 70 C. C. A. 680, 137 Fed. 1019; Vinton's Appeal, 99 Pa. 434, 44 Am. Rep. 116; Re Rogers, 161 N. Y. 108, 55 N. E. 303; Eisner's Appeal, 175 Pa. 143, 34 Atl. 577; Graham's Estate, 198 Pa. 216, 47 Atl. 1108; Tehrau (Johore) Rubber Syndicate v. Farmer, 5 Tax Cas. 658; Hudson's Bay Co. v. Stevens, 5 Tax Cas. 424; Assets Co. v. Forbes, 3 Tax Cas. 542.

Solicitor General Davis argued the cause and filed a brief for defendant in error:

This case falls directly within the rule laid down in the following decisions of this court:

Cornell v. Green, 163 U. S. 75, 78, 80, 41 L. ed. 76-78, 16 Sup. Ct. Rep. 959; Lampasas v. Beil, 190 U. S. 276, 282, 45 L. ed. 527, 530, 21 Sup. Ct. Rep. 368; Arbuckle v. Blackburn, 191 U. S. 405, 415, 43 L. ed. 239, 242, 24 Sup. Ct. Rep. 148; Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 489; Sloan v. United States, 193 U. S. 614, 620, 43 L. ed. 814, 817, 24 Sup. Ct. Rep. 573; United States ex rel. Taylor v. Taft, 203 U. S. 461, 464, 51 L. ed. 269, 274, 27 Sup. Ct. Rep. 148; American Sugar Ref. Co. v. United States, 211 U. S. 155, 161, 162, 53 L. ed. 129, 131, 29 Sup. Ct. Rep. 89; Rakes v. United States, 212 U. S. 55, 58, 53 L. ed. 401, 402, 29 Sup. Ct. Rep. 244; Childers v. McClaughry, 216 U. S. 139, 54 L. ed. 420, 30 Sup. Ct. Rep. 370; Norton v. Whiteside, 239 U. S. 144, 147, 60 L. ed. 186, 187, 36 Sup. Ct. Rep. 97; Lamar v. United States, 240 U. S. 60, 65, 60 L. ed. 526, 528, 36 Sup. Ct. Rep. 255; Chin Fong v. Backus, 241 U. S. 1, 5, 60 L. ed. 559, 561, 36 Sup. Ct. Rep. 490.

The claim that a tax properly levied upon income under the provisions of the Act of October 3, 1913, becomes unconditional if the income be derived from capital accumulated prior to January 1, 1913, is wholly frivolous, the point having been determined by this court adversely to the claim in Brushaber v. Union P. R. Co. 240 U. S. 1, 60 L. ed. 493, L.R.A.1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; Stanton v. Baltic Min. Co. 240 U. S. 103, 60 L. ed. 516, 36

Sup. Ct. Rep. 278; *Edwards v. Keith*, L.R.A.1918A, 498, 145 C. C. A. 298, 231 Fed. 110, writ of certiorari denied in 243 U. S. 638, 61 L. ed. 942; 37 Sup. Ct. Rep. 402.

Solicitor General Davis and Mr. William C. Herron also filed a brief for defendant in error :

The corporation is a distinct entity from the stockholders, the profits made prior to 1913 were made by it, and the surplus into which these profits were converted was its surplus. It is true that the stockholders have an equitable interest in such profits and surplus, but no income arises or accrues or is received by them until the profits or surplus of the corporation are duly distributed to them.

Gibbons v. Mahon, 136 U. S. 549, 557, 34 L. ed. 525-527, 10 Sup. Ct. Rep. 1057; *Humphreys v. McKissock*, 140 U. S. 364, 312, 35 L. ed. 473, 475, 11 Sup. Ct. Rep. 779.

Assuming that these dividends were income to the plaintiff in 1914, both on general principles and under the act, the claim that they cannot be taxed, because derived from capital accumulated prior to March 1, 1913, is disposed of by *Brushaber v. Union P. R. Co.* 240 U. S. 1, 60 L. ed. 493, L.R.A.1917D, 713, 36 Sup. Ct. Rep. 236, Ann. Cas. 713; and *Stanton v. Baltic Min. Co.* 240 U. S. 103, 60 L. ed. 546, 36 Sup. Ct. Rep. 278, and by all the authorities which hold that a tax on income is entirely different from a tax on the property from which it is derived.

Since the power to tax incomes, from whatever source derived, always existed under the Constitution, and did not depend on the 16th Amendment, the plaintiff's claim really is that there is no power to tax incomes derived from capital accumulated prior to the passage of the act,—a claim which practically nullifies the power to tax incomes at all. Furthermore, on this theory incomes derived from capital situated outside the territorial limits of the United States could not be taxed,—a conclusion repudiated in *Memphis & C. R. Co. v. United States*, 108 U. S. 228, 234, 27 L. ed. 711, 713, 2 Sup. Ct. Rep. 482.

Even if the distinction between permanent and circulating capital be adopted, it is settled by all the authorities that a distribution of the surplus of a corporation by the payment of dividends is not a payment out of capital, but is a true division of profits.

1 *Lindley, Companies*, p. 601; 2 *Cook*, 62 L. ed.

Corp. 7th ed. § 546, pp. 1610, 1611; *Return of a Company's Capital to its Shareholders*, 26 *Law Quarterly Review*, 231; *Farrington v. Tennessee*, 95 U. S. 679, 686, 24 L. ed. 558, 560.

The question whether a dividend shall be paid out of surplus is one within the discretion of the directors; and, especially as to taxation, their decision is final.

Davidson v. Tax Comrs. [1917] A. C. 542, 86 L. J. P. C. N. S. 148, 117 L. T. N. S. 369, 33 *Times L. R.* 441; *Central Nat. Bank v. United States*, 137 U. S. 355, 364, 34 L. ed. 703, 705, 11 Sup. Ct. Rep. 126.

The fact that the Southern Pacific owned practically all the stock of the Central Pacific is immaterial in a case of this kind.

Salomon v. Salomon & Co. [1897] A. C. 22, 65 L. J. Ch. N. S. 35, 75 L. T. N. S. 426, 45 *Week-Rep.* 193, 4 *Manson*, 89; *Peterson v. Chicago, R. I. & P. R. Co.* 205 U. S. 364, 391-393, 51 L. ed. 841, 852, 853, 27 Sup. Ct. Rep. 513; *Foster v. Inland Revenue Comrs.* [1894] 1 Q. B. 516, 63 L. J. Q. B. N. S. 173, 9 *Reports*, 161, 69 L. T. N. S. 817, 42 *Week-Rep.* 259, 58 J. P. 444.

For other contentions, see their brief as reported in *Doyle v. Mitchell Bros. Co.* ante, 1054.

Mr. Robert R. Reed filed a brief as *amicus curiæ*.

Mr. Justice Pitney delivered the opinion of the court:

This case presents a question arising under the Federal Income Tax Act of October 3, 1913 (chap. 16, 38 Stat. at L. 114, 166, Comp. Stat. 1916, § 5291) Suit was brought by plaintiff in error against the collector to recover taxes assessed against it and paid under protest. There were two causes of action, of which only the second went to trial, it having been stipulated that the trial of the other might be postponed until the final determination of this one. So far as it is presented to us, the suit is an effort to recover a tax imposed upon certain dividends upon stock, in form received by the plaintiff from another corporation in the early part of the year 1914, and alleged by the plaintiff to have been paid out of a surplus accumulated not only prior to the effective date of the act, but prior to the adoption of the 16th Amendment to the Constitution of the United States. The district court directed a verdict and judgment in favor of the collector (238 Fed. 847), and the case comes here by direct writ of error

under § 239, Judicial Code [38 Stat. at L. 1157, chap. 231, Comp. Stat. 1916, § 1215], because of the constitutional question. That our jurisdiction was properly invoked is settled by *Towne v. Eisner*, 245 U. S. 418, 425, ante, 372, 376, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158.

The case was submitted at the same time with several other cases arising under the same act and decided this day, viz., *Lynch v. Turrish*, 247 U. S. 221, ante, 1087, 38 Sup. Ct. Rep. 537; *Lynch v. Hornby*, 247 U. S. 339, post, 1149, 38 Sup. Ct. Rep. 543; and *Penbody v. Eisner*, 247 U. S. 347, post, 1152, 38 Sup. Ct. Rep. 546.

The material facts are as follows: Prior to January 1, 1913, and at all times material to the case, plaintiff, a [332] corporation organized under the laws of the state of Kentucky, owned all the capital stock of the Central Pacific Railway Company, a corporation of the state of Utah, including the stock registered in the names of the directors.¹ This situation existed continuously from the incorporation of the railway company in the year 1899. That company is the successor of the Central Pacific Railroad Company and acquired all of its properties, which constituted a part of a large system of railways owned or controlled by the Southern Pacific Company. The latter company, besides being sole stockholder, was in the actual physical possession of the railroads and all other assets of the railway company, and in charge of its operations, which were conducted in accordance with the terms of a lease made by the predecessor company to the Southern Pacific and assumed by the railway company, the effect of which was that the Southern Pacific should pay to the lessor company \$10,000 per annum for organization expenses, should operate the railroads, branches, and leased lines belonging to the lessor, and account annually for the net earnings, and if these exceeded 6 per cent on the existing capital stock of the lessor, the lessee should retain to itself one half of the excess; advances by the lessee for account of the lessor were to bear lawful interest, and the lessee was to be entitled at any time and from time to time to refund to itself its advances and interest out of any net earnings which might be in its hands. The pro-

¹ There was another question concerning a dividend paid by the Reward Oil Company, whose stock likewise was owned by the Southern Pacific Company, but the contention of plaintiff in error respecting this item has been abandoned.

visions of the lease were observed by both corporations for bookkeeping purposes. The Southern Pacific acted as cashier and banker for the entire system; the Central Pacific kept no bank account, its earnings being deposited with the bank account of the Southern Pacific; and if the [333] Central Pacific needed money for additions and betterments, or for making up a deficit of current earnings, the necessary funds were advanced by the Southern Pacific. As a result of these operations and of the conversion of certain capital assets of the Central Pacific Company, that company showed upon its books a large surplus accumulated prior to January 1, 1913, principally in the form of a debit against the Southern Pacific, which, at the same time, as sole stockholder, was entitled to any and all dividends that might be declared, and, being in control of the board of directors, was able to and did control the dividend policy. The dividends in question were declared and paid during the first six months of the year 1914 out of this surplus of the Central Pacific accumulated prior to January 1, 1913; but the payment was only constructive, being carried into effect by bookkeeping entries which simply reduced the apparent surplus of the Central Pacific and reduced the apparent indebtedness of the Southern Pacific to the Central Pacific by precisely the amount of the dividends.

The question is whether the dividends received under these circumstances and in this manner by the Southern Pacific Company were taxable as income of that company under the Income Tax Act of 1913.²

The act provides in § II, § A, subd. 1 (38 Stat. at L. 166, chap. 16): "That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year" to every person residing in the United States a tax of 1 per centum per annum, with exceptions not now [334] material. By § G (a) (p. 172), it is provided: "That the normal tax hereinbefore imposed upon individuals [1 per cent] likewise shall be levied, assessed, and paid annually upon the entire net income arising or

² In addition, a question was made in the district court as to a special dividend declared by the Central Pacific out of the proceeds of sale of certain land on Long Island, taken in satisfaction of a debt and sold in December, 1913. As to this, however, no argument is submitted by plaintiff in error, the facts are not clear, and we pass it without consideration.

accruing from all sources during the preceding calendar year to every corporation organized in the United States," with other provisions not now material.

It is provided in ¶ G (b), as to domestic corporations, that such net income shall be ascertained by deducting from the gross amount of the income of the corporation (1) ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals and the like; (2) losses sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation by use, wear and tear of property, if any, and in the case of mines, a certain allowance for depletion of ores and other natural deposits; (3) interest accrued and paid within the year upon indebtedness of the corporation, within prescribed limits; (4) national and state taxes paid. It will be observed that moneys received as dividends upon the stock of other corporations are not deducted, as they are in computing the income of individuals for the purpose of the normal tax under this act (p. 167), and as they were in computing the income of a corporation under the Excise Tax Act of August 5, 1909 (chap. 6, 36 Stat. at L. 11, 113, § 39).

By ¶ G (c), the tax upon corporations is to be computed upon the entire net income accrued within each calendar year, but for the year 1913 only upon the net income accrued from March 1 to December 31, to be ascertained by taking five sixths of the entire net income for the calendar year.

The purpose to refrain from taxing income that accrued prior to March 1, 1913, and to exclude from consideration [335] in making the computation any income that accrued in a preceding calendar year, is made plain by the provision last referred to; indeed, the 16th Amendment, under which for the first time Congress was authorized to tax income from property without apportioning the tax among the states according to population, received the approval of the requisite number of states only in February, 1913. *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 581. 39 L. ed. 759, 819. 15 Sup. Ct. Rep. 673; 158 U. S. 601. 637, 39 L. ed. 1109, 1125, 15 Sup. Ct. Rep. 912; *Brushaber v. Union P. R. Co.* 240 U. S. 1, 16, 60 L. ed. 493, 501. L.R.A.1917D, 414, 36 Sup. Ct. Rep. 228. Ann. Cas. 1917B, 713.

We must reject in this case, as we

have rejected in cases arising under the Corporation Excise Tax Act of 1909 (*Doyle v. Mitchell Bros. Co.* 247 U. S. 179, ante, 1054, 38 Sup. Ct. Rep. 467, and *Hays v. Gauley Mountain Coal Co.* 247 U. S. 189, ante, 1061, 38 Sup. Ct. Rep. 470; decided May 20, 1918), the broad contention submitted in behalf of the government that all receipts—everything that comes in—are income within the proper definition of the term "gross income," and that the entire proceeds of a conversion of capital assets, in whatever form and under whatever circumstances accomplished, should be treated as gross income. Certainly the term "income" has no broader meaning in the 1913 Act than in that of 1909 (see *Stratton's Independence v. Howbert*, 231 U. S. 399, 416, 417, 53 L. ed. 255, 293, 34 Sup. Ct. Rep. 136), and for the present purpose we assume there is no difference in its meaning as used in the two acts. This being so, we are bound to consider accumulations that accrued to a corporation prior to January 1, 1913, as being capital, not income, for the purposes of the act. And we perceive no adequate ground for a distinction, in this regard, between an accumulation of surplus earnings and the increment due to an appreciation in value of the assets of the taxpayer.

That the dividends in question were paid out of a surplus that accrued to the Central Pacific prior to January 1, 1913, is undisputed; and we deem it to be equally clear that this surplus accrued to the Southern Pacific Company prior to that date, in every substantial sense [336] pertinent to the present inquiry, and hence underwent nothing more than a change of form when the dividends were declared.

We do not rest this upon the view that, for the purposes of the Act of 1913, stockholders in the ordinary case have the same interest in the accumulated earnings of the company before as after the declaration of dividends. The act is quite different in this respect from the Income Tax Act of June 30, 1864 (chap. 173, 13 Stat. at L. 223, 231, 232), under which this court held, in *Collector v. Hubbard* (*Brainard v. Hubbard*) 12 Wall, 1, 16, 20 L. ed. 272, 278, that an individual was taxable upon his proportion of the earnings of the corporation although not declared as dividends. That decision was based upon the very special language of a clause of § 117 of the Act (13 Stat. at L. 232, chap. 173), that "the gains and profits of all companies, whether incorporated or partner-

ship, other than the companies specified in this section, shall be included in estimating the annual gains, profits, or income of any person entitled to the same, whether divided or otherwise. The Act of 1913 contains no similar language, but, on the contrary, deals with dividends as a particular item of income, leaving them free from the normal tax imposed upon individuals, subjecting them to the graduated surtaxes only when received as dividends (38 Stat. at L. 167, chap. 16, § B), and subjecting the interest of an individual shareholder in the undivided gains and profits of his corporation to these taxes only in case the company is formed or fraudulently availed of for the purpose of preventing the imposition of such tax by permitting gains and profits to accumulate instead of being divided or distributed.³ Our view of the effect of this act upon [335] dividends received by the ordinary stockholder after it took effect, but paid out of a surplus that accrued to the corporation before that event, is set forth in *Lynch v. Hornby*, 247 U. S. 339, post, 1149, 38 Sup. Ct. Rep. 543, decided this day.

We base our conclusion in the present case upon the view that it was the purpose and intent of Congress, while taxing "the entire net income arising or accruing from all sources" during each year, commencing the 1st day of March, 1913, to refrain from taxing that which, in mere form only, bore the appearance of income accruing after that date, while in truth and in substance it accrued before; and upon the fact that the Central Pacific and the Southern Pacific were in substance identical because of the complete ownership and control which the latter possessed over the former, as stockholder and in other capacities. While the two companies were separate legal entities, yet in fact, and for all practical purposes, they were merged, the former being but a part of the latter, acting merely as its agent, and subject in all things to its proper direction and control. And, besides, the

³ "For the purpose of this additional tax the taxable income of any individual shall embrace the share to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not, of all corporations, joint-stock companies, or associations however created or organized, formed or fraudulently availed of for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed; and the fact that any such corporation . . . is a mere holding com-
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funds represented by the dividends were in the actual possession and control of the Southern Pacific as well before as after the declaration of the dividends. The fact that the books were kept in accordance with the provisions of the lease, so that these funds appeared upon [335] the accounts as an indebtedness of the lessee to the lessor, cannot be controlling, in view of the practical identity between lessor and lessee. Aside from the interests of creditors and the public,—and there is nothing to suggest that the interests of either were concerned in the disposition of the surplus of the Central Pacific,—the Southern Pacific was entitled to dispose of the matter as it saw fit. There is no question of there being a surplus to warrant the dividends at the time they were made; hence, any speculation as to what might have happened in case of financial reverses that did not occur is beside the mark.

It is true that, in ordinary cases, the mere accumulation of an adequate surplus does not entitle a stockholder to dividends until the directors, in their discretion, declare them. *New York, L. E. & W. R. Co. v. Nickals*, 119 U. S. 296, 306, 30 L. ed. 363, 367, 7 Sup. Ct. Rep. 209; *Gibbons v. Mahon*, 136 U. S. 549, 558, 34 L. ed. 525, 527, 10 Sup. Ct. Rep. 1057. And see *Humphreys v. McKissock*, 140 U. S. 304, 312, 35 L. ed. 473, 475, 11 Sup. Ct. Rep. 779. But this is not the ordinary case. In fact, the discretion of the directors was affirmatively exercised by declaring dividends out of the surplus that was accumulated prior to January 1, 1913; it does not appear that any other fair exercise of discretion was open; and the complete ownership and right of control of the Southern Pacific, at all times material, makes it a matter of indifference whether the vote was at one time or another. Under the circumstances, the entire matter of the declaration and payment of the dividends was a paper transaction to bring the books into accord with the acknowledged rights of the Southern

pany, or that the gains and profits are permitted to accumulate beyond the reasonable needs of the business shall be prima facie evidence of a fraudulent purpose to escape such tax; but the fact that the gains and profits are in any case permitted to accumulate and become surplus shall not be construed as evidence of a purpose to escape the said tax in such case unless the Secretary of the Treasury shall certify that in his opinion such accumulation is unreasonable for the purposes of the business." 38 Stat. at L. 166, 167, chap. 16.

Pacific; and so far as the dividends represented the surplus of the Central Pacific that accumulated prior to January 1, 1913, they were not taxable as income of the Southern Pacific within the true intent and meaning of the Act of 1913.

The case turns upon its very peculiar facts, and is distinguishable from others in which the question of the identity of a controlling stockholder with his corporation has been [339] raised: Pullman's Palace Car Co. v. Missouri P. R. Co. 115 U. S. 537, 596, 29 L. ed. 499, 501, 6 Sup. Ct. Rep. 194; Peterson v. Chicago, R. I. & P. R. Co. 205 U. S. 364, 391, 51 L. ed. 541, 552, 27 Sup. Ct. Rep. 513.

Judgment reversed, and the cause remanded for further proceedings in conformity with this opinion.

Mr. Justice Clarke dissents.

E. J. LYNCH, Collector of Internal Revenue for the District of Minnesota, Petitioner,

H. C. HORNBY.

(See S. C. Reporter's ed. 330-346.)

Internal revenue — income tax — validity — taxing dividends — accumulated surplus.

1. Congress was at liberty, under U. S. Const., 16th Amend., to tax as income without apportionment everything that became income in the ordinary sense of the word after the adoption of the amendment, including dividends received in the ordinary course by a stockholder from a corporation, even though they were extraordinary in amount and might appear upon analysis to be a mere realization in possession of an inchoate and contingent interest that the

Note.—As to constitutionality of income tax—see notes to Alderman v. Wells, 27 L.R.A.(N.S.) 364, and State ex rel. Bolens v. Frear, L.R.A.1915B, 569.

As to income tax on dividends declared after, but paid from earnings accrued before, the act went into effect—see note to Trefry v. Putnam, L.R.A.1917F, 814.

The question whether extraordinary dividends, declared in cash or stock, including stock rights, constitute income or capital, as affecting the respective rights of life tenants and remaindermen, is considered at length in the notes to Holbrook v. Holbrook, 12 L.R.A.(N.S.) 768; Newport Trust Co. v. Van Rensselaer, 35 L.R.A.(N.S.) 563; and Re Osborne, 50 L.R.A.(N.S.) 510. 62 L. ed.

stockholder had in a surplus of corporate assets previously existing.

(For other cases, see Internal Revenue, III. b, in Digest Sup. Ct. 1908.)

Internal revenue — income tax — dividends — accumulated surplus.

2. The net income of a person taxable under the Income Tax Act of October 3, 1913 (38 Stat. at L. 114, chap. 16, Comp. Stat. 1916, § 5291), as arising or accruing within the year, included, for the purpose of the surtax, dividends declared and paid by a corporation in the ordinary course of business to him as a stockholder after that act took effect, although paid out of an accumulated surplus that accrued to that corporation before that event, whether made up of past earnings or of increase in value of the corporate assets.

(For other cases, see Internal Revenue, III. b, in Digest Sup. Ct. 1908.)

Internal revenue — income tax — dividends — accumulated surplus — legislative construction.

3. Provisions in the Income Tax Act of September 3, 1916 (39 Stat. at L. 756, chap. 463, Comp. Stat. 1916, § 6336a), and October 3, 1917 (40 Stat. at L. 300, chap. 63), excluding from the effect of the tax any dividends declared out of earnings or profits that accrued prior to March 1, 1913, were not intended to be declaratory of the meaning of the term "dividends" as used in the earlier act of October 3, 1913 (38 Stat. at L. 114, chap. 16, Comp. Stat. 1916, § 5291.)

(For other cases, see Internal Revenue, III. b, Statutes, II. e. 1. in Digest Sup. Ct. 1908.)

[No. 422.]

Argued March 4, 5, and 6, 1918. Decided June 3, 1918.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the District Court for the District of Minnesota in favor of plaintiff in an action to recover back an income tax paid under protest. Reversed and remanded to District Court for further proceedings.

See same case below, 149 C. C. A. 657, 236 Fed. 661.

The facts are stated in the opinion.

Solicitor General Davis argued the cause, and, with Mr. W. C. Herron, filed a brief for petitioner.

For their contentions, see their brief as reported in Doyle v. Mitchell Bros. Co., ante, 1054.

Mr. A. W. Clapp argued the cause, and, with Messrs. N. H. Clapp, H. Oldenburg, and H. J. Richardson, filed a brief for respondent.

For their contentions, see their brief as reported in Lynch v. Turrish, ante, 1087.

Mr. Robert R. Reed filed a brief as amicus curia.

Mr. Justice Pitney delivered the opinion of the court:

Hornby, the respondent, recovered a judgment in the United States district court against Lynch, as collector of internal revenue, for the return of \$171, assessed as an additional income tax under the Act of October 3, 1913 (chap. 16, 38 Stat. at L. 114, 166, Comp. Stat. 1916, § 5291), and paid under protest. The circuit court of appeals affirmed the judgment (149 C. C. A. 657, 236 Fed. 661), and the case comes here on certiorari. It was submitted at the same time with *Lynch v. Turrish*, 247 U. S. 221, ante, 1087, 38 Sup. Ct. Rep. 537; *Southern P. Co. v. Lowe*, 247 U. S. 330, ante, 1142, 38 Sup. Ct. Rep. 540; and *Peabody v. Eisner*, 247 U. S. 347, post, 1152, 38 Sup. Ct. Rep. 546, arising under the same act, and this day decided.

The facts, in brief, are as follows: Hornby, from 1906 to 1915, was the owner of 331 (out of 10,000) shares of the capital stock of the Cloquet Lumber Company, an Iowa corporation, which for more than a quarter of a century had been engaged in purchasing timber lands, manufacturing the timber into lumber, and selling it. Its shares had a par value of \$100 each, making the entire capital stock \$1,000,000. On and prior to March 1, 1913, by the increase of the value of its timber lands and through its business operations, the total property of the company had come to be worth \$1,000,000, and Hornby's stock, the par value of which was \$33,100, had become [341] worth at least \$150,000. In the year 1914 the company was engaged in cutting its standing timber, manufacturing it into lumber, selling the lumber, and distributing the proceeds among its stockholders. In that year it thus distributed dividends aggregating \$650,000, of which \$240,000, or 24 per cent of the par value of the capital stock, was derived from current earnings, and \$410,000 from conversion into money of property that it owned or in which it had an interest on March 1, 1913. Hornby's share of the latter amount was \$17,794, and this not having been included in his income tax return, the Commissioner of Internal Revenue levied an additional tax of \$171 on account of it, and this forms the subject of the present suit.

The case was tried in the district court and argued in the circuit court of appeals together with *Lynch v. Turrish*, 149 C. C. A. 649, 236 Fed. 653, and was treated as

presenting substantially the same question upon the merits. In our opinion it is distinguishable from the *Turrish* Case, where the distribution in question was a single and final dividend received by *Turrish* from the *Payette* Company in liquidation of the entire assets and business of the company and a return to him of the value of his stock upon the surrender of his entire interest in the company, at a price that represented its intrinsic value at and before March 1, 1913, when the Income Tax Act took effect.

In the present case there was no winding up or liquidation of the *Cloquet* Lumber company, nor any surrender of Hornby's stock. He was but one of many stockholders, and had but the ordinary stockholder's interest in the capital and surplus of the company; that is, a right to have them devoted to the proper business of the corporation and to receive from the current earnings or accumulated surplus such dividends as the directors, in their discretion, might declare. *Gibbons v. Mahon*, 136 U. S. 549, 557, 34 L. ed. 525, 526, 10 Sup. Ct. Rep. 1057. The operations of this company in the year 1914 [342] were, according to the facts pleaded, of a nature essentially like those in which it had been engaged for more than a quarter of a century. The fact that they resulted in converting into money, and thus setting free for distribution as dividends, a part of its surplus assets accumulated prior to March 1, 1913, does not render Hornby's share of those dividends any the less a part of his income within the true intent and meaning of the act, the pertinent language of which is as follows (38 Stat. at L. 166, 167, chap. 16):

"A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, . . . and to every person residing in the United States. . . . a tax of 1 per centum per annum upon such income, except as hereinafter provided; . . ."

"B. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service . . . , also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever."

Among the deductions allowed for the

purpose of the normal tax is: "Seventh, the amount received as dividends upon the stock or from the net earnings of any corporation, . . . which is taxable upon its net income as hereinafter provided." There is a graduated additional tax, commonly known as a "surtax," upon net income in excess of \$20,000, including income from dividends, and for the purpose of this additional tax "the taxable income of any individual shall embrace the share to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not, of all corporations . . . formed or fraudulently [3-43] availed of for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed."

It is evident that Congress intended to draw and did draw a distinction between a stockholder's undivided share or interest in the gains and profits of a corporation, prior to the declaration of a dividend, and his participation in the dividends declared and paid; treating the latter, in ordinary circumstances, as a part of his income for the purposes of the surtax, and not regarding the former as taxable income unless fraudulently accumulated for the purpose of evading the tax.

This treatment of undivided profits applies only to profits permitted to accumulate after the taking effect of the act, since only with respect to these is a fraudulent purpose of evading the tax predicable. Corporate profits that accumulated before the act took effect stand on a different footing. As to these, however, just as we deem the legislative intent manifest to tax the stockholder with respect to such accumulations only if and when, and to the extent that, his interest in them comes to fruition as income, that is, in dividends declared, so we can perceive no constitutional obstacle that stands in the way of carrying out this intent when dividends are declared out of a pre-existing surplus. The act took effect on March 1, 1913, a few days after the requisite number of states had given approval to the 16th Amendment, under which for the first time Congress was empowered to tax income from property without apportioning the tax among the states according to population. *Southern P. Co. v. Lowe*, *supra*. That the retroactivity of the act from the date of its passage (October 3, 1913) to a date not prior to the adoption of the Amendment was permissible 62 L. ed.

is settled by *Brushaber v. Union P. R. Co.* 240 U. S. 1, 20, 60 L. ed. 493, 502, L.R.A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713. And we deem it equally clear that Congress [3-14] was at liberty under the Amendment to tax as income, without apportionment, everything that became income, in the ordinary sense of the word, after the adoption of the Amendment, including dividends received in the ordinary course by a stockholder from a corporation, even though they were extraordinary in amount and might appear upon analysis to be a mere realization in possession of an inchoate and contingent interest that the stockholder had in a surplus of corporate assets previously existing. Dividends are the appropriate fruit of stock ownership, are commonly reckoned as income, and are expended as such by the stockholder without regard to whether they are declared from the most recent earnings, or from a surplus accumulated from the earnings of the past, or are based upon the increased value of the property of the corporation. The stockholder is, in the ordinary case, a different entity from the corporation, and Congress was at liberty to treat the dividends as coming to him *ab extra*, and as constituting a part of his income when they came to hand.

Hence we construe the provision of the act that "the net income of a taxable person shall include gains, profits, and income derived from . . . interest, rent, dividends, . . . or gains or profits and income derived from any source whatever," as including (for the purposes of the additional tax) all dividends declared and paid in the ordinary course of business by a corporation to its stockholders after the taking effect of the act (March 1, 1913), whether from current earnings, or from the accumulated surplus made up of past earnings or increase in value of corporate assets, notwithstanding it accrued to the corporation in whole or in part prior to March 1, 1913. In short, the word "dividends" was employed in the act as descriptive of one kind of gain to the individual stockholder; dividends being treated as tangible and recurrent returns upon his stock, analogous to the interest [3-45] and rent received upon other forms of invested capital.

In the more recent Income Tax Acts, provisions have been inserted for the purpose of excluding from the effect of the tax any dividends declared out of earnings or profits that accrued prior to March 1, 1913. This originated with the

Act of September 8, 1916, and has been continued in the Act of October 3, 1917.¹ We are referred to the legislative history of the Act of 1916, which it is contended indicates that the new definition of the term "dividends" was intended to be declaratory of the meaning [346] of the term as used in the 1913 Act. We cannot accept this suggestion, deeming it more reasonable to regard the change as a concession to the equity of stockholders, granted in the 1916 Act, in view of constitutional questions that had been raised in this case, in the companion case of *Lynch v. Turrish*, and perhaps in other cases. These two cases were commenced in October, 1915; and decisions adverse to the tax were rendered in the district court in January, 1916, and in the circuit court of appeals September 4, 1916.

We repeat that, under the 1913 Act dividends declared and paid in the ordi-

¹In Act of September 9, 1916 (chap. 463, 39 Stat. at L. 756, 757, Comp. Stat. 1916, §§ 6336a, 6336b), which took the place of the Act of 1913, the substance of what we have quoted from § B of the 1913 Act was embodied in § 2 (a), but with this proviso: "Provided, that the term 'dividends' as used in this title shall be held to mean any distribution made or ordered to be made by a corporation . . . out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation," etc. And by the Act of October 3, 1917 (chap. 63, 40 Stat. at L. 300, 329, 337, 338), § 2 (a) of the 1916 Act was amended by being repeated without the proviso (p. 329), while the proviso was inserted as a new section.—31. (a).—and to it was added a subsection, (b), as follows:

"(b) Any distribution made to the shareholders or members of a corporation . . . in the year nineteen hundred and seventeen, or subsequent tax years, shall be deemed to have been made from the most recently accumulated undivided profits or surplus, and shall constitute a part of the annual income of the distributee for the year in which received, and shall be taxed to the distributee at the rates prescribed by law for the years in which such profits or surplus were accumulated by the corporation, . . . but nothing herein shall be construed as taxing any earnings or profits accrued prior to March first, nineteen hundred and thirteen, but such earnings or profits may be distributed in stock dividends or otherwise, exempt from the tax, after the distribution of earnings and profits accrued since March first, nineteen hundred and thirteen, has been made. This subdivision shall not apply to any distribution made prior to August sixth, nineteen hundred and seventeen, out of earnings or profits accrued prior to March first, nineteen hundred and thirteen."

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nary course by a corporation to its stockholders after March 1, 1913, whether from current earnings or from a surplus accumulated prior to that date, were taxable as income to the stockholder.

We do not overlook the fact that every dividend distribution diminishes by just so much the assets of the corporation, and in a theoretical sense reduces the intrinsic value of the stock. But, at the same time, it demonstrates the capacity of the corporation to pay dividends, holds out a promise of further dividends in the future, and quite probably increases the market value of the shares. In our opinion, Congress laid hold of dividends paid in the ordinary course as de facto income of the stockholder, without regard to the ultimate effect upon the corporation resulting from their payment.

Of course we are dealing here with the ordinary stockholder receiving dividends declared in the ordinary way of business. *Lynch v. Turrish*, 247 U. S. 221, ante, 1687, 39 Sup. Ct. Rep. 537, and *Southern P. Co. v. Lowe*, 247 U. S. 330, ante, 1142, 39 Sup. Ct. Rep. 540, this day decided, rest upon their special facts and are plainly distinguishable.

It results from what we have said that it was erroneous to award a return of the tax collected from the respondent, and that the judgment should be reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

[347] CHARLES A. PEABODY, Plr. i.
Err.,

MARK EISNER, Collector of Internal Revenue.

(See S. C. Reporter's ed. 347-350.)

Internal revenue — income tax — dividends — accumulated surplus.

A distribution in specie by a corpora-

Note.—As to income tax on dividends declared after, but paid from earnings accrued before, the act went into effect—see note to *Trefry v. Putnam*, L.R.A. 1917F, 514.

The question whether extraordinary dividends, declared in cash or stock, including stock rights, constitute income or capital, as affecting the respective rights of life tenants and remaindermen, is considered at length in the notes to *Holbrook v. Holbrook*, 12 L.R.A. (N.S.) 768; *Newport Trust Co. v. Van Rensselaer*, 35 L.R.A. (N.S.) 563; and *Re Osborne*, 50 L.R.A. (N.S.) 510.

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Union Pacific) did not constitute a gain, profit, or income of the Union Pacific, and therefore did not constitute a gain, profit, or income of the plaintiff arising or accruing either in or for the year 1914 or for any period subsequent to March 1, 1913, the date when the Income [349] Tax Law took effect. The district court overruled this contention upon the authority of *Southern P. Co. v. Lowe*, 238 Fed. 547, and *Towne v. Eisner*, 242 Fed. 702. The latter case has since been reversed (245 U. S. 418, ante, 372, L.R.A.1918D, 254, 38 Sup. Ct. Rep. 158), but only upon the ground that it related to a stock dividend which in fact took nothing from the property of the corporation and added nothing to the interest of the shareholder, but merely changed the evidence which represented that interest. *Southern P. Co. v. Lowe* has been reversed this day, 247 U. S. 330, ante, 1142, 38 Sup. Ct. Rep. 310, but only upon the ground that the Central Pacific Railway Company, which paid the dividend, and the Southern Pacific Company, which received it, were in substance identical corporations because of the complete ownership and control which the latter possessed over the former as stockholder and in other capacities, so that while the two companies were separate legal entities, yet in fact and for all practical purposes the former was but a part of the latter, acting merely as its agent and subject in all things to its direction and control; and for the further reason that the funds represented by the dividend were in the actual possession and control of the Southern Pacific Company as well before as after the declaration of the dividend. In this case the plaintiff in error stands in the position of the ordinary stockholder, whose interest in the accumulated earnings and surplus of the company are not the same before as after the declaration of a dividend; his right being merely to have the assets devoted to the proper business of the corporation and to receive from the current earnings or accumulated surplus such dividends as the directors, in their discretion, may declare; and without right or power on his part to control that discretion.

It hardly is necessary to say that this case is not ruled by our decision in *Towne v. Eisner*, since the dividend of Baltimore & Ohio shares was not a stock dividend, but [350] a distribution in specie of a portion of the assets of the Union Pacific, and is to be governed for all present purposes by the same rule applicable to the distribution of a like

value in money. It is controlled by *Lynch v. Hornby* (this day decided), 247 U. S. 339, ante, 1149, 38 Sup. Ct. Rep. 543.

Judgment affirmed.

SUNDAY LAKE IRON COMPANY, Plf.
in Err.,
v.
TOWNSHIP OF WAKEFIELD.

(See S. C. Reporter's ed. 350-353.)

Constitutional law — equal protection of the laws — discrimination in tax assessment.

1. An intentional violation of the essential principle of practical uniformity is essential to support the claim of a mining corporation that it has been denied the equal protection of the laws by having its property assessed at full value while other taxable property in the same class is greatly undervalued by the taxing officers.

(For other cases, see Constitutional Law, IV, § 4, in Digest Sup. Ct. 1908.)

Evidence — presumption — burden of proof — good faith of tax officers.

2. The good faith of tax officials and the validity of their actions are presumed, and when assailed, the burden of proof is upon the complaining party.

(For other cases, see Evidence, II, § 1, in Digest Sup. Ct. 1908.)

[No. 38.]

Argued November 9, 1917. Decided June 3, 1918.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which affirmed a judgment of the Circuit Court of Gogebic County, in that state, in favor of defendant in an action in assumpsit against a township to recover back taxes paid under protest. Affirmed.

See same case below, 186 Mich. 626, 153 N. W. 14.

The facts are stated in the opinion.

Mr. Horace Andrews argued the cause, and, with Mr. William P. Belden, filed a brief for plaintiff in error:

A person may be denied the equal protection of the law, and his property may be taken without due process of law as well by the action of state boards and tribunals or state agents administering the law, as by the action of the legislature in adopting statutes which

Note.—On constitutional equality in the United States in relation to corporate taxation—see note to *Bacon v. State Tax Comrs.* 60 L.R.A. 321.

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WITNESS INDEX

FOR THE COUNTER-CLAIMANT:

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MARION JONES

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MARION JONES,

called as a witness on behalf of the Defendant Counter-Claimant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHENK:

Q Would you please state your name and spell your last name?

A Marion Jones, J-o-n-e-s.

Q Where do you reside?

A Durango, Colorado.

Q Do you reside in town or out in the country?

A No, it's outside of town, twelve miles out.

Q How long have you lived there?

A Eight years.

Q What is your occupation, Mr. Jones?

A I'm retired, have been retired for three years and two months.

Q Were you an Internal Revenue Service Agent?

A I was an Internal Revenue Service Officer.

Q Officer -- how long were you with the Internal Revenue Service?

A Nineteen and a half years.

Q Would that have made you a public servant?

A Yes.

1 Q What was your capacity as an I.R.S. Agent in 1985?

2 A I.R.S. Officer, I was not an agent.

3 Q Okay, would you please explain the duties of that
4 position?

5 A Collection of delinquent taxes and the securing of
6 delinquent returns.

7 Q Did you ever hold a position above that one with
8 the Internal Revenue Service?

9 A Yes, I did.

10 Q Where and when was that?

11 A I was in Albuquerque, New Mexico in 1974 and '75;
12 I was Chief of Tax Payers Service Branch.

13 Q Can you explain the duties of that position?

14 A It's an assistance-type program, assisting tax-
15 payers in preparation of their returns.

16 Q Was it over-seeing other officers, agents and
17 employees?

18 A Not other employees, not other agents and
19 officers, no, other employees, tax-payer service personnel.

20 Q Okay, did you have to pass an exam for these
21 positions?

22 A What do you mean "exam"?

23 Q Was there some kind of a testing for you to move
24 up into this position in the I.R.S.?

25 A No, just activity within the Internal Revenue

1 Service organization. --, you went before a board of three or
2 five people.

3 Q There weren't certain requirements that had to be
4 met in order to obtain these positions?

5 A Other than educational, none.

6 Q Were you tested on the education?

7 A I came out of college and with four years was
8 taken in the I.R.S. after my college, yes.

9 Q And immediately went to -- what was your position
10 in Albuquerque again?

11 A Albuquerque, well I was two positions there, I was
12 Revenue Officer and then became a Chief of Tax Payers
13 Service Branch, and then went back as a Revenue Officer.

14 Q Okay, you started as a Revenue Officer. Would you
15 say that you are an expert in the areas of the two fields
16 that you served?

17 A No.

18 Q No?

19 A In what sense an expert?

20 Q Are you a citizen of the United States or a
21 resident alien?

22 A A citizen.

23 Q Okay, were you served by a summons and complaint
24 from me by the LaPlata County Sheriff's Department on July
25 6th, 1988?

1 A July 6th, 1988, yes.

2 Q Upon service of summons and complaint, what did
3 you do with said summons and complaint?

4 A I turned it over to the Internal Revenue Service.

5 Q Was this case moved to the United States District
6 Court?

7 A Yes, it was.

8 Q On what grounds?

9 A On the grounds that the jurisdiction was the U.S.
10 District Court, rather than the County Court.

11 Q Did you bring with you a certified copy of your
12 oath of office today?

13 A No, I did not.

14 Q Were you served with a subpoena duces tecum to
15 produce such document?

16 A Yes, I was.

17 Q Did you ever file an oath of office?

18 A No, I took the oath of office.

19 Q You did not file one?

20 A When we entered, we raised our hands and was
21 entered into the Internal Revenue Service and at that time
22 were issued our commissions.

23 Q ~~Isn't it a fact that under Article 6 of the United~~
24 ~~States Constitution, that all executive officers are~~
25 ~~required to file an oath of office?~~

1 A [REDACTED] I'm not an executive officer.

2 Q [REDACTED] Were you a commissioned agent of the Treasury
3 Department?

4 A [REDACTED] I was a commissioned officer of the Treasury
5 Department, Internal Revenue Service.

6 Q Did you bring a certified copy of your commission
7 from the Secretary of the Treasurer of the United States
8 with you today?

9 A No, I did not.

10 Q Were you asked to on the subpoena?

11 A Yes.

12 Q May I ask why not?

13 A I turned it in, I don't have it, I don't have
14 access to that.

15 Q Did you work for the Bureau of Alcohol, Tobacco,
16 and Firearms?

17 A No.

18 Q Did you bring your Internal Revenue badge with you
19 today?

20 A No.

21 Q Did you bring any Internal Revenue Service
22 identification with you today?

23 A No.

24 Q That was my mistake, I forgot to ask for it. Did
25 you bring a certified copy of the Corporate Charter of the

1 Internal Revenue Service Incorporated with you today?

2 A No, I don't even know if one exists. I do not
3 have access to any of that.

4 Q Did you bring the full and correct name of the
5 Internal Revenue Service Incorporated, and its address, and
6 main place of business?

7 A No.

8 Q These last couple things were things that I
9 subpoenaed and asked you to bring.

10 A Sure, um-hum.

11 Q ~~Did you bring a certified copy of the Corporate~~
12 ~~Charter of the Internal Revenue Service Incorporated, filed~~
13 ~~with the Secretary of State in and for the State of~~
14 ~~Colorado?~~

15 A ~~No.~~

16 Q ~~I asked you to bring that. Did you bring a~~
17 ~~certified copy of the license or Corporate Charter of the~~
18 ~~Internal Revenue Service Incorporated to operate or do~~
19 ~~business in the State of Colorado with you today?~~

20 A ~~No.~~

21 Q ~~Is the Internal Revenue Service Incorporated a~~
22 ~~quasi corporation of the Federal Government?~~

23 A ~~I don't know.~~

24 Q ~~You were with the Internal Revenue Service for~~
25 ~~nineteen and a half years?~~

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A Yes

Q What branch and department?

A What branch -- Collection Division

Q What department of the Federal Government?

A Internal Revenue Service

Q And what branch of government is that?

A Treasury Department

Q Between the Executive, Legislative and Judicial, which branch would it fall into?

A Probably -- I wouldn't know that offhand, it's a cabinet level position.

Q Pardon me?

A The Treasury Department is a cabinet level position.

Q You work for the Secretary --

A Secretary of the Treasurer, under him Commissioner of Internal Revenue.

Q Do you know if the Internal Revenue Service Incorporated is a private corporation?

A I wouldn't think so, but I don't know.

Q The Internal Revenue Service Incorporated would be a foreign corporation?

A I doubt that very seriously.

Q Did you bring a certified copy of any and all employment agreements between yourself and the alleged

1 ~~Internal Revenue Service incorporated today?~~

2 A ~~No, as far as I know they don't exist.~~

3 Q ~~You never had to sign anything?~~

4 A ~~Not that I can recall.~~

5 Q Were you ever audited by the Internal Revenue
6 Service?

7 A Yes.

8 Q When?

9 A 1968.

10 Q How many times were suits brought against you for
11 violating the substantive rights of citizens?

12 A What's that?

13 Q How many times were suits brought against you for
14 violating the substantive rights of citizens?

15 A Alleged rights besides you -- I think you filed
16 two, and then one other, so a total of three.

17 Q Would you explain alleged substantive rights?

18 A Well, yes, I don't know -- they were dismissed,
19 therefore I presume they were not correct.

20 Q Were you ever convicted of a criminal offense?

21 A Never.

22 MR. NEWBOLD: Your Honor, I would like to object.
23 We've allowed some wide latitude in this; I don't see what
24 the point of this is or how it relates to the case that's
25 before the Court, and I'd request before answering the

1 question that an offer of proof be made as to what direction
2 we're going and --

3 THE COURT: Mr. Schenk, what's your offer of proof
4 for these questions? Mr. Newbold has objected they're not
5 relevant, that means they don't have any bearing on the
6 issue of your action with Mountain Gravel.

7 MR. SCHENK: Your Honor, very shortly I'm going to
8 get into the fact of the unlawful conversion of my funds
9 from Mountain Gravel to Marion Jones.

10 THE COURT: To Mr. Jones personally? Now you
11 understand that --

12 MR. SCHENK: It was through his sending of the
13 notice of levy, that's what I want to know.

14 THE COURT: Well let me ask you -- the things you
15 have asked to be subpoenaed to produce, did you bring any of
16 those things with you, Mr. Jones?

17 MR. JONES: No, Ma'am I didn't. All of them but
18 one are not available to me. Since I left I.R.S. I do not
19 have access to any records, copies of records, commissions,
20 or any of that. The only thing that I did not bring that
21 would be possible for me to, with time, is to go to my bank,
22 would be a financial statement of myself, which I see no
23 reason to bring, since I'm merely here as a witness and I
24 don't believe my financial statement has any bearing on this
25 case whatsoever.

1 THE COURT: Do you have an offer of proof as to
2 why that's relevant?

3 MR. SCHENK: Pardon me?

4 THE COURT: Do you have an offer of proof as to why
5 his financial statement is relevant to this action?

6 MR. SCHENK: It will be down here later. He
7 doesn't have it, so I won't ask him for it.

8 THE COURT: I don't see any reason to ask him
9 about the other items that are listed on this subpoena,
10 because he didn't get it; he doesn't have access to them and
11 did not bring them, so if that will speed up your
12 questioning and then maybe you can move into --

13 MR. SCHENK: I'll cross those, I'll skip over
14 those.

15 MR. NEWBOLD: Your Honor, just for the record, we
16 would indicate that no -- as I understand it, I just
17 recently became involved in this, but as I understand it,
18 there was no subpoena served on any custodian of records
19 with the I.R.S. Mr. Jones does not have access to any of
20 the documents since he resigned or retired from the Internal
1 Revenue Service, and therefore we would indicate that none
2 of those items he had in his possession or was able to bring
3 to the Court today.

4 THE COURT: All right, thank you Mr. Newbold. Go
5 ahead, Mr. Schenk.

Q (BY MR. SCHENK): Were you a direct party in the contractual agreement between myself and the officers, agent and employees of Mountain Gravel, and if so what was the agreement and where and about when was the agreement made?

A Further explain that.

Q Okay, were you a party in the agreement between myself and Mountain Gravel, their officers, agents or employees, and if so what was the agreement and where and about when was the agreement made?

A That's part of the personal tax thing, if he wishes to continue with that.

MR. NEWBOLD: Your Honor, if --

THE COURT: I think that Mr. Schenk's question lacks a couple of things. First you need to explain to him what agreement you're talking about with Mountain Gravel and when it occurred, so that he at least has an idea what you're referring to.

Q (BY MR. SCHENK): Okay, in the counterclaim --

THE COURT: You need to exactly tell him a time, because I don't think he has a counterclaim in front of him to refer to.

Q (BY MR. SCHENK): Okay, the counterclaim was filed July 1st, 1988, it was a tort claim for -- it started out originally as a violation of contract between my contract, verbal contract between myself and Mountain Gravel, and what

1 I'm asking Mr. Jones was he an agent or was he present,
2 or a direct party to this agreement that Mountain Gravel and
3 I had personally?

4 THE COURT: And when was that agreement with you
5 and Mountain Gravel?

6 Q (BY MR. SCHENK): And when was that agreement?

7 THE COURT: No, I'm asking you to tell him, because
8 otherwise he doesn't know how to answer.

9 Q (BY MR. SCHENK): The original agreement was
10 entered on approximately August 18th, 1978.

11 A Of course not, I wasn't here.

12 Q All right, so the conversion of the sum of money
13 as pointed out in the counterclaim naming you and Richard
14 Tibbits and Peter Ballode as counter defendants was not
15 actually a part of the same transaction occurrence between
16 myself and officers, employees, and agents of Mountain
17 Gravel?

18 MR. NEWBOLD: Your Honor, I'm interposing an
19 objection at this time. Pursuant to the regulations of the
20 Internal Revenue Code, in order to discuss any matters which
21 may be pertinent upon an individual's personal income tax
22 returns, we have to have a written consent by that
23 individual to discuss those matters on the record. I would
24 at this time present to Mr. Schenk a stipulation which has
25 been prepared which discusses --

1 MR. SCHENK: No way; I think you're full of
2 baloney.

3 THE COURT: Well now Mr. Schenk, this is a court
4 of law and that's an inappropriate thing to say. Mr.
5 Newbold has stated correctly that the I.R.S., in order to
6 testify or have testimony about a person's individual income
7 tax, which is the question you're asking Mr. Jones, must
8 have a release signed by that individual. Now in order for
9 you to ask a question that he can answer, you're either
10 going to have sign the release or not sign it, and that's a
11 decision for you to make.

12 MR. SCHENK: (Inaudible) ___ I can sign the form,
13 but I have no social security number, it's been rescinded.

14 A It's impossible.

15 Q (BY MR. SCHENK): It is not impossible.

16 MR. NEWBOLD: Your Honor, pursuant to the regs of
17 the Internal Revenue Code, and I'm not terribly well versed
18 as I indicated, I only was contacted on this very recently
19 -- this is the format that must be utilized in order to
20 obtain the information.

21 THE COURT: Does that include the social
22 security --

23 MR. NEWBOLD: It does include a social security
24 number, Your Honor.

25 MR. SCHENK: I would be pleased to write "none" in

1 it.

2 THE COURT: Do you want time to confer with Mr.
3 Jones as to whether or not he knows that that would be
4 appropriate or not?

5 MR. NEWBOLD: Well Your Honor, I'm not sure that
6 Mr. Jones would be the final authority on that anyway, so
7 that really isn't necessary. If I might have a moment, I
8 would like to confer with the compliance officer with the
9 Internal Revenue Department, if I could have access to a
10 telephone?

11 THE COURT: All right, why don't you go ahead and
12 we'll take a short recess and give you a chance to make that
13 phone call. Mr. Schenk, if you just want to be at ease, and
14 Mr. Jones you can step down as well -- Mr. McCabe. What you
15 probably need to do, there's a pay phone clear out or you
16 can use a credit card and make a credit card call from one
17 of the clerk's phones in here.

18 MR. NEWBOLD: I'll use my credit card, thank you.

19 (At this time, a short recess was held.)

20 THE COURT: Now Mr. Newbold, have you had a chance
21 to speak with whoever you needed to speak with?

22 MR. NEWBOLD: Yes Your Honor, I did, I contacted
23 Robert Hollihan, he's a disclosure counsel in Washington,
24 D.C. with the I.R.S. Mr. Hollihan indicated that per se
25 it's not a problem, except that we just need to make sure

that this is the same case, it's for identification purposes only. His request was Number One, either that Mr. Schenk put down the social security number as it was before it was rescinded, and so indicate on the form. We would have no objection to that, that the number has been rescinded and is no longer valid for those purposes, whatever that means, or there's two ways that it can be done -- this is the format that is used. However, if this is read into the record without the social security number, we would have no objection to that by Mr. Schenk.

THE COURT: Where he would just go ahead and read that he acknowledges whatever's contained in that document and then he agrees to the release of that information? I'm assuming that's what it says.

MR. NEWBOLD: That is correct, and that would not include --

THE COURT: And then he wouldn't need a social security number in that case?

MR. NEWBOLD: That's my understanding, Your Honor.

THE COURT: Which one of those procedures do you want to follow, Mr. Schenk?

MR. SCHENK: Well I would choose the latter, but I don't believe that I've asked any questions pertaining to my U.S. individual income tax return for those years.

THE COURT: I understood that you were asking him

1 about his intervention with the agreement with you and
2 Mountain Gravel as an I.R.S. agent, which seemed to be
3 leading to the point of getting into your personal tax
4 condition, and I think that was the basis for the objection.

5 MR. SCHENK: Well maybe. I will choose the
6 latter.

7 THE COURT: Okay, why don't you go ahead then --

8 MR. SCHENK: Word for word?

9 THE COURT: Yes.

10 MR. SCHENK: "County Court, Montezuma County,
11 Cortez, Colorado. Mountain Gravel and Construction Company,
12 Incorporated, Plaintiff, versus Charles A. Schenk,
13 Defendant, versus Richard Tibbits, Peter Ballode and Marion
4 Jones, Counter-Defendants, Case Number 88C069, for purposes
5 of the above captioned case and related matters, I, Charles
6 A. Schenk, no social security number, do hereby give my
7 knowing and voluntary consent for former Internal Revenue
8 Service Revenue Officer Marion Jones, to disclose any and
9 all U.S. individual income tax return information concerning
10 my tax matters for tax years 1980 and 1981. The above
11 described information may be disclosed to the judge in the
12 above captioned case, and to the public in open court in the
13 above captioned case."

THE COURT: You don't need to sign it now that
you've read it, because that was my understanding.

1 MR. NEWBOLD: That is my understanding as well,
2 Your Honor.

3 THE COURT: Thank you. Now why don't you go ahead
4 with your questions, Mr. Schenk?

5 Q (BY MR. SCHENK): Did you induce, command or
6 procure the conversion of a sum due and owing to me from
7 the plaintiff, Mountain Gravel?

8 A As a revenue officer, I served a notice of levy
9 and received \$175, which was applied to your 1980 tax
10 assessment.

11 Q Okay, the sum was \$175, and you received that on a
12 notice of levy?

13 A That's correct.

14 Q This is Court Case Freeman versus Meyer, 152
15 Federal Supplement 383 --

16 THE COURT: Mr. Schenk, you need to ask him
17 questions. He is not a lawyer or in a position to answer
18 questions out of a specific case, so you need to formulate a
19 question that in his capacity he can understand and answer.

20 Q (BY MR. SCHENK): Does a mere notice of an intent
21 to levy constitute a levy?

22 THE COURT: Understand again that's a legal
23 question; I can't find that he's in a position to answer
24 that.

25 MR. SCHENK: Your Honor, wouldn't he if he

1 attaches on notice of levy?

2 THE COURT: Not necessarily, no.

3 Q (BY MR. SCHENK): Were you operating under U.S.C.
4 Title 26 at the time of the conversion?

5 A I was only operating under the Internal Revenue
6 Code, you'll have to convert that to the code sections.

7 Q Is that found under Title 26, United States Code?

8 A I would presume it is, I really don't know. We
9 operated under the Internal Revenue Code.

10 Q Mr. Jones, what was my specific capacity that
11 subjects me to Title 26 in the conversion of the sum due and
12 owing to me from the plaintiff Mountain Gravel?

13 MR. NEWBOLD: Your Honor, I object, that calls for
14 a legal conclusion.

15 THE COURT: I'd ask you to rephrase the question;
16 I'm not sure it's a question he can answer, and you can
17 interpose your objection again, just as to the form.

18 A Will you repeat the question?

19 Q (BY MR. SCHENK): Under what section of Title 26
20 did you seize said sum?

21 A I told you I operated under the Internal Revenue
22 Code; it's on the back of the levy. You received a copy of
23 the levy, you can see on the back of that the Internal
24 Revenue Code section that covers that.

25 Q I've got the levy. You don't know what authority

gave you that?

A No, no, I can't remember the Code Sections right now that covers that, no.

Q Nineteen and a half years doing the same thing?

A That's correct, and three years and two months out.

Q What made you feel that I was one that you could levy upon?

A What made me feel that you were a person that I could levy upon?

Q Yes, what did you base that on?

A You were --

MR. NEWBOLD: Your Honor, I would object to relevance. I don't see how this is relevant to the case as against Mountain Gravel. I would like to interpose a continuing objection; if we're going to talk about the Mountain Gravel case, that's fine, that's what we're here for and I have no objection to that. It appears that we're getting into issues that may have been raised had Mr. Jones' lawsuit not been dismissed in Federal District Court, but had no pertinence in this matter.

THE COURT: I'm failing to see how this ties into the issue with Mountain Gravel, as well. Can you explain that?

MR. SCHENK: Apparently there had to be some

reason in Mr. Jones' mind that he either believed he had the authority to convert a sum duing owing me from Mountain Gravel to his possession, or the Internal Revenue Service's possession.

THE COURT: Well, now those were matters that were raised in your counterclaim, and that's been adjudicated in the Federal District Court and dismissed. The original complaint filed by Mountain Gravel deals with the question of \$728.19, which was not paid for delivery of gravel, and I fail to see how this withholding in any way ties into that.

MR. SCHENK: That was the entire contention that the \$175 -- I did not, and in the answer you will find I did not dispute that I owed a gravel bill to Mountain Gravel. The amount was in dispute, and part of the amount that was based on was \$175 that they had unlawfully converted to the Internal Revenue Service.

THE COURT: So, you're saying the \$175 that the I.R.S. took was actually part of what was due and owing on the gravel?

MR. SCHENK: Yes, I am.

THE COURT: I'm not following that at all. I'm going to sustain your objection.

MR. NEWBOLD: Thank you, Your Honor.

THE COURT: You need to ask another question.

Q (BY MR. SCHENK): Did you ever speak directly to

1 any of the officers, employees or agents of Mountain Gravel
2 specifically, concerning this conversion?

3 A Speak orally, you mean?

4 Q Yes.

5 A No.

6 Q How many letters between you and the officers of
7 the plaintiff Mountain Gravel were necessary to affect the
8 conversion of the said sum \$175?

9 MR. NEWBOLD: Your Honor, I would object to the
10 legal conclusion "conversion" -- I'm not sure if that's
11 being used as a term of art or simply as a -- but other than
12 that I have no objection to the question.

13 THE COURT: Your objection will be noted, and I'm
14 not treating it as a legal term.

15 MR. NEWBOLD: Fine, thank you.

16 THE COURT: Go ahead.

17 Q (BY MR. SCHENK): How many letters of
18 correspondence?

19 A How many letters did I send to them? The one
20 letter which was the notice of levy.

21 Q In what form were you paid?

22 A I'm sure it was by check made out to the Internal
23 Revenue Service.

24 Q Do you recall if you picked up the check in
25 person, or was it by mail?

1 A No, it was by mail.

2 Q Was there any other communication or documents or
3 papers attached to the check?

4 A No, it was a response to the notice of levy I sent
5 to them.

6 Q ~~Okay, for the record I want to state that you did
7 not bring the deposit slips --~~

8 A ~~I have no access to them as I stated before.~~

9 Q ~~Who endorsed the check for the Internal Revenue
10 Service?~~

11 A ~~It would have to be in the District Office --
12 probably the District Director or someone in the place where
13 the money was sent.~~

14 Q ~~You don't know where it was deposited?~~

15 A ~~Ultimately in the Federal Reserve Bank
16 undoubtedly.~~

17 Q Do you know why the Internal Revenue Service's
18 officers, agents or employees would be subject to obeying
19 the laws of the State of Colorado?

20 A Speeding and such as that?

21 Q Any laws.

22 A Why certainly, why sure, um-hum.

23 Q Did you ever serve an administrative summons 2039
24 on me or anyone else to produce my papers, records or
25 effects?

MR. NEWBOLD: Your Honor, again I believe this goes outside the scope of what moneys are owed from Mountain Gravel. This smacks more of the underlying original counterclaim which has been dismissed, and for that reason I'd interpose irrelevancy objection.

THE COURT: Mr. Schenk, do you have a reason why you think this ties in?

MR. SCHENK: In the counterclaim it was stated that the money was unlawfully converted without affording me due process of law. There were steps skipped, and I'm going to get into more and more of them.

THE COURT: Well let me explain that that counterclaim, as it relates to Mr. Jones, has been dismissed. I have no jurisdiction to rule on whether any steps were skipped or any due process was not afforded you, because that's already been ruled on.

MR. SCHENK: That's correct, this is relevant to this case.

THE COURT: How?

MR. SCHENK: With the exception of a notice of levy that funds that were due and owing me were converted over in the Internal Revenue Service with nothing to back it up, no proof the money was owed, just something comes in the mail and something goes out that belongs to me.

THE COURT: And again how does this relate to and

1 involve Mountain Gravel?

2 MR. SCHENK: Mountain Gravel was in possession of
3 the funds.

4 THE COURT: Pacific 2039, is that what you said?

5 MR. SCHENK: Yes, it's an administrative summons
6 that the Internal Revenue Service uses.

7 THE COURT: How does that tie in with this
8 specific thing that's happened here?

9 MR. SCHENK: Well I'm trying to get at was there
10 was no sound basis for the alleged sum owed, but yet the
11 levy went and the money went the other way.

12 THE COURT: Now I cannot see how that has not
13 already been ruled on with your counterclaim which was
14 dismissed, because the procedure, and whether it was
15 properly levied upon or not, were things that would've been
16 raised in that counterclaim, so I'm going to sustain Mr.
17 Newbold's objection and you need to ask a different
18 question.

19 Q (BY MR. SCHENK): The \$175 that was given to you,
20 did it affect the amount shown in the County Clerk and
21 Recorder's office on the levy?

22 A Explain yourself on that -- what do you mean, did
23 it affect it?

24 Q Yes, was there a lien filed with the Montezuma
25 County Clerk and Recorder?

1 A Yes, there was.

2 Q The \$175 you received from Mountain Gravel and
3 Construction Company, did it affect that lien?

4 A Ultimately when the taxes would be full paid, it
5 would be reduced from there when -- they do not send out a
6 release or partial release for every amount of money
7 received. The lien will be released when the full amount of
8 taxes and penalties and interest are full paid.

9 Q Did you record with the Montezuma County Clerk and
10 Recorder that you had received the amount of \$175 against
11 the lien?

12 A No I did not, there's no requirement to do so.
13 Once it's filed, the internal assessments are made, it's
14 still kept -- (inaudible) --

5 Q Are you aware that Colorado Revised Statutes
6 requires any documents affecting a lien must be filed in the
7 County Clerk and Recorder's office in the county where the
8 lien was filed?

9 MR. NEWBOLD: Your Honor, I would object; it calls
0 for legal conclusion again. I don't believe that Mr. Jones
1 has indicated or been certified as an expert or anything
2 that would give him knowledge as to that particular area of
3 the law.

4 THE COURT: Let me just ask -- can you answer that
5 question, do you know?

A No, I cannot.

THE COURT: All right. I'm basically overruling your objection when we got the answer.

Q (BY MR. SCHENK): Do you know if there was an assessment ever made on me?

A Assessment of taxes?

Q Yes.

A Yes, I do.

Q Do you know by whom?

A You mean the person?

Q Yes.

A I know it was made by the audit division.

Q Do you know what information they used to determine that?

A No, I don't.

Q Do you know whether Congress has ever enacted Title 26 as positive law?

A I do not know; I don't know what Title 26 covers, I go by the Internal Revenue Code.

Q You did not bring a notice of lien?

A No, they're on file over here, you can check with the County Clerk's office over here, they're on file as public records. Most of the liens are filed over -- and they are public records.

Q The lien?

1 A Lien. You're talking about the levy or the lien?

2 Q No, the levy's coming next -- you didn't bring a
3 copy of the levy?

4 A No, I didn't bring a copy of the levy, I didn't
5 bring a copy of the lien, but the liens are public records
6 in the County Clerk's --

7 Q When you received \$175, was that a seizure?

8 A No, that was a notice of levy -- in effect a
9 seizure, yes, seizure of moneys rather than physical access,
10 you know, such as vehicles, boats, et cetera.

11 Q Should a notice of seizure have been --

12 A No, it's not required against moneys.

13 Q ~~Did you send Mountain Gravel Construction Company~~
14 ~~a receipt?~~

15 A ~~No, they kept their copy for the receipt.~~

16 Q ~~Did you have a court order to seize the said sum~~
17 ~~and amount due?~~

18 A ~~It's not required.~~

19 Q ~~It's not?~~

20 A ~~It is not required in the Internal Revenue~~
21 ~~Service, no.~~

22 Q ~~Can you tell me why not?~~

23 A ~~It's covered under the Internal Revenue Code.~~

24 Q Are you aware that the plaintiff summoned me for
25 an alleged gravel bill that is due and owing?

1 A Am I aware that they summoned you -- no, I was
2 not.

3 Q You didn't get a copy of Mountain Gravel's
4 complaint?

5 A Well yes, after the court case then I saw -- I
6 didn't know that they'd summoned you or you'd summoned them
7 or how it all began until today.

8 Q The process that Mountain Gravel is going through
9 is known as due process of law. Law in its regular course
10 of administration through the courts of justice is what
11 they're doing here today. The Internal Revenue Service is
12 above and beyond that, they don't have to require to do
13 process.

14 A I think that calls for a conclusion, I wouldn't be
15 able to answer that.

16 Q Are you immune to criminal prosecution?

17 A No.

18 Q Oh, you're immune to civil prosecution?

19 A No.

20 Q Do you ever make a reply to the counterclaims
21 stated as such?

22 MR. NEWBOLD: Your Honor I would object, that has
23 been disposed of; there's no purpose for going into that at
24 this point.

25 THE COURT: I'm going to sustain the objection.

1 MR. SCHENK: There's no further questions, Your
2 Honor.

3 THE COURT: Mr. McCabe, any questions?

4 MR. McCABE: I have no questions, Your Honor.

5 MR. NEWBOLD: Your Honor, I do have just very
6 briefly, if I could mark an exhibit. Your Honor, may I
7 approach the witness?

8 THE COURT: Yes, you may.

9 CROSS EXAMINATION

10 BY MR. NEWBOLD:

11 Q Mr. Jones, I'm handing you a document -- can you
12 explain what that document is?

13 A It's a subpoena for me to appear on this date and
14 time at County Court in Montezuma, State of Colorado.

15 Q Is that in fact a true and correct copy of the
16 subpoena that you received?

17 A It is, I have up on top the date I received it and
18 the time I received it.

19 Q Okay. Have you had an opportunity to go through
20 these enumerated items on the attached exhibit?

21 A I have.

22 Q Do you have any of those items in your possession?

23 A ~~Not a one, as I say not even the one which I don't~~
24 ~~think is required, and that's my financial statement, Number~~
25 ~~11, I could have if I would've taken the time to have gone~~

1 to the bank and got one from the bank. However, all the
2 other items are not appearable to me, they're in possession
3 of the Internal Revenue Service, and I do not have the
4 right to enter the office and go through the records since
5 I am now retired.

6 Q Have you had access to any of those documents at
7 any point since you retired?

8 A None since I've retired.

9 Q Okay, does the Internal Revenue Service have a
0 custodian of records that would keep those documents?

1 A They maintain certain records in Denver for a
2 period of time from six months to a year, and then they go
3 to the Federal Records Center in Kansas City, and I presume,
4 I believe they're maintained there for five years, and then
5 ultimately they're destroyed.

6 Q Now relative to Number 11, what does that
7 specifically ask for?

8 A Number 11 asks for a certified copy of financial
9 disclosure of Counter-Defendant Marion Jones.

0 Q Okay, are you currently a Counter-Defendant in the
1 case?

2 A I am not.

3 MR. NEWBOLD: I have no further questions, Your
4 Honor.

5 THE COURT: Thank you. Mr. Schenk, do you have

1 any questions based on that?

2 MR. SCHENK: No, I don't.

3 THE COURT: Okay. Mr. McCabe?

4 MR. McCABE: No questions, Your Honor.

5 MR. NEWBOLD: Your Honor, we'd request that Mr.
6 Jones be excused and excused from the further attendance in
7 this proceeding.

8 THE COURT: All right, since no one has any other
9 questions for Mr. Jones -- you did not intend to call him in
10 your case, Mr. McCabe?

11 MR. McCABE: No, Your Honor, we have no objection
12 to his being excused.

13 THE COURT: All right. Mr. Schenk, do you have
14 any objection to him being excused?

15 MR. SCHENK: No.

16 THE COURT: Okay, thank you, sir; you're free to
17 leave.

18 * * * * *

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1 **CLERK'S CERTIFICATE**

2 _____
3 **COUNTY COURT, MONTEZUMA COUNTY, CORTEZ, COLORADO**
4 _____

5 I, LOU SPRINGMEYER, do hereby certify that the
6 foregoing proceedings, pages 1 through 33 were reduced to
7 typewritten form under my direction from a tape recording of
8 the hearing held on February 22, 1989, in the Montezuma
9 County Court, the Honorable Sharon L. Hansen presiding, in
10 the matter of Mountain Gravel and Construction Co., Inc.,
11 Plaintiff, vs. Charles A. Schenk, Defendant Counter-
12 Claimant, vs. Richard Tibbits, Peter Ballode, Marion Jones,
13 Counter-Defendants, Case No. 88C069, and that the foregoing
14 is a true and correct transcription of the tape recording
15 then and there made, to the best of my knowledge and belief.

16 **LOU SPRINGMEYER, CLERK**

17
18 **BY:** _____
19 **DEPUTY CLERK**

20 **DATED:** _____
21
22
23
24
25

JURISDICTION

**SUITS AT COMMON LAW
AMENDMENT VII**

ARTICLE III

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 663 (R.S. § 5279). Last sentence of said section 663, relating to rescue of such fugitive, was omitted as covered by section 752 of this title, the punishment provision of which is based on later statutes. (See reviser's note under that section.)

Minor changes were made in phraseology.

§ 3195. Payment of fees and costs

All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.

All witness fees and costs of every nature in cases of international extradition, including the fees of the magistrate, shall be certified by the judge or magistrate before whom the hearing shall take place to the Secretary of State of the United States, and the same shall be paid out of appropriations to defray the expenses of the judiciary or the Department of Justice as the case may be.

The Attorney General shall certify to the Secretary of State the amounts to be paid to the United States on account of said fees and costs in extradition cases by the foreign government requesting the extradition, and the Secretary of State shall cause said amounts to be collected and transmitted to the Attorney General for deposit in the Treasury of the United States.

(June 25, 1948, ch. 645, 62 Stat. 825; Oct. 17, 1968, Pub. L. 90-578, title III, § 301(a)(3), 82 Stat. 1115.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§ 662, 662c, 662d, 668 (R.S. § 5278; Aug. 3, 1882, ch. 378, § 4, 22 Stat. 216; June 28, 1902, ch. 1301, § 1, 32 Stat. 475; Mar. 22, 1934, ch. 73, § 2, 3, 48 Stat. 455).

First paragraph of this section consolidates provisions as to costs and expenses from said sections 662, 662c, and 662d.

Minor changes were made in phraseology and surplage was omitted.

Remaining provisions of said sections 662, 662c, and 662d of title 18, U.S.C., 1940 ed., are incorporated in sections 752, 3182, 3183, and 3187 of this title.

The words "or the Department of Justice as the case may be" were added at the end of the second paragraph in conformity with the appropriation acts of recent years. See for example act July 5, 1946, ch. 541, title II, 60 Stat. 460.

AMENDMENTS

1968—Pub. L. 90-578 substituted "magistrate" for "commissioner" in two instances.

EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90-578 effective Oct. 17, 1968, except when a later effective date is applicable, which is the earlier of a date when implementation of amendment by appointment of magistrates and assumption of office takes place or third anniversary of enactment of Pub. L. 90-578 on Oct. 17, 1968, see section 403 of Pub. L. 90-578, set out as an Effective Date of 1968 Amendment note under section 631 of Title 28, Judiciary and Judicial Procedure.

CANAL ZONE

Applicability of section to Canal Zone, see section 14 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 14, 4114 of this title.

CHAPTER 211—JURISDICTION AND VENUE

Sec.	
3231.	District courts.
3232.	District of offense—Rule.
3233.	Transfer within district—Rule.
3234.	Change of venue to another district—Rule.
3235.	Venue in capital cases.
3236.	Murder or manslaughter.
3237.	Offenses begun in one district and completed in another.
3238.	Offenses not committed in any district.
3239.	Threatening communications.
3240.	Creation of new district or division.
3241.	Jurisdiction of offenses under certain sections.
3242.	Indians committing certain offenses; acts on reservations.
3243.	Jurisdiction of State of Kansas over offenses committed by or against Indians on Indian reservations.
3244.	Jurisdiction of proceedings relating to transferred offenders.

AMENDMENTS

1978—Pub. L. 95-598, title III, § 314(j)(2), Nov. 6, 1978, 92 Stat. 2678, added item 3244.

~~§ 3231. District courts.~~
The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

(June 25, 1948, ch. 645, 62 Stat. 826.)

HISTORICAL AND REVISION NOTES

Based on section 588d of title 12, U.S.C., 1940 ed., Banks and Banking; title 18, U.S.C., 1940 ed., §§ 546, 547 (Mar. 4, 1909, ch. 321, §§ 326, 340, 35 Stat. 1151, 1153; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; May 18, 1934, ch. 304, § 4, 48 Stat. 783).

This section was formed by combining sections 546 and 547 of title 18, U.S.C., 1940 ed., with section 588d of title 12, U.S.C., Banks and Banking, with no change of substance.

The language of said section 588d of title 12, U.S.C., 1940 ed., which related to bank robbery, or killing or kidnapping as an incident thereto (see section 2113, of this title), and which read "Jurisdiction over any offense defined by sections 588b and 588c of this title shall not be reserved exclusively to courts of the United States" was omitted as adequately covered by this section.

SENATE REVISION AMENDMENT

The text of this section was changed by Senate amendment. See Senate Report No. 1620, amendment No. 10, 80th Cong.

CROSS REFERENCES

Civil jurisdiction of Federal courts, see section 1331 et seq. of Title 28, Judiciary and Judicial Procedure.
Consular courts, jurisdiction and procedure, see section 141 et seq. of Title 22, Foreign Relations and Intercourse.

Exclusive jurisdiction of Federal courts, see sections 1251, 1333, 1334, 1338, 1351, 1355, 1356 of Title 28, Judiciary and Judicial Procedure.

plying with or in violation of the provisions of law regulating the issuance and circulation of such Federal Reserve notes; or

Whoever, being an officer acting under the provisions of chapter 2 of Title 12, countersigns or delivers to any national banking association, or to any other company or person, any circulating notes contemplated by that chapter except in strict accordance with its provisions—

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 700.)

HISTORICAL AND REVISION NOTES

Based on sections 581 and 592 of title 12, U.S.C., 1940 ed., Banks and Banking (R.S. §§ 5187, 5209; Sept. 26, 1918, ch. 177, § 7, 40 Stat. 972; Aug. 23, 1935, ch. 614, § 316, 49 Stat. 712).

This section consolidates section 581 and part of section 592 of title 12, U.S.C., 1940 ed., Banks and Banking.

The punishment provision was drawn from said section 592 as being the latest expression of congressional intent, in preference to the provision of said section 581 which authorized a fine "not more than double the amount so countersigned and delivered and imprisonment not more than 15 years".

The words "shall be guilty of a misdemeanor" were omitted as unnecessary in view of definition of misdemeanor in section 1 of this title.

Likewise the words "upon conviction in any district court of the United States" were omitted as unnecessary since punishment can follow only after conviction.

(See reviser's note under section 656 of this title for statement of reasons for dividing said section 592 into three revised sections, with consequent changes in phraseology, style, and arrangement.)

CROSS REFERENCES

Offense punishable by imprisonment for term exceeding one year declared a felony, see section 1 of this title.

State banks becoming members of Federal reserve system, application to, see section 324 of Title 12, Banks and Banking.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 12 sections 209, 324.

§ 335. Circulation of obligations of expired corporations

Whoever, being a director, officer, or agent of a corporation created by Act of Congress, the charter of which has expired, or trustee thereof, or an agent of such trustee, or a person having in his possession or under his control the property of such corporation for the purpose of paying or redeeming its notes and obligations, knowingly issues, reissues, or utters as money, or in any other way knowingly puts in circulation any bill, note, check, draft, or other security purporting to have been made by any such corporation, or by any officer thereof, or purporting to have been made under authority derived therefrom, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 700.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 289 (Mar. 4, 1909, ch. 321, § 174, 35 Stat. 1122).

The reference to persons aiding was omitted as unnecessary, since such persons are made principals by section 2 of this title.

The last sentence excepting bona fide holders in due course was omitted as surplusage.

Other changes in phraseology also were made.

CROSS REFERENCES

Forfeiture of counterfeit paraphernalia, see section 492 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 492 of this title.

§ 336. Issuance of circulating obligations of less than \$1

Whoever makes, issues, circulates, or pays out any note, check, memorandum, token, or other obligation for a less sum than \$1, intended to circulate as money or to be received or used in lieu of lawful money of the United States, shall be fined not more than \$500 or imprisoned not more than six months, or both.

(June 25, 1948, ch. 645, 62 Stat. 701.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 293 (Mar. 4, 1909, ch. 321, § 178, 35 Stat. 1122).

Numerous suggestions, of which that of Mr. E. M. Million, of Arlington, Va., is typical, recommend that this section be omitted as obsolete or revised to except commercial obligations. However, since the decisions make it plain that only obligations intended to circulate as money are within the provisions of this section and that commercial checks of less than \$1 are not affected, there seems no reason so to rewrite the section. (See *U.S. v. Monongahela Bridge Co.*, Fed. Cas. No. 15,796; *Stettinius v. U.S.*, Fed. Cas. No. 13,387.)

Minor changes were made in phraseology.

CROSS REFERENCES

Forfeiture of counterfeit paraphernalia, see section 492 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 492 of this title.

§ 337. Coins as security for loans

Whoever lends or borrows money or credit upon the security of such coins of the United States as the Secretary of the Treasury may from time to time designate by proclamation published in the Federal Register, during any period designated in such a proclamation, shall be fined not more than \$10,000 or imprisoned not more than one year, or both.

(Added Pub. L. 89-81, title II, § 212(a), July 23, 1965, 79 Stat. 257.)

EFFECTIVE DATE

Section 212(e) of Pub. L. 89-81 provided that: "The amendments made by this section (adding this section) shall apply only with respect to loans made, renewed, or increased on or after the 31st day after the date of enactment of this Act (July 23, 1965)."

said Circuit Court in this cause be, and the same is hereby reversed, with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to overrule the demurrer, and order the defendants to answer the bill.

THE UNITED STATES, Appellants,

FRANCIS P. FERREIRA, Administrator of Francis Pass, Deceased.

No appeal lies from decision of District Judge of U. S. for Florida, upon claims for war damages adjudicated as commissioner, under special statute.

The Treaty of 1819, between the United States and Spain, contains the following stipulation, viz.: "The United States shall cause satisfaction to be made for the injuries, if any, which by process of law shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

Congress, by two Acts passed in 1823 and 1834, (3 Stat. at Large, 768, and 6 Stat. at Large, 509), directed the Judge of the Territorial Court of Florida to receive, examine, and adjudge all cases of claim for losses, and report his decisions, if in favor of the claimants, together with the evidence upon which they were founded, to the Secretary of the Treasury, who, on being satisfied that the same was just and equitable, within the provisions of the Treaty, should pay the amount thereof; and by an Act of 1849 (9 Stat. at Large, p. 788), Congress directed the Judge of the District Court of the United States for the Northern District of Florida to receive and adjudicate certain claims in the manner directed by the preceding Acts. From the award of the District Judge, an appeal does not lie to this court.

As the Treaty itself designated no tribunal to assess the losses, it remained for Congress to do so by referring the claims to a commissioner according to the established practice of the government in such cases. His decision was not the judgment of a court, but a mere award, with a power to review it, conferred upon the Secretary of the Treasury.

THIS was an appeal from the District Court of the United States for the Northern District of Florida.

The facts of the case are stated in the opinion of the court.

It was argued by Mr. Crittenden, who placed the case upon the ground which will be presently stated, and by Mr. Johnson for the appellee. There were also briefs filed on the same side by Messrs. Sherman, W. Cost Johnson, and Ewing.

Mr. Crittenden, after giving a history of the cause and the laws, proceeded:

"The District Judge, being satisfied with the causes assigned why this claim was not presented under the Act of 1834, adjudicated to the petitioner, upon his claim and proof, as the amount or value of his losses, \$6,080, and for interest thereon at the rate of 6 per cent. from the tenth of May, 1813, to the 26th June, 1835, \$6,726.83, making in all \$12,806.83.

From this decision the District Attorney prayed an appeal to the Supreme Court of the United States, "to the end that he might, if the laws allowed it, prosecute such appeal if instructed to do so." I know nothing more of this proceeding than that, upon this appeal, the case has been brought to this court; and being

here, it would be quite agreeable to me if the court would, by its high authority, settle and determine all the questions that arise out of this case, and which are presented before the Treasury Department in many others of a like character, and especially the question respecting the allowance of interest on the amount of the losses or injuries sustained by the claimants.

These questions have from the first been subjects of controversy between the claimants and the Secretary of the Treasury, and are likely to continue so till some higher authority shall interpose. It would be conducive to the public interest, and certainly desirable to the government, to obtain the judgment and directions of this enlightened court on this vexed subject.

In the adjustment or adjudication of these Florida claims by the Florida judges, interest was allowed, except in a few instances. The first of these adjudications were presented to the Secretary of the Treasury for payment in the year 1825, and others have been constantly and successively presented from that time to the present. The number of claims thus presented is about two hundred, and the amount paid has exceeded one million of dollars. But from the first and in every case where interest had been allowed by the Florida judge, the principal only was paid, and the interest disallowed and rejected by the Secretary of the Treasury. For the period of the last twenty-five years this has been the unvaried and uniform course of decision and action by every successive Secretary of the Treasury, who has acted on the subject, sustained by the official opinions of several attorneys-general, and without the expressed dissent of any one of them officially declared.

It is respectfully insisted on the part of the United States that such a uniform and long-continued series and course of decision has made the disallowance of interest, in whatever form awarded, a *res adjudicata*.

Congress had power to create a special tribunal with jurisdiction to examine and adjust or adjudge these claims arising under the Treaty with Spain. Their power in this respect was plenary and discretionary. By the [?] 12 Acts above referred to they exercised that power, and created such a tribunal. It was a judicatory tribunal which they established, consisting of two parts or members, namely, one of the territorial judges of Florida to act and decide in the first instance; and second, the Secretary to exercise a revisory power or jurisdiction over the decisions of the Florida judge, paying the amount of them only "on being satisfied that the same is just and equitable within the provisions of the Treaty." To this tribunal, thus constituted, Congress gave authority to decide on these claims; the decision of the Secretary of the Treasury being revisory and final. His decision was in its nature judicial, and made of the matter decided, a *res adjudicata*, in every rational and legitimate sense of those terms. The decision of a special or limited tribunal upon a subject within its jurisdiction is just as conclusive and binding as the judgments of courts of the highest and most unlimited jurisdiction.

The present case is in its origin, and in re-

1.—Mr. Justice Wayne did not sit in this cause.

to the question of interest, identical with other Florida cases above alluded to.

~~It is the opinion of the United States District Court of the Southern District of Florida, in the above case, that the Act of Congress, in the above case, is unconstitutional and void. The Act of Congress is the measure of their authority and of effect of their proceedings under that authority.~~

Mr. Johnson was the only counsel who argued the case orally, for the appellee; the other counsel filed briefs. It is proper to say, that a motion had been made by the counsel for the appellee to dismiss the case for want of jurisdiction. This may serve to explain the preliminary remarks of Mr. Johnson, which were as follows:

It is our earnest wish, in behalf of the appellee, that this court should take jurisdiction of the case, and hear and decide it upon the merits, that if the decision of the court below be wrong, its errors may be corrected, and we may know the limits of our rights; and if the decision be correct, that it may be so pronounced by the authoritative voice of this high tribunal.

Nevertheless, in order to raise such questions as may be thus raised, we have found it necessary to move to dismiss the appeal. In the consideration of that motion, however, we do not feel bound to use such arguments only as will tend to show that "an appeal does not lie in this case, but think we may with propriety present such views on the subject, and refer to such authorities, as in our judgment in any manner bear upon the question, and which will enable the court the more readily to apprehend and decide it.

The question now strictly before the court involves the nature of the claim, and the character of the tribunal whose decision is here for revision. We will therefore consider it in this order, and—

I. As to the nature of the claim; is it, and is the class to which it belongs, the proper subject of judicial investigation and decision? (Then followed an explanation of the case, after which the inference was drawn.)

There can be, therefore, no objection to the ordinary jurisdiction of the courts of the United States arising from the nature of these claims. They are proper subjects for the investigation of courts of justice, involving as they do questions touching the rights of property and injuries thereto. They fall properly within the jurisdiction of courts of the United States, as the judicial injury, and the rights to which it refers, arise out of treaty stipulations, and Acts of Congress to carry the Treaty into effect.

They are, therefore, wholly unlike the duties attempted to be imposed by the Act of March 3, 1792, on the Circuit and District Courts, relative to pensions, and which they refuse to perform because they were not judicial, holding the Act for that, among other things, unconstitutional and void. Vide 2 Dall. Rep. 410, note. 14 L. ed.

Whatever analogy, therefore, may be found. In other respects, or if not found, made by construction, between the Act of 1792 and that of 1823, they differ wholly in this, that the duty, imposed by that Act was not judicial in its nature; in this, it is strictly so; and the instructions of the Legislature to the judicial tribunals, on whom the duty is imposed "to receive, examine, and adjudge," is an explicit instruction to perform that duty judicially.

We have next to consider the character of the tribunal whose decision is before this court for revision; and on this point several inquiries suggest themselves:

1st. Was it a judicial tribunal?

2d. Was it a part of a judicial system, created by the Acts of 1823 and 1834, under the Treaty, which acted and decided judicially, but from which an appeal lay, not to this court, but to the Secretary of the Treasury, as the highest appellate tribunal in that special system created under the Treaty by those statutes?

3d. Or was it a judicial tribunal whose decision was final in all cases coming within the jurisdiction conferred upon it under the Treaty?

4th. Or was it an ordinary judicial tribunal, from which, in these, as in other cases, an appeal lies to this court?

(Upon each of these questions the argument was very elaborate.

III. Then arises the question, is the decision final, or does an appeal lie from it to this court?

There is nothing in the nature of the case itself, or the mode of proceeding directed by the Acts of 1823 and 1834, which tends to settle this question. If the United States had not assumed the satisfaction of these injuries, suits would have been brought against the trespassers in the usual form, and a writ of error would have lain to revise the judgments. But the United States assumes the liability, agrees by Treaty to open her courts, and allow the injuries to be established by her legal process, and binds herself to make satisfaction for the injuries, if any, which shall be so established. But the United States is not formerly made defendant on the record; this was not directed by the Acts of Congress, but the claims were presented to the tribunals which she designated "to receive, examine, and adjudge" them. They were claims against the United States, and it is not a matter of substance whether she was named on the record as defendant or not; they were, nevertheless, "cases," within the legal meaning of the term; whether belonging to that numerous class of cases called in the books *ex parte*, or the still more numerous class of cases *inter partes*, is immaterial. But what militates against the right of appeal is the provision, that the judges shall report their decision to the Secretary of the Treasury, who shall "pay the amount thereof."

But, on the other hand, we perceive nothing in these statutes to cut off an appeal, if the decision be against the claimant. The case before the court was prosecuted in, and decided by, the District Court of Florida, and there seems to be no other reason, than that named, why

the general law authorizing appeals from those courts should not extend to and embrace this case. If, however, an appeal do not lie, it must be, as we think, because the decision of the Judge of the District Court of Florida was final, not because the Secretary of the Treasury is the appellate tribunal.

Mr. Chief Justice Taney delivered the opinion of the court:

This purports to be an appeal from the District Court of the United States for the Northern District of Florida. The case brought before the court is this:

The Treaty of 1819 by which Spain ceded Florida to the United States, contains the following stipulation in the 9th article:

"The United States shall cause satisfaction to be made for the injuries if any, which by process of law shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

In 1823 Congress passed an Act to carry into execution this article of the Treaty. The 1st section of this law authorizes the judges of the superior courts established at St. Augustine and Pensacola respectively, to receive and adjust all claims arising within their respective jurisdictions, agreeably to the provisions of the article of the Treaty above mentioned; and the 2d section provides "that in all cases where the judges shall decide in favor of the claimants the decisions, with the evidence on which they are founded, shall be by the said judges reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the Treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged."

Under this law the Secretary of the Treasury held that it did not apply to injuries suffered from the causes mentioned in the Treaty of 1812 and 1813, but to those of a subsequent period. And in consequence of this decision, another law was passed in 1834, extending the provisions of the former Act to injuries suffered in 1812 and 1813, but limiting the time for presenting the claims to one year from the passage of the Act. This law embraced the claim of the present claimant.

He did not, however, present his claim within the time limited. And in 1849 a special law was passed authorizing the District Judge of the United States for the Northern District of Florida, to receive and adjudicate this claim and that of certain other persons mentioned in the law; under the Act of 1834; the several claims to be settled by the Treasury as in other cases under the said Act. Florida had become a State of the Union in 1845, and therefore the District Judge was substituted in the place of the territorial officer.

Ferreira presented his claim according to the District Judge, who took the testimony offered to support it, and decided that the amount stated in the proceedings was due to him. The District Attorney of the United States prayed an appeal to this court from this decision; and under that prayer the case has been docketed here as an appeal from the District Court.

"The only question now before us is whether we have any jurisdiction in the case."

And in order to determine that question we must examine the nature of the proceeding before the District Judge, and the character of the decision from which this appeal has been taken.

The Treaty certainly created no tribunal by which these damages were to be adjusted, and gives no authority to any court of justice to inquire into or adjust the amount, which the United States were to pay to the respective parties who had suffered damage from the causes mentioned in the Treaty. It rested with Congress to provide one, according to the treaty stipulation. But when that tribunal was appointed it derived its whole authority from the law creating it, and not from the Treaty; and Congress had the right to regulate its proceedings and limit its power; and to subject its decisions to the control of an appellate tribunal, if it deemed it advisable to do so.

Undoubtedly Congress was bound to provide such a tribunal as the Treaty described. But if they failed to fulfill that promise, it is a question between the United States and Spain. The tribunal created to adjust the claims cannot change the mode of proceeding, or the character in which the law authorizes it to act, under any opinion it may entertain, that a different mode of proceeding, or a tribunal of a different character, would better comport with the provisions of the Treaty. If it acts at all, it acts under the authority of the law and must obey the law.

The territorial judges, therefore, in adjusting these claims, derived their authority altogether from the laws above mentioned; and their decisions can be entitled to no higher respect or authority than these laws gave them. They are referred by the Act of 1823 to the Treaty for the description of the injury which the law requires them to adjust; but not to enlarge the power which the law confers, nor to change the character in which the law authorizes them to act.

The Act of 1823, therefore, and not the stipulations of the Treaty, furnishes the rule for the proceeding of the territorial judges, and determines their character. And it is manifest that this power to decide upon the validity of these claims, is not conferred on them as a judicial function, to be exercised in the ordinary forms of a court of justice. For there is to be no suit; no parties in the legal acceptance of the term, are to be made—no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*; and all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence, nor his award, are to be filed in the court in which he presides, nor recorded there; but he is required to transmit, both the decision and the evidence upon which he decided, to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge.

It is too evident for argument on the subject, that such a tribunal is not judicial; op-

Howard 13.

and that the Act of Congress did not intend to make it one. The authority conferred on the judge is nothing more than that which is given to adjust certain claims against the United States; and the office of judges, and their respective jurisdictions, are referred to in the law, merely as a designation of the persons to whom the authority is conferred, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commissioner. The Act of 1834 calls it an award. And an appeal to this court from such a decision, by such an authority from the judgment of a court of record, would be an anomaly in the history of jurisprudence. An appeal might as well have been taken from the awards of the board of commissioners, under the Mexican Treaty, which were recently sitting in this city. Nor can we see any ground for objection to the power of revision and control given to the Secretary of the Treasury. When the United States consent to submit the adjustment of claims against them to any tribunal, they have a right to prescribe the conditions on which they will pay. And they had a right therefore to require the approval of the award by the Secretary of the Treasury, one of the conditions upon which they would agree to be liable. No claim, therefore, is due from the United States until it is sanctioned by him; and his decision against the claimant for the whole or a part of the claim as allowed by the judge is final and conclusive. It cannot afterwards be disturbed by an appeal to this or any other court, or in any other way, without the authority of an Act of Congress.

It is said, however, on the part of the claimant, that the Treaty requires that the injured parties should have an opportunity of establishing their claims by a process or law; that process of law means a judicial proceeding in a court of justice; and that the right of supervision given to the Secretary, over the decision of the District Judge, is therefore a violation of the Treaty.

The court think differently; and that the government of this country is not liable to the reproach of having broken its faith with Spain. The tribunals established are substantially the same with those usually created, where one nation agrees by treaty to pay debts or damages which may be found to be due to the citizens of another country. This Treaty meant nothing more than the tribunal and mode of proceeding ordinarily established on such occasions; and well known and well understood when treaty obligations of this description are undertaken. But if it were admitted to be otherwise, it is a question between Spain and that department of the government which is charged with our foreign relations; and with which the judicial branch has no concern. Certainly the tribunal which acts under the law of Congress, and derives all its authority from it, cannot call in question the validity of its provisions, nor claim absolute and final power for its decisions, when the law by virtue of which the decisions are made, declares that they shall not be final, but subordinate to that of the Secretary of the Treasury, and subject to his reversal.

And if the judicial branch of the government

had the right to look into the construction of the Treaty in this respect, and was of opinion that it required a judicial proceeding; and that the power given to the Secretary was void as in violation of the Treaty, it would hardly strengthen the case of the claimant on this appeal. For the proceedings before the judge are as little judicial in their character as that before the secretary. And if his decisions are void on that account, the decisions of the judge are open to the same objections; and neither the principal nor interest, nor any part of this claim could be paid at the Treasury. For if the tribunal is unauthorized, the awards are of no value.

The powers conferred by these Acts of Congress upon the judge as well as the Secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner appointed to inquire into lands or money under a treaty; or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a Secretary as well as on a commissioner. It is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States.

The proceeding we are now considering, did not take place before one of the territorial judges, but before a district judge of the United States. But that circumstance can make no difference, for the Act of 1819 authorizes him to receive and adjudicate the claims of the persons mentioned in the law, under the Act of 1834; and provides that these claims may be settled by the Treasury, as other cases under the said Act. It conferred on the District Judge, therefore, the same power, and the same character, and imposed on him the same duty that had been conferred and imposed on the territorial judges before Florida became a State.

It would seem, indeed, in this case, that the District Judge acted under the erroneous opinion that he was exercising judicial power strictly speaking, under the Constitution, and has given to these proceedings as much of the form of proceedings in a court of justice as was practicable. A petition in form is filed by the claimant; and the judge states in his opinion that the District Attorney appeared for the United States and argued the case, and prayed an appeal. But the Acts of Congress require no petition. The claimant had nothing to do, but to file his claim to the judge, with the vouchers and evidence to support it. The District Attorney had no right to enter an appearance for the United States, so as to make them a party to the proceedings, and to authorize a judgment against them. It was no doubt his duty as a public officer, if he knew of any evidence against the claim, or of any objection to the evidence produced by the claimant, to bring it before the judge, in order that he might consider it, and report it to the secretary. But the Acts of Congress certainly do not authorize him to convert a proceeding before a commissioner into a judicial one, nor to bring an appeal from his award before this court.

The question as to the character in which a judge acts in a case of this description, is not a new one. It arose as long ago as 1792, in Hayburn's case, reported in 2 Dall. 400.

The Act of 23d of March, in that year, required the Circuit Courts of the United States to examine into the claims of the officers and soldiers and seamen of the Revolution, to the pensions granted to invalids by that Act, and to determine the amount of pay that would be equivalent to the disability incurred, and to certify their opinion to the Secretary of War. It authorized the Secretary, when he had cause to suspect imposition or mistake, to withhold the pension allowed by the court, and to report the case to Congress at its next session. The authority was given to the Circuit Courts; a question arose whether the power conferred was a judicial one, which the Circuit Courts, as such, could constitutionally exercise. The question was not decided in the Supreme Court in the case above mentioned. But the opinions of the judges of the Circuit Courts for the Districts of New York, Pennsylvania, and North Carolina, are all given in a note to the case by the reporter.

The Judges in the New York Circuit, composed of Chief Justice Jay, Justice Cushing, and Judge, District Judge, held that the power could not be exercised by them as a court. But in consideration of the meritorious and violent object of the law, they agreed to exercise the power as conferred on them individually as commissioners, and to adjourn the court over from time to time, so as to enable them to perform the duty in the character of commissioners, and

The judges of the Pennsylvania Circuit, consisting of Wilson and Blair, Justices of the Supreme Court, and Peters, District Judge, refused to execute it altogether, upon the ground that it was conferred on them as a court, and was not a judicial power when subject to the revision of the Secretary of War and Congress. The judges of the Circuit Court of North Carolina, composed of Iredell, Justice of the Supreme Court, and Sitzgreaves, District Judge, were of opinion that the court could not exercise it as a judicial power; and held it under advisement whether they might not construe the Act as an appointment of the judges personally as commissioners, and perform the duty in the character of commissioners out of court, as had been agreed on by the judges of the New York Circuit.

These opinions, it appears by the report in 2 Dall. were all communicated to the President, and the motion for a mandamus in Hayburn's case, at the next term of the Supreme Court, would seem to have been made merely for the purpose of having it judicially determined in this court, whether the judges, under that law, were authorized to act in the character of commissioners. For every judge of the court, except Thomas Johnson, whose opinion is not given, had formally expressed his opinion in writing, that the duty imposed, when the decision was subject to the revision of a secretary and of Congress, could not be executed by the court as a judicial power; and the only question upon which there appears to have been any difference of opinion, was whether it might

not be construed as conferring the power on the judges personally as commissioners. And if it would bear that construction, there seems to have been no doubt, at that time, but that they might constitutionally exercise it, and the Secretary constitutionally revise their decisions. The law, however, was repealed at the next session of the Legislature, and a different way provided for the relief of the pensioners; and the question as to the construction of the law was not decided in the Supreme Court. But the repeal of the Act clearly shows that

~~President and Congress possessed in the case a judicial power.~~

This law is the same in principle with the one we are now considering, with this difference only, that the Act of 1792

~~gave the court no power, and~~

~~gave the judges.~~ In the case before us it is imposed upon the judge, and it appears from [51] the note to the case of Hayburn, that a majority of the judges of the Supreme Court were of opinion that if the law of 1792 had conferred the power on the judges, they would have held that it was given to them personally by that description; and would have performed the duty as commissioners, subject to the revision and control of the Secretary and Congress, as provided in the law. Nor have Justices Wilson, Blair, and Peters, District Judges dissented from this opinion. Their communication to the President is silent upon this point. But the opinions of all the judges embrace distinctly and positively the provisions of the law now before us, and declare that, under such a law, the power was not judicial within the grant of the Constitution, and could not be exercised as such.

Independently of these objections, we are at some loss to understand how this case could legally be transmitted to this court, and certified as the transcript of a record in the District Court. According to the directions of the Act of Congress, the decision of the judge and the evidence on which it is founded, ought to have been transmitted to the Secretary of the Treasury. They are not to remain in the District Court, nor to be recorded there. They legally belong to the office of the Secretary of the Treasury, and not to the court; and a copy from the clerk of the latter would not be evidence in any court of justice. There is no record of the proceedings in the District Court in which a transcript can legally be made and certified; and consequently there is no transcript now before us that we can recognize as evidence of any proceeding or judgment in that court.

A question might arise whether commissioners appointed to adjust these claims, are not officers of the United States within the meaning of the Constitution. ~~It is to be perceived that the functions of a court of justice are not to be performed by officers appointed by the President, and by the consent of the Senate, or courts to secure the due administration of the laws. And, if they are to be regarded as officers, holding offices under the government, the power of appointment is in the President, by and with the advice and consent of the Senate.~~

Out of court proceedings. An opinion in a Summary Disposition.

and Congress could not, by law, designate persons to fill these offices. And if this be the construction of the Constitution, then as a judge designated could not act in a judicial character as a court, nor as a commissioner, because he was not appointed by the President, nothing that has been done under the Acts of 1823, and 1834, and 1849, would be void, and the payments heretofore made, might be recovered back by the United States. But this question has not been made; nor does it arise in the case, which could arise only in a suit by the United States to recover back the money. And as the case does not present it, and the parties interested are not before the court, and these laws have for so many years been acted on as valid, and constitutional we do not think it proper to give an opinion upon it. In the case at bar, the power of the judge to decide in the first instance, is assumed on both sides, and the controversy has turned upon the power of the Secretary to revise it; and it is in this aspect of the case that it has been considered by the court in the foregoing opinion.

The appeal must be dismissed for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Florida, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that this cause be, and the same is hereby dismissed for the want of jurisdiction.

NOTE BY THE CHIEF JUSTICE, INSERTED BY ORDER OF THE COURT.

Since the foregoing opinion was delivered, the attention of the court has been drawn to the case of the United States v. Yale Todd, which arose under the Act of 1792, and was decided in the Supreme Court, February 17, 1794. There was no official reporter at that time, and this case has not been printed. It shows the opinion of the court upon a question which was left in doubt by the opinions of the different judges, stated in the note to Hayburn's case. And as the subject is one of much interest, and concerns the nature and extent of judicial power, the substance of the decision in Yale Todd's case is inserted here, in order that it may not be overlooked, if similar questions should hereafter arise.

The 2d, 3d, and 4th sections of the Act of 1792, were repealed at the next session of Congress by the Act of February 23, 1793. It was those three sections that gave rise to the questions stated in the note to Hayburn's case. The repealing Act provided another mode for taking testimony, and deciding upon the validity of claims to the pensions granted by the former law; and by the 3d section it saved all rights to pensions which might be founded upon any legal adjudication, under the Act of 1792, and made it the duty of the Secretary of War, in conjunction with the Attorney-General, to take such measures as might be necessary to obtain an adjudication of the Supreme Court on the validity of such rights, claimed under the Act aforesaid, by the determination of certain persons styling themselves commissioners.

It appears from this case, that Chief Justice Jay and Justice Cushing acted upon their construction of the Act of 1792, immediately after its passage and before it was repealed. And the saving and proviso, in the Act of 1793, was manifestly occasioned by the difference of opinion upon that question which existed among the justices, and was introduced for the purpose of having it determined,

whether under the Act conferring the power upon the Circuit Courts, the judges of those courts when refusing for the reasons assigned by them to act as courts, could legally act as commissioners out of court. If the decision of the judges, as commissioners, was a legal adjudication, then the party's right to the pension allowed him was saved; otherwise not.

In pursuance of this Act of Congress, the case of Yale Todd was brought before the Supreme Court, in an amicable action, and upon a case stated at February Term, 1794.

The case was docketed by consent, the United States being plaintiff and Todd the defendant. The declaration was for one hundred and seventy-two dollars and ninety-one cents, for so much money had and received by the defendant to the use of the United States; to which the defendant pleaded non assumpsit.

The case as stated, admitted that on the 16th of May, 1792, the defendant appeared before the Hon. John Jay, William Cushing, and Richard Law, then being judges of the Circuit Court hold at New Haven, for the District of Connecticut, then and there sitting, and claiming to be commissioners under the Act of 1792, and exhibited the vouchers and testimony to show his right under that law to be placed on the pension list; and that the judges above named, being judges of the Circuit Court, and then and there sitting at New Haven, in and for the Connecticut District, proceeded, as commissioners designated in the said Act of Congress, to take the testimony offered by Todd, which is set out at large in the statement, together with their opinion that Todd ought to be placed on the pension list, and paid at the rate of two-thirds of his former monthly wages, which they understood to have been eight dollars and one third per month, and the sum of one hundred and fifty dollars for arrears.

The case further admits, that the certificate of their proceedings and opinions, and the testimony they had taken, were afterwards, on the 5th of May, 1792, transmitted to the Secretary of War, and that by means thereof Todd was placed on the pension list, and had received from the United States one hundred and fifty dollars for arrears, and twenty-two dollars and ninety-one cents claimed for his pension aforesaid, said to be due on the 2d of September, 1792.

And the parties agreed that if upon this statement the said judges of the Circuit Court sitting as commissioners, and not as a circuit court, had power and authority by virtue of said Act so to order and adjudge of and concerning the premises, that then judgment should be given for the defendant, otherwise for the United States, for one hundred and seventy-two dollars and ninety-one cents, and six cents costs.

The case was argued by Bradford, Attorney-General, for the United States, and Illinoise for the defendant; and the judgment of the court was rendered in favor of the United States for the sum above mentioned.

Chief Justice Jay and Justices Cushing, Wilson, Blair, and Interson were present at the decision. No opinion was filed stating the grounds of the decision. Nor was any dissent from the judgment entered on the record. It would seem, therefore, to have been unanimous, and that Chief Justice Jay and Justice Cushing became satisfied, on further reflection, that the power given in the Act of 1792 to the Circuit Court as a court, could not be construed to give it to the judges out of court as commissioners. It must be admitted that the justice of the claims and the meritorious character of the claimants would appear to have exercised some influence on their judgments in the first instance, and to have led them to give a construction to the law which its language would hardly justify upon the most liberal rules of interpretation.

The result of the opinions expressed by the judges of the Supreme Court of that day in the note to Hayburn's case, and in the case of the United States v. Todd, is this:

1. That the power proposed to be conferred on the Circuit Courts of the United States by the Act of 1792 was not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the courts.

2. That as the Act of Congress intended to confer the power on the courts as a judicial function, it could not be construed as an authority to the composing the court to exercise the power out of court in the character of commissioners.

3. That money paid under a certificate from per-

miss, upon the ground that the sum due to each complainant is severally and specifically decreed to him; and that the amount thus decreed is the sum in controversy between each representative and the appellant, and not the whole amount for which he has been held liable. But the court think the matter in controversy in the Kentucky court was the sum due to the representatives of the deceased collectively, and not the particular sum to which each was entitled when the amount due was distributed among them according to the laws of the State. They all claimed under one and the same title. They had a common and undivided interest in the claim; and it was perfectly immaterial to the appellant how it was divided among them. He had no controversy with either of them on this point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him." Vide 17 How. pp. 4, 5. This reasoning appears to be conclusive against the defect of multifariousness imputed to the claim of the appellees in this case; and we deem it equally so with respect to defendants sustaining an equal responsibility deducible from one and the same source.

The remaining objection arising upon the demurrer, which we deem it necessary to consider, is that urged against the right of the appellees to institute proceedings in equity in the State of Iowa, to enforce the decree rendered in their favor by the court in Kentucky. We can perceive no force in the effort to sustain 262*] this objection by citation of the 7th amendment of the Constitution of the United States, which provides, "that in suits at common law where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved." This provision, correctly interpreted, cannot be made to embrace the established, exclusive jurisdiction of courts of equity, nor that which they have exercised as concurrent with courts of law; but should be understood as limited to rights and remedies peculiarly legal in their nature; and such as it was proper to assert in courts of law, and by the appropriate modes and proceedings of courts of law.

With respect to the character and effects of decrees in chancery, although they now rank in dignity upon an equality with judgments at law, it is well known that they were once regarded as not being matters of record; and that the final process incident to judgments at law was unknown to and not permitted in courts of equity; that where such process has been permitted to them, it has been the result of statutory enactments. But the extension to a court of equity of the power to avail itself of common law process, cannot be regarded as applying any abridgment of the original constitutional powers or practice of the former; but as cumulative and ancillary, or as leaving those powers and that practice as they formerly existed, except as they should have been expressly restricted. Amongst the original and undoubted powers of a court of equity is that of entertaining a bill filed for enforcing and carrying into effect a decree of the same, or of a different court, as the exigencies of the case, or the interests of the parties may require.

Vide Story's Eq. Pl. secs. 429, 430, 431, upon 373

the authority of Mitford, Eq. Pl. 95, and of Cooper's Eq. Pl. pp. 93, 99.

In the present case the appellees were, by the residence of the appellant in a different state, cut off from the benefit of final process upon the decree of the State Court, which process would not run beyond the territorial jurisdiction of the State. They were left, therefore, to the alternative of instituting either an action or actions at law upon the decree in their favor, or of filing a bill for enforcing and carrying into effect that decree. Upon the former mode of proceeding, they would have been compelled to encounter circuitry, and most probably the technical exceptions urged in argument here, founded upon the nature of the decree with respect to its unity or divisibility. The appellees have elected, as the remedy most beneficial for them, and as we think they had the right to do, the proceeding bill in equity, to carry into execution the decree of the State Court. We can perceive no just exception to the jurisdiction of the District Court of Iowa in entertaining the bill of the appellants, nor with respect to the measure of relief decreed, nor with respect to the party against whom that relief has been granted.

We therefore order that the decree of the District Court of Iowa be affirmed.

*JOHN DEN, ex dem. James D. Murray, Appellants,
and John C. Knysor, Appellees.

THE HOBOKEN LAND AND IMPROVEMENT COMPANY.

(See S. C. 13 How. 272-280.)

Warrant from treasury against delinquent collector, is "due process of law" and not unconstitutional—adjustment of accounts of officer, not a judicial controversy—warrant, evidence of facts and authority—not invalid by Constitution, because issued without oath—levy on lands, prima facie evidence of want of goods.

A distress warrant issued by the Solicitor of the Treasury under the Act of May 15, 1820, against a delinquent collector, is not in conflict with the Constitution, but is "due process of law."

The adjustment of the balances due from accounting officers, is not necessarily a judicial controversy.

There is a distinction between claims of government for their taxes and all others, which may be carried out by summary methods of proceeding.

When the Act of 1820 enacts that after levy of the distress warrant has begun, the collector may bring before the District Court the question whether he is indebted as recited in the warrant, and give security and avert the proceedings, it simply waives a privilege which belongs to the government; by granting it, nothing which may not be the subject of judicial cognizance is brought before the court.

The action of the executive power in issuing the warrant, pursuant to the Act of 1820, is conclusive evidence of the facts recited in it, and of the authority to make a levy.

The warrant was not invalid because it was issued without oath or affirmation, and so forbidden by the 4th article of the Amendments to the Constitution.

The return of the marshal that he had levied on lands by virtue of the warrant, is prima facie evidence that there were no goods and chattels to levy on.

Argued Jan. 30 and 31, and Feb. 1 and 4, 1854.
Decided Feb. 19, 1856.

ON A certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of New Jersey.

The case is stated by the court.

Messrs. Edgar S. Van Winkle, George Wood and J. D. Miller, for the plaintiff:

The warrant of distress issued by the Solicitor of the Treasury was not sufficient, under the Constitution of the United States, to transfer the title to the premises in question, as against the lessors of the plaintiff. The laws under which it was issued are unconstitutional. This summary proceeding was, in substance and effect, a judicial proceeding, and could only be taken and carried out under the judicial power.

The Constitution of the United States, art. 3, secs. 1 and 2, Federalist No. 50, etc., *Iloke v. Henderson*, 4 Dev. 1; *Ex parte Randolph*, 2 Brock. 417; *Robinson v. Campbell*, 3 Wheat. 212; *U. S. v. Nourse*, 9 Pet. 3; *Bank of the State v. Cooper*, 2 Yerg. 399; *Killburn v. Woodworth*, 5 Johns. 37; Art. 7, Amend. to the Const.

This process deprives of liberty and property, contrary to the 5th article of Amendments to the Constitution.

Co. Lit. 2 Inst. 47 *Magna Charta*, Ch'y, 29 and 8; 2 *Kent's Com.* 5th ed. 13; *Sto. Const.* 1783; *Sullivan's Lectures*, C. 39, 40; *Taylor v. Porter*, 4 Hill, 146; *Fletcher v. Peck*, 6 Cr. 135; *Bank of Columbia v. Okely*, 4 Wheat. 235; *Van Zant v. Waddel*, 2 Yerg. 260; *Jones v. Perry*, 10 Yerg. 39; *Lane v. Dorman*, 3 Seam. 228; *White v. White*, 5 Barb. 481; *Holden v. James*, 11 Mass. 404.

If the warrant of distress be constitutional, the statute authorizing it must be regularly pursued, and should appear to be so on the face of the proceedings.

U. S. v. Nourse, 6 Pet. 470; 9 Pet. 3; *Smith v. Hileman*, 1 Seam. 323; *Thatcher v. Powell*, 6 Wheat. 119.

Messrs. A. O. Zabriskie, J. P. Bradley, and R. H. Gillett, for the defendants:

This is a mere proceeding upon distress and sale to raise an amount alleged to be due, without any adjudication or judicial proceeding to ascertain or settle the amount due. There are none of the usual characteristics of judicial proceeding. It is not a "case" or "controversy," within the meaning of the Constitution.

3 *Bl. Com.* 3 and 8; *U. S. v. Ferreira*, 13 How. 40; *U. S. v. Nourse*, 6 Pet. 470; 9 Pet. 3. Distress and sale for taxes has never been held illegal, but has been sanctioned by the uniform action of the courts.

Parker v. Rule, 9 Cranch, 61; *Williams v. Peyton*, 4 Wheat. 77; *U. S. v. Bullock*, cited 6 Pet. 485; *U. S. v. Nourse*, 4 Cranch, C. C. 151; *Union Tow Boat Co. v. Bordelon*, 7 La. Ann. 192.

When a statute introduces a new remedy or a new mode of procedure, then to obtain the benefit of that new remedy or new mode of procedure, the directions of the statute must be pursued; but without negative words, it does not supersede any remedy or mode of procedure before existing. But when the statute is declaratory of the common law, then affirmative words, though positive, are not imperative or compulsive.

Rex v. Woodstanton, 1 Holt. Littl. Cas. 610; *Rex v. Lester*, 7 L. & C. 12; *Rex v. Lordale*, 15 L. ed.

1 *Burr.* 447; *Pond v. Negus*, 3 Mass. 230; *Jackson v. Young*, 1 Cow. 131; *People v. Allen*, 6 Wend. 430; *People v. Peck*, 11 Wend. 604; *Marchant v. Langworthy*, 6 Hill, 646; *People v. Holley*, 12 Wend. 481; *U. S. Bank v. Dandridge*, 12 Wheat. 64; *In re Mohawk & Hudson R. R. Co.* 19 Wend. 130; *People v. Cook*, 14 Barb. 290; *Morril v. Gardner, Spencer, N. J.* 673; *Wilson v. Troup*, 2 Cow. 195.

Mr. Justice Curtis delivered the opinion of the court:

This case comes before us on a certificate of division of opinion of the judges of the Circuit Court of the United States for the District of New Jersey. It is an action of ejectment, in which both parties claim title under Samuel Swartwout—the plaintiffs, under the levy of an execution on the 10th day of April, 1839, and the defendants, under a sale made by the Marshal of the United States for the District of New Jersey, on the 1st day of June, 1839—by virtue of what is denominated a distress warrant, issued by the Solicitor of the Treasury under the Act of Congress of May 15, 1820, entitled, "An Act providing for the better organization of the Treasury Department." This Act having provided, by its first section, that a lien for the amount due should exist on the lands of the debtor from the time of the levy and record thereof in the office of the District Court of the United States for the proper district, and the date of that levy in this case being prior to the date of the judgment under which the plaintiffs' title was made, the question occurred in the Circuit Court, "whether the said warrant of distress in the special verdict mentioned, and the proceedings thereon and anterior thereto, under which the defendants claim title, are sufficient, under the Constitution of the United States and the law of the land, to pass and transfer the title and estate of the said Swartwout in and to the premises in question, as against the lessors of the plaintiff." Upon this question, the judges being of opposite opinions, it was certified to this court, and has been argued by counsel.

No objection has been taken to the [275] warrant on account of any defect or irregularity in the proceedings which preceded its issue. It is not denied that they were in conformity with the requirements of the Act of Congress. The special verdict finds that Swartwout was Collector of the Customs for the port of New York for eight years before the 20th of March, 1828; that, on the 10th of November, 1838, his account, as such Collector, was audited by the first Auditor, and certified by the first Comptroller of the Treasury; and for the balance thus found, amounting to the sum of \$1,374.119.65, the warrant in question was issued by the Solicitor of the Treasury. Its validity is denied by the plaintiffs, upon the ground that so much of the Act of Congress as authorized it is in conflict with the Constitution of the United States.

In support of this position, the plaintiff relies on that part of the first section of the third article of the Constitution which requires the judicial power of the United States to be vested in one supreme court and in such inferior courts as Congress may, from time to time,

ordain and establish; the judges whereof shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office. Also, on the second section of the same article, which declares that the judicial power shall extend to controversies to which the United States shall be a party.

It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceedings.

The question, whether these acts were an exercise of the judicial power of the United States, can best be considered under another inquiry, raised by the further objection of the plaintiff, that the effect of the proceedings authorized by the Act in question is to deprive the party, against whom the warrant issues, of his liberty and property "without due process of law;" and therefore, is in conflict with the fifth article of the Amendments of the Constitution.

~~These objections together, raise~~ the questions, whether, under the Constitution of the United States, a Collector of the Customs, from whom a balance of account has been found to be due by accounting officers of the Treasury, designated for that purpose by law can be deprived of his liberty or property, [?] "in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the Constitution; and if so; then, second, whether the warrant in question was such due process of law.

The words "due process of law," were undoubtedly intended to convey the same meaning as the words "by the law of the land," in Magna Charta. Lord Coke, in his commentary on those words (2 Inst. 50), says, they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal Constitution, following the language of the Great Charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land." The Ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the River Ohio, used the words:

~~The Constitution of the United States, as~~ ~~adopted contained the provision, that the trial~~ ~~of all crimes, except in cases of impeachment,~~ ~~shall be by jury." When the fifth article of amendment containing the words now in question was made, the trial by jury in criminal cases had thus already been provided for. By the sixth and seventh articles of amendment, further special provisions were separately made for that mode of trial in civil and criminal~~

tutions, and in the Ordinance of 1787, the words of Magna Charta, and declared that no person shall be deprived of his life, liberty or property, but by the judgment of his peers of the law of the land, would have been in part superfluous and inappropriate. To have taken the clause, "law of the land," without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on Magna Charta had declared to be the true meaning of the phrase, "law of the land," in that instrument, and which were undoubtedly then received as their true meaning.

That the warrant now in question is legal process, is not denied. It was issued in conformity with an Act of Congress. "But is it due process of law?" The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law," by its mere will. To what principles, then, are we to resort to ascertain whether this process [?] enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the Crown, and especially those due from receivers of the revenues. It is difficult, at this day, to trace with precision all the proceedings had for these purposes in the earliest ages of the common law. That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of Magna Charta treats of their restraint. It declares: "We or our bailiffs shall not seize any land or rent for any debt as long as the present goods and chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to satisfy therefor. Neither shall the pledges of the debtor be distrained, as long as the principal debtor is sufficient for the payment of the debt; and if the principal debtor fail in payment of the debt, having nothing wherewith to pay, or will not pay where he is able, the pledges shall answer for the debt. And if they will, they shall have the lands and rents of the debtor until they be satisfied of the debt which they before paid for him, except that the principal debtor can show himself to be acquitted against the said sureties."

By the common law, the body, lands and

goods of the King's debtor were liable to be levied on to obtain payment. In conformity with the above provision of Magna Charta, a conditional writ was framed, commanding the sheriff to inquire of the goods and chattels of the debtor, and if they were insufficient, then to extend on the lands. 3 Co. 12 b; Com. Dig. Debt, G, 2; 2 Inst. 19. But it is said that since the Statute 33 H. VIII. ch. 39, the practice has been to issue the writ in an absolute form, without requiring any previous inquisition as to the goods. Gilbert's Exch. 127.

must be matter of record in the King's quer. The 33 H. VIII. ch. 39, sec. 50, all specialty debts due to the King, of the force and effect as debts by statute staple, giving to such debts the effect of debts of record. In regard to debts due upon simple contract, other than those due from collectors of the revenue and other accountants of the Crown, the practice, from very ancient times, has been to issue a commission upon the goods of the debtor.

This commission being returned, the debt found was thereby evidenced by a record, and an extent could issue thereon. No notice was required to be given to the alleged debtor of the execution of this commission (2 Tidd's Pr. 1047); though it seems that, in some cases, an order for notice might be obtained. 1 Ves. 269. Formerly, no witnesses were examined by the commission, (Chitty's Prerog. 267; West, 22); the affidavit prepared to obtain an order for an immediate extent being the only evidence introduced. But this practice has been recently changed. 11 Price, 29. By the Statute 13 Eliz. ch. 4, balances due from receivers of the revenue and all other accountants of the Crown were placed on the same footing as debts acknowledged to be due by statute staple. These balances were found by auditors, the particular officers acting thereon having been, from time to time, varied, by legislation and usage. The different methods of accounting in ancient and modern times are described in Mr. Price's Treatise on the Law and Practice of the Exchequer, ch. 9. Such balances, when found, were certified to what was called the Pipe-Office, to be given in charge to the sheriffs for their levy. Pr. 231.

... a process was issued, termed a capias in the district, against the body, goods and lands of the accountant. Price, 232, 162.

This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due from receivers of the revenue in England; is sufficient to show that the methods of ascertaining the existence and amount of such debts, and compelling their payment, have varied widely from the usual course of the common law on other subjects; and that, as respects such debts due from such officers, "the law of the land" authorized the employment of auditors, and an inquisition without notice, and a writ of execution bearing a very close resemblance to a writ of fieri facias.

It is certain that this diversity in "the law of the land" between public defaulters and ordinary debtors was understood in this country.

... and entered into the legislation of the colonies and provinces, and more especially of the States, after the Declaration of Independence and before the formation of the Constitution of the United States. Not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it: Without a wearisome repetition of details, it will be sufficient to give one section from the Massachusetts Act of 1796: "That if any constable or collector, to whom any tax or assessment shall be committed to collect, shall be remiss and negligent of his duty, in not levying and paying unto the treasurer and receiver-general such sum or sums of money as he shall from time to time have received, and as ought by him to have been paid within the respective time set and limited by the assessor's warrant, pursuant to law, the treasurer and receiver-general is hereby empowered, after the expiration of the time so set, by warrant under his hand and seal, directed to the sheriff or his deputy, to cause such sum and sums of money to be levied by distress and sale of such deficient constable or collector's estate, real and personal, returning the overplus, if any there be; and for want of such estate, to take the body of such constable or collector, and imprison him until he shall pay the same, which

warrant the sheriff or his deputy is hereby empowered and required to execute accordingly." Then follows another provision, that if the deficient sum shall not be made by the first warrant, another shall issue against the town; and if its proper authorities shall fail to take the prescribed means to raise and pay the same, a like warrant of distress shall go against the estates and bodies of the assessors of such town. Laws of Massachusetts, Vol. I, p. 266. Provisions not distinguishable from these in principle may be found in the Acts of Connecticut, Revision of 1781, p. 193; of Pennsylvania, 1782, 2 Laws of Penn. 13; of South Carolina, 1788, 6 Stats. of S. C. 55, New York, 1788, 1 Jones & Varick's Laws, 34; see also, 1 Henning's Stats. of Virginia, 319, 343; 12 Ib. 562; Laws of Vermont (1797, 1800) 340. Since the formation of the Constitution of the United States, other States have passed similar laws. See 7 La. Ann. 192. Congress, from an early period, and in repeated instances, has legislated in a similar manner. By the fifteenth section of the "Act to lay and collect a direct tax within the United States," of July 14, 1798, the supervisor of each district was authorized and required to issue a warrant of distress against any delinquent collector and his sureties, to be levied upon the goods and chattels, and for want thereof upon the body of such collector; and failing of satisfaction thereby, upon the goods and chattels of the sureties. 1 Stat. at L. 602. And again, in 1813, 3 Stat. at L. 33, sec. 29, and 1815, 3 Stat. at L. 177, sec. 33, the Comptroller of the Treasury was empowered to issue a similar warrant against collectors of the customs and their sureties. This legislative construction of the Constitution, commencing so

Seizure
warrant
in rem

280") early in the government, "when the first occasion for this manner of proceeding arose, continued throughout its existence and repeatedly acted on by the judiciary and the executive, is entitled to no inconsiderable weight upon the question whether the proceeding adopted by it was "due process of law." Prigg v. Pennsylvania, 16 Pet. 621; U. S. v. Nourse, 9 Pet. 3; Randolph's case, 2 Brock. 447; U. S. v. Nourse, 4 Cranch, C. C. 151; U. S. v. Bullock, cited 6 Pet. 455, note.

England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the Act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the Government from a Collector of Customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings. For, though "due process of law" generally implies and includes actor, reus, iudex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, 2 Inst. 47; 60; Hoke v. Henderson, 4 Dev. N. C. 15; Taylor v. Porter, 4 Ill. 146; Van Zandt v. Waddel, 2 Yerger, 260; 509; State Bank v. Cooper, Ibid. 509; Jones v. Heirs v. Perry, 1 Yerg. 50; Greene v. Briggs, 1 Curtis, yet, this is not universally true. There may be, and we have seen that there are cases, under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands and goods of certain public debtors without any such trial; and this brings us to the question, whether those provisions of the Constitution which relate to the judicial power are incompatible with those proceedings.

That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the Act of the President in calling out the militia under the Act of 1795, 12 Wheat. 19, or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient, to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. United States v. Ferreira, 13 How. 40. It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party within the meaning of the 2d section of the 23d article of the Constitution. We do not doubt the power of Congress to provide by law that such a question shall form the subject matter of a suit in which the judicial power can be exerted. The Act of 1820 makes such a provision for reviewing the decision of the accounting officers of the Treasury. But until reviewed it is final and binding; and the question is, whether its subject matter is necessarily, and with regard to the consent of Congress, a judicial controversy. And we are of opinion it is not.

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Among the legislative powers of Congress are the powers "to lay and collect taxes; duties, imposts, and excises; to pay the debts, and provide for the common defense and welfare of the United States; to raise and support armies; to provide and maintain a navy, and to make all laws which may be necessary and proper for carrying into execution these powers." What officers should be appointed to collect the revenue thus authorized to be raised, and to disburse it in payment of the debts of the United States; what duties should be required of them; when, and how, and to whom they should account, and what security they should furnish, and to what remedies they should be subjected to enforce the proper discharge of their duties, Congress was to determine. In the exercise of these powers, they have required collectors of customs to be appointed; made it incumbent on them to account, from time to time, with certain officers of the Treasury Department, and to furnish sureties by bond, for the payment of all balances of the public money which may become due from them. And by the Act of 1820, now in question, they have undertaken to provide summary means to compel these officers—and in case of their default, their sureties—to pay such balances of the public money as may be in their hands.

The power to collect and disburse revenue, and to make all laws that shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution. The power has not been exhausted by the receipt of the money by the Collector. Its purpose is to raise money and use it in payment of the debts of the government; and whoever may have possession of the public money, until it is actually disbursed, the power to use those known and appropriate means to secure its due application continues.

As we have already shown, the means provided by the Act of 1820 do not differ in principle from those employed in England from remote antiquity—and in many of the States, so far as we know, without objection—for this purpose, at the time the Constitution was formed. It may be added, that [282] probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties; but always in some way observed and yielded to.

It is true that in England all these proceedings were had in what is denominated the Court of Exchequer, in which Lord Coke says, 4 Inst. 115, the barons are the sovereign auditors of the kingdom. But the barons exercise in person no judicial power in auditing accounts, and it is necessary to remember that the exchequer includes two distinct organizations, one of which has charge of the revenues of the Crown, and the other has long been in fact,

15 How.

If you do not put
up for judicial
review it is final
& binding

and now is, for all purposes, one of the judicial courts of the kingdom, whose proceedings are and have been as distinct in most respects, from those of the revenue side of the exchequer, as the proceedings of the Circuit Court of this district are from those of the Treasury; and it would be an unwarrantable assumption to conclude that, because the accounts of receivers of revenue were settled in what was denominated the Court of Exchequer, they were judicial controversies between the King and his subjects, according to the ordinary course of the common law or equity. The fact, as we have already seen, was otherwise.

It was strongly urged by the plaintiff's counsel, that though the government might have the rightful power to provide a summary remedy for the recovery of its public dues, aside from any exercise of the judicial power, yet it had not done so in this instance. That it had enabled the debtor to apply to the judicial power, and having thus brought the subject matter under its cognizance, it was not for the government to say that the subject matter was not within the judicial power. That if it were not in its nature a judicial controversy, Congress could not make it such, nor give jurisdiction over it to the district courts. In short, the argument is, that if this were not, in its nature, a judicial controversy, Congress could not have conferred on the District Court power to determine it upon a bill filed by the Collector. If it be such a controversy, then it is subject to the judicial power alone; and the fact that Congress has enabled the District Court to pass upon it, is conclusive evidence that it is a judicial

We cannot admit the correctness of the last [233] position. If we were of opinion that this subject matter cannot be the subject of a judicial controversy, and that consequently it cannot be made a subject of judicial cognizance, the consequence would be, that the attempt to bring it under the jurisdiction of a court of the United States would be ineffectual. But, the previous proceedings of the Executive Department would not necessarily be affected thereby. They might be final, instead of being subject to judicial review.

But the argument leaves out of view an essential element in the case, and also assumes something which cannot be admitted.

It assumes that the entire subject matter is or is not, in every mode of presentation, a judicial controversy, essentially and in its own nature, aside from the will of Congress to permit it to be so; and it leaves out of view the fact that the United States is a party.

It is necessary to take into view some settled rules.

Though, generally, both public and private wrongs are redressed through judicial action, there are more summary extrajudicial remedies for both. An instance of extrajudicial redress of a private wrong is, the recapture of goods by their lawful owner; of a public wrong by a private person, is the abatement of a public nuisance; and the recovery of public dues by a summary process of distress, issued by some public officer authorized by law, is an instance of redress of a particular kind of public wrong, by the act of the public through its authorized

L. C.

agents. There is, however, an important distinction between these. Though a private person may retake his property, or abate a nuisance, he is directly responsible for his acts to the proper judicial tribunals. His authority to do these acts depends not merely on the law, but upon the existence of such facts as are, in point of law, sufficient to constitute that authority; and he may be required, by an action at law, to prove those facts; but a public agent, who acts pursuant to the command of a legal precept, can justify his act by the production of such precept. He cannot be made responsible in a judicial tribunal for obeying the lawful command of the government; and the government itself, which gave the command, cannot be sued without its own consent.

At the same time there can be no doubt that the mere question, whether a Collector of the Customs is indebted to the United States, may be one of judicial cognizance. It is competent for the United States to sue any of its debtors in a court of law. It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just. Though both the marshal and the government are exempt from suit, for anything done by the former in obedience to legal process, still Congress may provide by law that both, or either, shall, in a particular class of cases, and under such restrictions as they may think proper to impose, come into a court of law or equity and abide by its determination. The United States may thus place the government upon the same ground which is occupied by private persons who proceed to take extrajudicial remedies for their wrongs, and they may do to such extent, and with such restrictions, as may be thought fit.

When, therefore, the Act of 1820 enacts, that after the levy of the distress warrant has been begun the Collector may bring before a district court the question, whether he is indebted as recited in the warrant, it simply waives a privilege which belongs to the government, and consents to make the legality of its future proceedings dependent on the judgment of the court; as we have already stated in case of a private person, every fact upon which the legality of the extrajudicial remedy depends may be drawn in question by a suit against him. The United States consents that this fact of indebtedness may be drawn in question by a suit against them. Though they might have withheld their consent, we think that, by granting it, nothing which may not be a subject of judicial cognizance is brought before the court.

To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withhold from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the

Dec. Term,

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United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of Congress whether a remedy in the courts shall be allowed at all, in such cases they may regulate it and prescribe such rules of determination as they may think just and needful. Thus it has been repeatedly decided in this class of cases, that upon their trial, the acts of executive officers, done under the authority of Congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title.

Foley v. Harrison, 15 How. 433; Burgess v. Gray, 16 How. 48.

It is true, also, that even in a suit between private persons to try a question of private right, the action of the executive power, upon a matter committed to its determination by the Constitution and laws, is conclusive.

Luther v. Borden, 7 How. 1; Doe v. Braden, 15 How. 635.

Applying these principles to the case before us, we say that, though a suit may be brought against the marshal for seizing property under such a warrant of distress, and he may be put to show his justification; yet the action of the executive power in issuing the warrant, pursuant to the Act of 1820, passed under the powers to collect and disburse the revenue granted by the Constitution, is conclusive evidence of the facts recited in it, and of the authority to make the levy; that though no suit can be brought against the United States without the consent of Congress, yet Congress may consent to have a suit brought, to try the question whether the Collector be indebted, that being a subject capable of judicial determination, and may empower a court to act on that determination, and restrain the levy of the warrant of distress within the limits of the debt judicially found to exist.

It was further urged that, by thus subjecting the proceeding to the determination of a court, it did conclusively appear that there was no such necessity for a summary remedy, by the action of the executive power, as was essential to enable Congress to authorize this mode of proceeding.

But it seems to us that the just inference from the entire law is, that there was such a necessity for the warrant and the commencement of the levy, but not for its completion, if the collector should interpose, and file his bill and give security. The provision that he may file his bill and give security, and thus arrest the summary proceedings, only proves that Congress thought it not necessary to pursue them, after such security should be given, until a decision should be made by the court. It has no tendency to prove they were not, in the judgment of Congress, of the highest necessity under all other circumstances; and of this necessity Congress alone is the judge.

The remaining objection to this warrant is, that it was issued without the support of an oath or affirmation, and so was forbidden by the 4th article of the Amendments of the Constitution. But this article has no reference to civil proceedings for the recovery of debts, of which a search warrant is not made part. The proceeding in this case, is termed, in the Act of

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Congress, a warrant of distress. The name bestowed upon it cannot affect its constitutional validity. In substance, it is an extent authorizing a levy for the satisfaction of a debt, and as no other authority is conferred, to make searches or seizures, than is ordinarily embraced in every execution issued upon a recognizance, or a stipulation in the admiralty, we are of opinion it was not invalid for this cause.

Some objection was made to the proceedings of the marshal under the warrant, because he did not levy on certain shares of corporate stock belonging to Swartwout, and because it does not appear, by the return of the warrant, that he had not goods and chattels wherewith to satisfy the exigency of the warrant. In respect to the corporate stocks, they do not appear to have been goods or chattels, subject to such levy at the time it was made; and the return of the marshal, that he had levied on the lands by virtue of the warrant, is, at least, prima facie evidence that his levy was not irregular, by reason of the existence of goods and chattels of the collector subject to his process.

The third question is, therefore, to be answered in the affirmative.

This renders the other questions proposed immaterial, and no answer need be returned there to.

The other two cases—John Den, ex dem., Jas. B. Murray, et al., v. The Hoboken Land and Improvement Co., and John Den, ex dem., Wm. P. Rathbone, et al., v. Rutsen Suckley et al., are disposed of by this opinion, the same questions having been certified therein.

WILLIAM D. NUTT, Ex'r of Alexander Hunter, Deceased, Plaintiff in Error,

v.

PHILIP H. MINOR.

(See S. C. 13 How. 237-239.)

Where there is evidence of promise, case must go to the jury.

Where the case depended on proof of a promise, and there is evidence from which the jury might infer a promise, it is the duty of the Circuit Court to leave the fact to the jury.

Argued Feb. 7, 1856. Decided Feb. 25, 1856.

IN ERROR to the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

Messrs. Joseph H. Bradley and H. Winter Davis, for the plaintiff in error.

This cause was formerly before this court—Nutt v. Minor, 14 How. 464.

The evidence is not varied, so as to change the relative rights of the parties. Where there is an entire absence of any evidence from which the jury would be legally justified in finding any fact essential to the case of either plaintiff or defendant, it is proper for the court so to instruct them.

Parks v. Ross, 11 How. 362.

Mr. A. H. Lawrence and Messrs. Badger and Carlisle, for the defendant in error:

The court will not disturb a verdict so well founded in equity and conscience.

Jacobson v. LeGrange, 3 Johns. 199.

13 How.

proposition to say, that a state cannot, by her own consent, appear in any other court, than the supreme court. The general rule applies among all sovereigns, who, as equals, are not amenable to courts of each other; and yet I remember an action was instituted and sustained, some years ago, in the name of Louis XVI. king of France, against Mr. Robert Morris, in the supreme court of Pennsylvania.

Under these impressions, I am disposed to think, that the state of Georgia ought rather to have sued out a writ or error, than to have asked for an injunction. But still, in the ex-408*)isting *circumstances of the case, I have no objection to retain the money within the power of the court, till we can better satisfy ourselves both as to the remedy and the right.

CHITING, Justice:—The judicial act expressly declares, that "suits in equity shall not be sustained, in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." Now, if Georgia has any right to the debt in question, it is a right at law, for which, of course, the law will furnish a plain, adequate, and complete remedy. The decision of the circuit court, in a case to which Georgia was neither party nor privy, did not, and could not take away either the right or the remedy of the state. Nor can Spaulding, the defendant below, be made liable twice, for the same debt, without his wilful laches. For, it is in his power to bring writ of error; and then the whole merits of the claim of Georgia appearing on the record, we must decide it as a question of law, either by affirming or reversing the judgment, so as to bind us in any suit, which Georgia might institute for the same cause.

Beside, the state of Georgia (notwithstanding the judgment of the circuit court) may bring an action of *indebitatus assumpsit* against Brailsford (who as a man of fortune, after they have received the money, upon the principle of *Moss versus M'Farland*, and with stronger reason; as in that case the parties, in both courts, were the same; but, in the case proposed, they would be different, and one of them has never been heard. In some form, therefore, Georgia may obtain complete redress at law.

I do not, upon the whole, consider the refusal of Spaulding to bring a writ of error (which he is not compellable to bring) nor any other suggestion in the bill, as a sufficient foundation for exercising the equitable jurisdiction of the court; and consequently, I think that an injunction ought not to be awarded.

JAY, Chief Justice:—My first ideas were unfavorable to the motion; but many reasons have been urged, which operate forcibly to produce a change of opinion.

The great question turns on the property of a certain bond;—whether it belongs to Brailsford or to Georgia? It is put in suit by Brails-

ford; but if Georgia, by virtue of the confiscation act, is really entitled to the debt, she is entitled to the money, though the evidence of the debt happened to be in the possession of Brailsford, and though Brailsford has, by that means, obtained a judgment for the amount.

Then the only point to be considered is—whether, under these circumstances, it is not equitable to stay the money in the hands (*409 of the marshal, till the right to it is fairly decided; and so avoid the risk of putting the true owner to a suit, for the purpose of recovering it back?

For my part, I think that the money should remain in the custody of the law, till the law has adjudged to whom it belongs; and, therefore, I am content, that the injunction issue. An injunction granted.¹

S. C. 3 D. 415, 3 D. 1.
Cited, 2 Dall. 422; 1 Pet. 122; 5 Pet. 29; 2 How. 27; 9 How. 29, 13 How. 333; 17 How. 230; 24 How. 94.

HAYBURN'S CASE.

THIS was a motion for a *mandamus* to be directed to the circuit court for the district of Pennsylvania, commanding the said court to proceed in a certain petition of Wm. Hayburn, who had applied to be put on the pension list of the United States, as an invalid pensioner.

The principal case arose upon the act of Congress passed the 2d of March, 1791.

The Attorney General (*Sendolph*) who made the motion for the *mandamus*, having promised that it was done *ex officio*, without an application from any particular person, but with a view to procure the execution of an act of Congress particularly interesting to a meritorious and unfortunate class of citizens, the court declared that they entertained great doubt upon his right, under such circumstances, and in a case of this kind, to proceed *ex officio*; and directed him to state the principles on which he attempted to support the right. The attorney general, accordingly, entered into an elaborate description of the powers and duties of his office:

But the Court being divided in opinion on that question, the motion, made *ex officio*, was not allowed.

The attorney general then changed the ground of his interposition, declaring it to be at the instance, and on behalf of Hayburn, a party interested; and he entered into the merits of the case, upon the acts of Congress, and the refusal of the judges to carry it into effect.

The Court observed, that they would hold the motion under advisement, until the next term; but no decision was ever pronounced, so the legislature, at an intermediate *ses- (*410 sion, provided, in another way, for the relief of the pensioners.¹

Cited, 13 How. 42, 50; 1 Hatchf. 72.

1.—See the same case, *supra*, 3 vol. D. 1, as well on a motion to dissolve the injunction, as on a trial of the merits, upon a feigned issue.

2.—See an act passed the 23d Feb. 1793.—As the reasons assigned by the judges, for declining to execute the first act of Congress, involve a great constitutional question, it will not be thought improper to subjoin them, in illustration of Hayburn's case.
The circuit court for the district of New York

(consisting of JAY, Chief Justice, CHITING, Justice, and HUNTER, District Judge) proceeded on the 21st of April, 1791, to take into consideration the act of Congress entitled "An act to provide for the settlement of the claims of widows and orphans" "barred by the limitations heretofore established," and to regulate the claims to invalid pensions; and were, thereupon, unanimously, of opinion and advised,

"That by the Constitution of the United States, the government thereof is divided into three dis-
Dall. 2

411*]

*RULE.

Practice of Courts of King's Bench and Chancery in England affords outlines for the Practice of Supreme Court.

THE Attorney General having moved for information, relative to the system of practice by which the attorneys and counsellors of this court shall regulate themselves, and of

distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.

"That neither the Legislative nor the Executive branches, can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner."

"That the duties assigned to the circuit courts, by this act, are not of that description, and that the act itself does not appear to contemplate them, as such; in as much as it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the secretary at war, and then to the revision of the Legislature; whereas, by the constitution, neither the secretary at war, nor any other executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court."

"As, therefore, the business assigned to this court, by the act, is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it, by official, instead of personal, designation."

"That the judges of this court regard themselves as being the commissioners designated by the act, and therefore as being at liberty to accept or decline that office."

"That as the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress; and as the judges desire to manifest, on all proper occasions, and in every proper manner, their high respect for the national Legislature, they will execute this act in the capacity of commissioners."

"That as the Legislature have a right to extend the session of this court for any term, which they may think proper by law to assign, the term of five days, as directed by this act, ought to be punctually observed."

"That the judges of this court will, as usual, during the session thereof, adjourn the court from day to day, or other short periods, as circumstances may render proper, and that they will, regularly, between the adjournments, proceed as commissioners to execute the business of this act in the same court room, or chamber."

The circuit court for the district of Pennsylvania, consisting of Wilson, and Blair, Justices, and Perrine, District Judge, made the following representation, in a letter jointly addressed to the President of the United States, on the 18th of April, 1792.

"To you it officially belongs to 'take care that the laws' of the United States 'be faithfully executed.'" Before you, therefore, we think it our duty to lay the sentiments, which, on a late painful occasion, governed us with regard to an act passed by the Legislature of the Union.

"The people of the United States have vested in Congress all legislative powers granted in the constitution."

"They have vested in one Supreme court, and in such inferior courts as the Congress shall establish, the judicial power of the United States."

"It is worthy of remark, that in Congress the whole legislative power of the United States is concentrated. An important part of that power was exercised by the people themselves, when they 'ordained and established the constitution.'"

"This Constitution is 'the Supreme Law of the Land.'" This supreme law "all judicial officers of the United States are bound, by oath or affirmation to support."

"It is a principle important to freedom, that in government, the judicial should be distinct from, and independent of, the legislative department: To this important principle the people of the United States, in forming their constitution, have manifested the highest regard."

Dall. 2.

the place in which rules in causes here [*412] depending shall be obtained, the Chief Justice, at a subsequent day, stated that

"The Court considers the practice [*413] of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from [*414] time to time, make such alterations therein, as circumstances may render necessary."

"They have placed their judicial power not in Congress, but in 'courts.'" They have ordained that the "judges of those courts shall hold their offices during good behavior," and that "during their continuance in office, their salaries shall not be diminished."

"Congress have lately passed an act, to regulate, among other things, 'the claims to invalid pensions.'"

"Upon due consideration, we have been unanimously of opinion, that under this act, the Circuit court held for the Pennsylvania district could not proceed."

"1st. Because the business directed by this act is not of a judicial nature. It forms no part of the power vested by the constitution in the courts of the United States; the circuit court must, consequently, have proceeded without constitutional authority."

"2d. Because, if, upon that business, the court had proceeded, its judgments (for its opinions are its judgments) might, under the same act, have been revised and controlled by the Legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and, consequently, with that important principle which is so strictly observed by the constitution of the United States."

"These, Mr. are the reasons of our conduct. We assure that, though it became necessary, it was far from being pleasant. To be obliged to act contrary, either to the obvious directions of Congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us, which we never to experience again."

The circuit court for the district of North Carolina (consisting of Izumi, Justice, and Birnie, District Judge) made the following representation in a letter jointly addressed to the President of the United States, on the 6th of June, 1792.

"We, the judges now attending at the circuit court of the United States for the district of North Carolina, conceive it our duty to lay before you some important observations which have occurred to us in the consideration of an act of Congress lately passed, entitled 'an act to provide for the settlement of the claims of widows and orphans, barred by the limitations heretofore established, and to regulate the claims to invalid pensions.'"

"We beg leave to premise, that it is as much our inclination, as it is our duty, to receive with all possible respect every act of the Legislature; and that we never can find ourselves in a more painful situation than to be obliged to object to the execution of any, more especially to the execution of one founded on the purest principles of humanity and justice, which the act in question undoubtedly is. But, however lamentable a difference in opinion really may be, or with whatever difficulty we may have formed an opinion, we are under the indispensable necessity of acting according to the dictates of our own judgment, after duly weighing every consideration that can occur to us; which we have done on the present occasion."

"The extreme importance of the case, and our desire of being explicit beyond the danger of being misunderstood, will, we hope, justify us in stating our observations in a systematic manner. We therefore, sir, submit to you the following:—"

"1. That the legislative, executive, and judicial departments, are each formed in a separate and independent manner; and that the ultimate basis of each is the constitution only within the limits of which each department can alone justify any act of authority."

"2. That the Legislature, among other important powers, unquestionably possess that of establishing the courts in such a manner as to their wisdom shall appear best, limited by the terms of the constitution only; and to whatever extent that power

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415] FEBRUARY TERM, 1793.

THE STATE OF GEORGIA

versus
BRAILSFORD, et al.OSWALD, Administrator,
versus
The STATE OF NEW YORK.

Judgment entered by default against a state for want of appearance.

PROCLAMATION was made in this cause, "that any person having authority to appear for the state of New York is required to appear accordingly;" and no person appearing it was ordered, on motion of *Coxe*, for the plaintiff,

By THE COURT:—Unless the state appears by the first day of next term to the above suit, or show cause to the contrary, judgment will be entered by default against the said state.

1.—See ante, p. 401 and also post, 419. *Chisholm, executor, versus Georgia*. Cutting, administrator, versus *South Carolina*. *Grayson versus Virginia*. S. C. 2 Dall. 402; cited—3 Dall. 1: 6 Pet. 225; 24 How. 50.

may be exercised, or however severe the duty they may think proper to require, the judges, when appointed in virtue of any such establishment, owe implicit and unreserved obedience to it.

2. That at the same time such courts cannot be warranted, as we conceive, by virtue of that part of the constitution delegating judicial power, for the exercise of which any act of the legislature is provided. In exercising (even under the authority of another act) any power not in its nature judicial, or, if judicial, not provided for upon the terms the constitution requires.

3. That whatever doubt may be suggested whether the power in question is properly of a judicial nature, yet inasmuch as the decision of the court is not made final, but may be at least suspended in its operation by the secretary at war if, he shall have cause to suspect imposition or mistake; this subjects the decision of the court to a mode of revision which we consider to be unwarranted by the constitution; for, though Congress may certainly establish, in instances not yet provided for courts of appellate jurisdiction, yet such courts must consist of judges appointed in the manner the constitution requires, and holding their offices by no other tenure than that of their good behavior, by which tenure the office of secretary at war is not held. And we beg leave to add, with all due deference, that no decision of any court of the United States can, under any circumstances, be liable to a reversion, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested, but the largest one relative to impeachments.

"These, sir, are our reasons for being of opinion, as we are at present, that this circuit court cannot be justified in the execution of that part of the act, which requires it to examine and report an opinion on the unfortunate cases of officers and soldiers disabled in the service of the United States. The part of the act requiring the court to sit five days, for the purpose of receiving applications from such persons, we shall deem it our duty to comply with; for, whether it is our duty to comply can or cannot be answered, it is, as we conceive, our indispensable duty to keep open any court of which we have the honor to be judges, as long as Congress shall direct.

"The high respect we entertain for the legislature, our feelings as men for persons whose situation requires the earliest, as well as the most effectual relief, and our sincere desire to promote, whether officially or otherwise, the just and benevolent views of Congress, so conspicuous on the present as well as on many other occasions, have induced us to reflect, whether we could be justly

Injunction will be granted, in behalf of a state to stay money collected by a marshal, on a judgment obtained by a British creditor, on a debt contracted by the state, until it shall be decided to whom the money belongs.

BILL IN EQUITY. This cause was again brought before the court, upon a motion by *Randolph*, to dissolve the injunction, which had been issued, and to dismiss the bill. He assigned two grounds in support of his motion:—1st. That the state of Georgia had no remedy at law to recover the debt in question; and 2d. That even if there was a remedy at law, there was no equitable right to justify the present form of proceeding. The motion was opposed by *Ingersoll* and *Dallas*; and after argument, the opinions of the judges (in the absence of *Johnson, Justice*.) were delivered as follows:

IN DEBELL, Justice.—It is my misfortune to dissent from the opinion entertained by the rest

2.—See ante, p. 402, 3 vol. p. L.

in acting, under this act, personally in the character of commissioners during the session of a court; and could we be satisfied that we had authority to do so, we would cheerfully devote such part of our time as might be necessary for the performance of the service. But we confess we have great doubts on this head. The power appears to be given to the court only, and not to the judges of it; and as the secretary at war has not a discretion in all instances, but only in those where he has cause to suspect imposition or mistake, he withholds a person recommended by the court from being named on the pension list, it would be necessary for us to be well persuaded we possessed such an authority, before we exercised a power, which might be a means of drawing money out of the public treasury as effectually as an express appropriation by law. We do not mean, however, to preclude ourselves from a very deliberate consideration, whether we can be warranted in executing the purposes of the act in that manner, in case an application should be made.

"No application has yet been made to the court, or to ourselves individually, and therefore we have had some doubts as to the propriety of giving an opinion in a case which has not yet come regularly and judicially before us. None can be more sensible than we are of the necessity of judges being in general extremely cautious in not intimating an opinion in any case extra-judicially, because we well know how liable the best minds are, notwithstanding their utmost care, to a bias, which may arise from a pre-conceived opinion, even unawarded, much more deliberately, given. But in the present instance, as many unfortunate and meritorious individuals, whom Congress have justly thought proper objects of immediate relief, may suffer great distress even by a short delay, and may be utterly ruined by a longer one, we determined at all events to unke our sentiments known as early as possible, considering this as a case which must be deemed an exception to the general rule, upon every principle of humanity and justice; resolving however, that so far as we are concerned individually, in case an application should be made, we will most attentively hear it; and if we can be convinced this opinion is a wrong one, we shall not hesitate to act accordingly, being as far from the weakness of supposing that there is any approach to having committed an error, to which the greatest and best men are sometimes liable, as we should be from so low a sense of duty, as to think it would not be the slightest and most deserved reproach that could be bestowed on any man (such more on judges) that they were convicted, from any motive of recovering against conviction, in apparently maintaining an opinion, which they really thought to be erroneous." Dall. 2.

BRIEF IN SUPPORT OF
ARTICLE LII COURT AND JUDGE

87 C 48
District Court
Montgomery Co
22nd Jud District

BRIEF IN SUPPORT OF
ARTICLE III COURT AND JUDGE

The Constitution of the United States of America, Article III set forth a Separate and Distinct Branch of the Duly Ordained Republican form of Government, the "Judiciary." The vested Powers, Authority and the Proper qualified terms of Service, and Compensation of Constitutional Judges, are clearly expressed therein.

ARTICLE III, SECTION 1

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during the Continuance in Office."

The individuals who enter therein to act as Judges, and to exercise the vested Judicial Powers and Authority of the United States, are therefore subject to the Specific Performance as Mandated therein, including but not limited to "During Good Behavior."

The Framers of the Constitution had experienced and noted a Judiciary, dependent upon and submissive to the edicts of the Crown, and Parliament, as proclaimed in the Declaration Of Independence.

"He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers."

"He has made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."

"For protecting them, by mock trial, from punishment for murders which they should commit on the inhabitants of these states."

"For depriving us, in many cases, of the benefits of Trial by Jury."

For taking away our charters, abolishing our most Valuable Laws, and Altering Fundamentally The Forms Of Our Governments."

In observing the Mischief, the Framers, set forth a Remedy for the evils set upon them by the Crown through a Corrupt Judiciary. Therefore they felt the provision of "During Good Behavior" was a necessary and appropriate Mandate.

"The servile dependence of the Judges, in some States that have neglected to make proper provision on this subject endangers the liberty and property of the citizen; and I apprehend that, whenever it has happened that the appointment has been for a less period than During Good Behavior, this object has not been sufficiently secured; for if, every five or seven years, the Judges are obliged to make court for their appointment to Office, they cannot be styled independent. This is not the case with regard to those appointed under the general Government; for the judges here shall hold their Offices During Good Behavior."

(The Debates In the Several State Conventions On Adoption Of The Federal Constitution, (1901) Jonathan Elliot Ed.)

Hamilton stated that the provision of Good Behavior were the

Most Valuable of Improvements in the practice of Government.

"The standard of Good Behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the

*House Rules 602
They are subject to
impeachment*

practice of Government. In a Republic it is an excellent barrier to the encroachments and oppression of the Representative Body. And it is the best expedient which can be devised in any Government To Secure a Steady, Upright, and Impartial Administration of The Laws..."

(Federalist Papers No. 78)

Thomas Jefferson's observations of usurpation, consolidation and destruction of the Constitutional Republic was deeply rooted in the Judiciary as an oppressive and subversive tool.

"The great object of my fear is the Federal Judiciary. That body, like gravity, ever acting with noiseless foot and unalarming advance, gaining ground step by step and holding what it gains, is engulfing insidiously the (State) governments into the jaws of that which feeds them."

(The Writings Of Thomas Jefferson (1892-99), Paul Leicester Ford Ed., vol. 10 p.189)

Thomas Jefferson was quoted in The Writings Of Thomas Jefferson, by Albert Ellery Bergh (1907), vol. 15 p. 331 as stating his grave concern over the bent of the judiciary.

It has long...been my opinion, and I have never shrunk from its expression, that the germ of dissolution of our Federal Government is in the Constitution of the Federal Judiciary; an irresponsible body (for impeachment is scarcely a scarecrow), working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief over the field of jurisdiction, until all shall be usurped from the States and the Government of all be consolidated into one. To this I am opposed, because when all Government, domestic and foreign, in little and great things, shall be drawn to Washington as the center of all power, it will render powerless the checks provided one Government on another, and will become as venal and oppressive as the Government from which we separated. It will be as in Europe, where every man must either pike or grudgeon hammer or anvil. Our functionaries and theirs are wares from the same

Workshop, made of the same materials and by the same hand. IF THE STATES LOOK WITH APATHY ON THIS SILENT DESCENT OF THEIR GOVERNMENT INTO THE GULF WHICH IS TO ALLOW ALL, WE HAVE ONLY TO WEEP OVER THE HUMAN CHARACTER FORMED UNCONTROLLABLE BUT BY A ROD AND IRON, AND THE BLASPHEMERS OF MAN, AS INCAPABLE OF SELF-GOVERNMENT, BECOME HIS TRUE HISTORIANS."

These observations were noted again later in The Writings Of Thomas Jefferson, vol. 15 p. 341, Supra

Our Government is now taking so steady a course as to show by what road it will pass to destruction, to wit, by consolidation first, and then corruption, its necessary consequence. The engine of consolidation will be the Federal Judiciary; the two other branches the corrupting and corrupted instruments."

legislative body *executive body*
And further at p. 335, Supra:

"We already see the power, installed for life, responsible to no authority (for impeachment is not even a scarecrow) advancing with a noiseless and steady pace to the great object of consolidation. The foundations are already deeply laid by their decisions for the annihilation of Constitutional States Rights, and removal of every check, EVERY COUNTERPOISE TO THE ENGULFING POWER OF WHICH THEY THEMSELVES ARE TO MAKE A SOVEREIGN PART. IF EVER THIS VAST COUNTRY IS BROUGHT UNDER A SINGLE GOVERNMENT, IT WILL BE ONE OF THE MOST EXTENSIVE CORRUPTION, INDIFFERENT AND INCAPABLE OF A WHOLESOME CARE OVER SO WIDE A SPREAD OF SURFACE. This will not be borne, and you will have to choose between reformation and revolution. If I know the spirit of this country, the one or the other is inevitable, BEFORE ITS VENOM HAS REACHED SO MUCH OF THE BODY POLITIC AS TO GET BEYOND CONTROL, REMEDY SHOULD BE APPLIED."

Thomas Jefferson, one of the Framers of the Constitution and Law Givers, was hardly to be considered as ignorant of the situation which had arisen again in this land, nor, who had and

was participating in the same Criminally Insane Behavior.

One single object, if your proposed code of Laws contains it, will entitle you to the endless gratitude of society: that of restraining Judges from usurping legislation. And WITH NO BODY OF MEN IS THIS RESTRAINT MORE WANTING than with the Judges of what is called our General Government, but what I call our Foreign Department. They are practicing on the Constitution by references, analogies, and sophisms as they would ordinary law. They do not seem aware that it is not even a Constitution, formed by a single authority and subject to a single superintendence and control; but THAT ITS IS A COMPACT OF MANY INDEPENDENT POWERS, EVERY ONE OF WHICH CLAIMS AN EQUAL RIGHT TO UNDERSTAND IT, AND TO REQUIRE ITS OBSERVANCE... They imagine they can lead us into a consolidate Government, while their road leads Directly to its dissolution. This member of the Government was first considered as the most harmless and helpless of all its organs. BUT IT HAS PROVED THAT THE POWER OF DECLARING WHAT THE LAW IS AD LIBITUM, BY TAPPING AND MINING, SLYLY AND WITHOUT ALARM, THE FOUNDATIONS OF THE CONSTITUTION, CAN DO WHAT OPEN FORCE WOULD NOT DARE TO ATTEMPT."

(The Writings Of Thomas Jefferson, Albert Ellery Bergh Ed., Supra, vol. 16, pg. 113)

The knowledge of such covinous actions by the Judiciary were based in and embedded in the memory of men like Thomas Jefferson's, who recalled the fact that:

impeachment → judiciary dependent on the will of the King had proved itself THE MOST OPPRESSIVE OF ALL TOOLS in the hands of that magistrate. Nothing, then, could be more salutary than a change there to the tenure of Good Behavior; and the question of Good Behavior left to the vote of a simple majority in the two houses of Parliament."

(The Writings Of Thomas Jefferson, Albert Ellery Bergh Ed. (1907) vol. 1, page 120)

Therefore an Independent Judiciary was necessary and

imperative to the security of both the Corporeal and Incorporeal RIGHTS of the Citizens, and to the Peace and Dignity of the Society. Upon this understanding the Framers separated the Three Branches and yet bound them to the expressed concepts of the Social Compact by, the Constitution Of The United States Of America, Article VI, to wit:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, SHALL BE THE SUPREME LAW OF THE LAND; and THE JUDGES IN EVERY STATE SHALL BE BOUND THEREBY, ANY THING IN THE CONSTITUTION OR LAWS OF ANY STATE TO THE CONTRARY NOTWITHSTANDING."

This was necessary to allow the Judges to be Impartial in their proper capacity.

JUDGE - Impartiality is the FIRST DUTY of a Judge; before he gives an opinion, or sits in judgment in a cause, he ought to BE CERTAIN that he has NO BIAS for or against either of the parties; and if he has any (the slightest) interest in the cause, he is Disqualified from sitting as judge."
Bouvier's Law Dictionary (1859)

The Constitutional Mandate sets forth another requisite for a Lawful and Impartial Judge, to wit:

"...and SHALL at stated Times, receive for their services a COMPENSATION, WHICH SHALL NOT BE DIMINISHED during their Continuance in Office."

The concept of compensation for Services was understood by the Framers of the Constitution, not only in Substance but in its

Source, as noted in the Federalist Papers No. 31.

"As REVENUE IS THE ESSENTIAL ENGINE by which the MEANS of answering the national exigencies must be procured..."

It was therefore well understood that "Money" was the Base Root of a Body Politic, it being necessary and imperative, to procure the Services of individuals to perform the required Duties and Powers, Mandated in the Compact.

It was further known that:

In the general course of Human Nature, A POWER OVER A MAN'S SUBSTANCE AMOUNTS TO A POWER OVER HIS WILL. And we can never hope to see realized in practice the Complete Separation of the Judicial from the Legislative Power, IN ANY SYSTEM WHICH LEAVES THE FORMER DEPENDENT FOR PECUNIARY RESOURCES ON THE OCCASIONAL GRANTS OF THE LATTER..."

It will readily be understood that the Fluctuation In The Value Of Money in the state of society rendered a Fixed rate of Compensation in the Constitution inadmissible. What might be extravagant today might in a half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the Legislature to vary its provisions in conformity to the variations in circumstances, Yet under Such Restrictions As To PUT IT OUT OF THE POWER OF THAT BODY TO CHANGE THE CONDITION OF THE INDIVIDUAL FOR THE WORSE. A man may then be sure of the ground upon which he stands, and can never be deterred from his DUTY by the apprehension of being placed in a less eligible situation."

Alexander Hamilton, Federalist Papers No. 79)

The concept of "WHY" the provision mandating an un-diminished Compensation and "WHAT" substance was required as

tender for such Services is recorded in "The Debates in The Several State Conventions on The Adoption of The Federal Constitution," Johnathan Elliot Ed. 1901 Vol. 2:539, to wit:

McKean: "An objection is made that the COMPENSATION FOR SERVICES OF THE JUDGES SHALL NOT BE DIMINISHED during their continuance in office; and this is contrasted with the Compensation of the President, which is to be neither increased nor DIMINISHED during the period for which he shall be elected. But that of the Judges may be increased."

"Do gentlemen not see the reason why this difference is made? Do they not see that the President is appointed but for four years, whilst the judges may continue for life, if they shall so long behave themselves well? In the first case, little alteration can happen in the value of money; but in the course of a man's life, a very great one may take place from the discovery of SILVER AND GOLD mines, and the great influx of those metals; in which case an Increase Of Salary may be requisite. A security that their Compensation shall Not Be Lessened nor they have to look up to every session for salary, will certainly tend to make those officers more easy and independent."

It is therefore clearly and unambiguously stated in the Express and Conditional Contract, that a Guaranteed Compensation, FREE FROM ANY TYPE OR FORM OF DIMINUTION IS MANDATED.

"No provisions of the Constitution, ...are more explicit and specific than those pertaining to the Courts established under Article III."
(National Mutual Insurance Co. vs Tidewater Transfer Co. Inc., 337 U.S. 582, Frankfurter, J. Dissenting)

In order for any Judge to exercise the Judicial Power of the United States, and rule on Constitutional issues, the Judge MUST BE PROPERLY QUALIFIED. The 9th Circuit Court of Appeals, held in

Pacemaker Diagnostic Clinic Of America vs Instromedix Inc. 725 F.

2d 537 (1984), that:

"The lesson of the Framers is that, THOSE WHO EXERCISE THE JUDICIAL POWER OF THE UNITED STATES UNDER ARTICLE III, MUST BE ARTICLE III JUDGES."

The decision further states that:

"The Judiciary is the principle check on the usurpation of Power by the other Branches."

The Court also quoted John Rutledge in the "Annals Of Congress", 729 - 748, to wit:

"So long as we have an Independent Judiciary, the great Interest of THE PEOPLE will be safe."

Therefore, it is a necessary and imperative prerequisite that the Judge who exercises any of the Judicial Power of the United States, BE AND ENJOY the Independence and Security of a Constitutionally Mandated, Article III Judge. The Independence COMMANDED therein was to insure the proper "Separation Of Powers" and the interests of "WE THE PEOPLE."

NO COURT CAN RECEIVE OR EXERCISE ARTICLE III JUDICIAL POWERS, if the Judges can be DIRECTLY or INDIRECTLY influenced by either of the other Branches of the Government, OR THEIR DEPARTMENTS."
U.S. vs Woody, 726 F. 2d 1328)

The United States Congress (Legislative branch), began its usurpation of Power in 1919, by and through Taxing Statutes which

included the Compensation of all Federal Judges, which placed them under the Power of not only the Legislature but the Executive branch of the United States Government.

Congress then proceeded to further violate the Constitutional Contract and the the Rights Of Citizens, including but not limited to, Protection of their Property and their Right to a LAWFUL AND IMPARTIAL Constitutional JUDGE. This act was done through the passage of the "Public Salaries Act" of 1939, found at 4 U.S.C., Section 111.

The "Act", thereby Diminished the Compensation of both Federal and State Judges, subjecting them to Direct and Indirect influence of both the Legislative and Executive Branches of Government, in direct and intentional violation of the "Separation Of Powers Doctrine."

In ~~Evans v. Gore~~ 253 U.S. 245, the United States Supreme Court held that:

NO DIMINUTION which by necessary operation and effect withholds or takes from a Judge a part of that which is promised BY LAW for his Services MUST BE REGARDED WITHIN THE LIMITATION."

The Court went on to clarify the provision, stating that:

"The PROHIBITION (against Diminution of Compensation)

EMBRACES AND PREVENTS DIMINUTION BY TAXATION, and has been so construed in the actual practice of the Government."

(Evans vs Gore, Supra p. 255)

The provisions of Article III, Section 1, are Mandatory, and not subject to any Arbitrary or Capricious acts of any Branch of Government, as noted by the words, "The Judges of the Supreme and Inferior Court, SHALL..." Therefore it was held that:

"A tax upon the net income of a United States District Judge, assessed under the Act of February 24, 1919, c. 18, 40 Stat. 1062; Section 213,...by including his official salary in the computation, operates to Diminish his Compensation, in violation of the Constitution AND IS INVALID."

(Peck & Co. vs Lowe, 247 U.S. 165; United States Glue Co. vs Oak Creek, id, 321 distinguished. 262 Fed. Rep. 550, reversed,... Supra, p. 263.)

From the foregoing ruling it would be reasonable to state that the "Public Salaries Act" of 1939, 4 U.S.C., Section 111, is also invalid, as it pertains to, and attaches a Federal and/or State Income Tax on the net Compensation of ALL Public Servants, which purportedly includes Article III Judges.

Article III Judges are expressly exempt from Taxation or other Diminution of their Compensation, as stated in Article III, Section 1, and reiterated and clarified in U.S. vs Woodly, Supra, and Evans vs Gore, Supra.

ANY ACT which DIRECTLY or INDIRECTLY influences Article III Judges, or seeks in any manner to make the Judiciary,

dependent upon, or under the dominion of the other two branches of Government, or a Department thereof, through the Diminution of their Compensation is therefore invalid and Un-Constitutional. There is no more effective way to control a man than through his purse strings.

Such Acts, by their operation and application, destroy the very spirit and intent of Article III, and the very Constitution the individual "Swore To Uphold." Article III, was obviously intended to prevent Bias, Prejudice, and Fear Of Retribution, for exercising the Constitutional Judicial Authority, and the Laws of the Land, and further to alleviate undue Influence, in the very same exercise.

"The acts of each Department SHOULD NEVER be controlled by, or subjected, Directly or Indirectly, to, the coercive influence of either of the other Departments."
(O'Donoghue vs U.S., 289 U.S. 516.)

It is eminently clear that the Judges can be independent ONLY if they are protected under, and subject to the limitations prescribed in the Constitution, and therefore not subject to ANY Influence, Coercion and/or Intimidation, by any party to an action.

A Judge who may be influenced Psychologically and/or Financially by another Branch, Department, Agency or Corporation, cannot fairly or objectively conduct a Trial or act upon an

Appeal in which the interest of said Departments, Agencies, Corporations, etc. are at stake. This would be an obvious Conflict Of Interest. Therefore any and all Judges who are to exercise the Laws of the United States in any form or proceeding, when under the influence or dominion of another Branch, Agency or Corporation, are acting in a capacity which the Supreme Law Of The Land forbids! They are not Independent, Free from Influence, and ARE NOT CONSTITUTIONAL JUDGES.

"Judges must be not only independent of Outside Influence in fact, but must also be above even the suspicion of any influence."
(Evans vs Gore, Supra.)

"Judiciary FREE from control by the Executive and Legislature, is essential IF There Is A RIGHT to have claims decided by Judges who are Free From Potential Domination by other Branches of Government."
(United States vs Will, 499 U.S. 200, 217-218 (1980))

And further:

"There can be NO LIBERTY...If the Power of Judging be not Separated from the Legislative and Executive Powers."
(Searle vs Yensen, 118 Neb. 835, 26 N.W. 464, 69 P. 2d 935)

The "Citizen", being sovereign, and heirs in fact, are not subject to, nor to be subjected to Any Arbitrary Deprivation of Rights, which are set forth in the Constitution, and Guaranteed thereby.

"The 'Due Process Clause' and 'Equal Protection Of The Law', stand as an Absolute Bar against the ARBITRARY ACTS OF ANY GOVERNMENT AGENCY."
(People vs Harris, 104 Colo. 386, 91 P. 2d 989)

The "Citizen" should not and cannot be suspicious of any coercive influence by Any other Branch, Department, Agency, or Corporation, which might be Directly or Indirectly involved in the Action or Question before the Court. The People are By RIGHT, entitled to an Independent Judiciary, to allow for Proper "Redress Of Grievance" in the Courts, without suspicion that the Judiciary is beholden to the party or issue before the Court, by/to which the action is brought.

"WHEN ANY COURT VIOLATES THE CLEAN UNAMBIGUOUS LANGUAGE OF THE CONSTITUTION, A FRAUD IS PERPETRATED AND NO ONE IS BOUND TO OBEY IT."
(State vs Sutton, 63 Minn. 147, 65 N.W. 262, 30 L.R.A. 630 Am. St. 459)

"It cannot be assumed that the FRAMERS of the Constitution and THE PEOPLE who adopted it did not Intend that which is the Plain Import of the language used. When the language of the Constitution is positive and free from all ambiguity, ALL COURTS ARE NOT AT LIBERTY, by a resort to the refinements of legal learning, to restrict its obvious meaning to avoid hardships of particular Cases, we must accept the Constitution as it reads when its language is unambiguous, for it is the MANDATE OF THE SOVEREIGN POWERS."
(State vs Sutton, Supra.)

This Reasoning, is due to the fact that:

"Every one of the People of the United States owns a residue of Individual RIGHTS and LIBERTIES, WHICH HAVE NEVER BEEN, AND WHICH ARE NEVER TO BE SURRENDERED TO THE STATE, BUT WHICH ARE STILL TO BE RECOGNIZED,

PROTECTED AND SECURED FROM INFRINGEMENT OR DIMINUTION
BY ANY PERSON AS WELL AS ANY DEPARTMENT OF GOVERNMENT."
(Colorado Anti-Discrimination Comm'n vs Case, 151 Colo.
235, 380 P. 2d 34)

And this due to the Fact that:

"THE INDIVIDUAL, AND NOT THE STATE, IS THE SOURCE AND
BASIS OF OUR SOCIAL COMPACT, AND THAT SOVEREIGNTY NOW
RESIDES WITH AND HAS ALWAYS RESIDED IN THE INDIVIDUAL."
(Colorado Anti-Discrimination Comm'n vs Case, Supra)

Now, if in fact, Any Judge, assigned to hear a Case, pays an
Income Tax on his Guaranteed Compensation, then his Compensation
has been DIMINISHED in Violation of the clear and unambiguous
language of Article III, Section 1, of the Constitution of the
United States of America, and IS NOT AN ARTICLE III JUDGE!

Now, if in fact, Any Judge, assigned to hear a Case is not
appointed to the position on condition of "Good Behavior", he IS
NOT AN ARTICLE III JUDGE!

Now, if in fact, Any Judge, assigned to hear a Case is not
Compensated for his Services in "DOLLARS", "Gold And Silver
Coin", pursuant to the Constitutional Mandate, he IS NOT AN
ARTICLE III JUDGE!

When a "CITIZEN'S" Constitutional RIGHTS, are involved, ONLY
Courts established under the provisions of Article III, are
empowered, by the Constitution, to adjudicate such matters of

Constitutional merit or import.

ARTICLE III, SECTION 2

"Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public ministers and Consuls; - To all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and the Citizens of another State; - between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make..."

The Lawful, de jure, judicature of the United States is declared by the duly ordained Constitution, and its Powers and Authorities are properly and clearly expressed and defined therein.

"The judicial authority of the federal judicature is declared by the Constitution to comprehend certain cases particularly specified. These expressions mark the precise limits beyond which the federal courts cannot extend their Jurisdiction, because the object of their cognizance being enumerated, the specifications would be nugatory if it did not exclude all ideas of more extensive authority."
(Federalist Papers No. 83)

Congress was vested with certain limited Powers and Authority over certain Courts, and those exercising the Powers and Authority of the same, which includes but is not limited to, establishing inferior Tribunals under Article I, Section 8, Clause 9. The United States District and Appellate Courts for the State of Colorado, are not Article III Courts, but creatures of the Legislature.

"A United States District Court is purely a creature of the legislative branch of government, generally provided for by Constitution, but not a constitutional court in stricter sense, and its jurisdiction comes from congress."
(Cochran et al. vs. St. Paul & Tacoma Lumber Co., 73 F. Supp. 288, 293)

The lower Tribunals are purely subject to the will of the Legislature, the Commissioners thereof, being subject to diminution of compensation, are subject to direct influence over their very existence, by acts of both the Legislative and Executive body, and other political and corporate entities.

(Exhibit A-1, Atkins et al. vs. United States of America, Docket No. 41-76, filed Feb. 11, 1976, in United States Court of Claims; Atkins et al. vs. The United States, 556 Fed. Rep.2d 1028, Exhibit A-2, Public Law 82-269, 82 Stat. 50)

There are NO Constitutional Judges in the 22nd Judicial District, pursuant to the "Order Of Recusal" entered in Case No. 87-CV-48, on June 1, 1987 Exhibit A-3, and have been and are now

setting under false pretenses and impersonations as Lawful, Constitutional Judges, when in fact they are Commissioners U.S. vs. Ferreira, 13 How. 42, acting under direction and control of the "International Bank For Reconstruction And Development" and the "International Monetary Fund" 22 U.S.C.A. 286, and/or are financed, subsidized, compensated, and/or receive emoluments or remuneration from, by or through its "Fiscal and Depository Agent" the "Federal Reserve Banks" 22 U.S.C.A. 286d, and are "the other positions" paid "by the institution" Exhibit A-4, Public Law 94-564, 90 Stat. 2660, and further, set ONLY under "Rule Of Necessity" United States vs. Wills, 499 U.S. 200, which HAS NO LAW. Plowden's 18, 15 Viner's Abridgments 534, 22 Viner's Abridgments 540.

The system of "Checks and Balances" are properly established in the Paramount Law. The Constitution, FORBIDS the Usurpation and Encroachments of one Departments Powers into the Proper Powers of another.

"It is an ingrained principle in Government that the Three Departments of Government are coordinated and shall cooperate with and complement, while acting as checks and balances against, one another, but shall not interfere with or encroach on the Authority or within the province of the other."
(Smith vs Miller, 153 Colo. 35, 384 P. 2d 738 (1963))

The Court went on to say that:

"The Legislative and Executive Departments have their functions and their EXCLUSIVE POWERS including the 'Purse' and the 'Sword.' The Judiciary has its Exclusive Powers and functions, to wit: It has Judgment and the power to enforce its judgments and orders."

(Smith vs Miller, Supra)

The Constitutional Prohibition therefore Mandates, a Judiciary, which is Independent and Free of Influence, either Directly or Indirectly, by the Acts or Conduct of the Legislative or Executive Departments and their respective Agencies, and yet within its Proper Mandated Sphere of Power and Limitations.

"The Judiciary is charged with Administration Of Justice and Must be free to perform its functions without Restrictions or Impairment by the acts or conduct of another Department."

(Smith vs Miller, Supra)

And that the:

"COURTS MUST BE INDEPENDENT, UNFETTERED, and FREE FROM DIRECTIVES, INFLUENCE, OR INTERFERENCE FROM ANY EXTRANEOUS SOURCE IN THEIR RESPONSIBILITIES AND DUTIES."

(Smith vs Miller, Supra)

In no other format could a Judge set Impartially, and thereby protect the integrity of the Court, and most important the TRUST and Integrity of the PEOPLE, free from Influence, to Administer Justice.

"The role of the Judiciary, if its integrity is to be maintained, is one of Impartiality."

(People vs Martinez, 185 Colo. 225, 526 P. 2d 120)

Therefore:

"IT IS INCUMBENT UPON EACH DEPARTMENT TO ASSERT AND EXERCISE ALL ITS POWERS WHENEVER PUBLIC NECESSITY REQUIRES IT TO DO SO; Otherwise It Is RECREANT TO THE TRUST REPOSED IN IT BY THE PEOPLE. IT IS EQUALLY INCUMBENT UPON IT TO REFRAIN FROM ASSERTING POWER THAT DOES NOT BELONG TO IT, FOR THIS IS EQUALLY A VIOLATION OF THE PEOPLE'S CONFIDENCE.

(City & County of Denver vs Lynch, 92 Colo. 102, 18 P. 2d 907; Smith vs Miller, *Supra*.)

The Framers of the Constitution, left behind words of certain wisdom for their Posterity to hear and abide by. Thomas Jefferson left these words as warning to TRUST and CONFIDENCE. They are well to be heeded this day.

"IT WOULD BE A DANGEROUS DELUSION WERE A CONFIDENCE IN MEN OF OUR CHOICE TO SILENCE OUR FEARS FOR THE SAFETY OF RIGHTS; THAT CONFIDENCE IS EVERYWHERE THE PARENT OF DESPOTISM; FREE GOVERNMENT IS FOUNDED IN JEALOUSY, AND NOT IN CONFIDENCE; IT IS JEALOUSY, AND NOT IN CONFIDENCE WHICH PRESCRIBES LIMITED CONSTITUTIONS TO BIND DOWN THOSE WHOM WE OBLIGED TO TRUST WITH POWER; THAT OUR CONSTITUTION HAS ACCORDINGLY FIXED THE LIMITS AND NO FARTHER, OUR CONFIDENCE MAY GO... IN QUESTIONS OF POWER, THEN LET NO MORE BE SAID OF CONFIDENCE IN MAN, BUT BIND HIM DOWN FROM MISCHIEF BY THE CHAINS OF THE CONSTITUTION."

The Judiciary is a Separate and Distinct Branch of the DULY ORDAINED Government. Deriving its Powers and Limitations from the COMMANDS of the PEOPLE, by way of the Express and Conditional Contract, known as the Constitution. The Limitations set forth in the Paramount Law, explicitly state; that a Judge's "Compensation May Not Be Decreased" IN ANY WAY. The influence over a man's purse or substance is to control his very life, both

Corporeal and Incorporeal, Psychologically and Physically.

Therefore a **LAWFUL, CONSTITUTIONAL, JUDGE** of the United States of America, must be free from Extraneous Influences, including but not limited to, Compensation For His Services, pursuant to the **MANDATE** set forth in the Constitution of the United States, Article I, Section 8, Clause 5, and Article I, Section 10, TO WIT: "GOLD AND SILVER COIN" and as reiterated in Statute (31 U.S.C. 314 and 321; C.R.S. 11-61-101), In "DOLLARS." His Compensation **MAY NOT BE DIMINISHED IN ANY WAY**, including by the "Purse" holder, by and through Taxation, or the inflationary affects caused by International Monetary Fund/World Bank "Bills of Credit". (Public Laws 94-564, 90 Stat. 2660; 90-269, 82 Stat. 50; 96-221 and the 1965 Coinage Act) And of course the clauses Demanding and Commanding Compliance with and Adherence to the Constitutions Clear and Unambiguous Language, as used to describe the lawful Direction, and Purpose of exercising the said Vested Powers and Authority, and the Methods of attaining it, including but not limited to, "Good Behavior" and "Establish Justice", and to "Secure The Blessings Of Liberty to ourselves and our Posterity" i.e. "Public Policy."

Impartiality being Necessary and Imperative to both **RIGHTS** and **JUSTICE**, the Constitution is both **PROHIBITIVE** and **MANDATORY**.

It has long been recognized and upheld that:

"EVERY JURISDICTION HAS ITS BOUNDS."
(3 Coke On Littleton)

"EQUITY FOLLOWS THE LAW."
(1 Story's Commentaries On Equity Jurisprudence § 64; 3
Wooddeson's Vinerian Lectures 479, 482)

"A JUDGMENT GIVEN BY AN IMPROPER JUDGE IS OF NO
MOMENT."
(11 Coke's Reports 76)

"TO A JUDGE WHO EXCEEDS HIS OFFICE OR JURISDICTION NO
OBEDIENCE IS DUE."
(Jenkins Eight Centuries of Reports, 139)

"WHENEVER ANYTHING IS PROHIBITED DIRECTLY, IT IS ALSO
PROHIBITED INDIRECTLY."
(See: Coke on Littleton 223; Craig vs. Missouri, 4
Peters 903; Federalist Papers No. 44)

A "LAWFUL", "CONSTITUTIONAL", "IMPARTIAL", "JUDGE," AND
ARTICLE III COURT, IS RIGHTFULLY DEMANDED HEREIN, NO
OTHER, HAS VESTED POWERS OR AUTHORITY.

IN THE
UNITED STATES COURT OF CLAIMS

C. CLYDE ATKINS	(1))
WILLIAM H. BECKER	(2))
LLOYD H. BURKE	(3))
OLIVER J. CARTER	(4))
FRED J. CASSIBRY	(5))
SAMUEL CONTI	(6))
HOWARD F. CORCORAN	(7))
WALTER EARLY CRAIG	(8))
JESSE W. CURTIS	(9))
PETER T. FAY	(10))
WARREN J. FERGUSON	(11))
ROBERT FIRTH	(12))
ROGER D. FOLEY	(13))
CHARLES B. FULTON	(14))
FLOYD R. GIBSON	(15))
WILLIAM P. GRAY	(16))
GEORGE L. HART, JR.	(17))
A. ANDREW HAUK	(18))
IRVING HILL	(19))
JAMES LAWRENCE KING	(20))
SAMUEL P. KING	(21))
THOMAS D. LAMBROS	(22))
JOSEPH S. LORD, III	(23))
MALCOLM M. LUCAS	(24))
WILLIAM J. LYNCH	(25))
WALTER R. MANSFIELD	(26))
THOMAS J. MAC BRIDE	(27))
FRANK J. MC GARR	(28))
JAMES B. PARSONS	(29))
ROBERT F. PECKHAM	(30))
NORMAN C. ROETTGER, JR.	(31))
DONALD R. ROSS	(32))
ROBERT A. SCHNACKE	(33))
COLLINS J. SEITZ	(34))
JOHN V. SINGLETON, JR.	(35))
ADRIAN A. SPEARS	(36))
ROBERT A. SPRECHER	(37))
ALBERT LEE STEPHENS, JR.	(38))
FRANCIS C. WELAN	(39))
HUBERT L. WILL	(40))
DAVID W. WILLIAMS	(41))
SPENCER WILLIAMS	(42))
HARRISON L. WINTER	(43))
JOSEPH H. YOUNG	(44))

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No.

41-76

FILED

FEB 11 1976

COURT OF CLAIMS

P E T I T I O N

Plaintiffs, by their counsel, petition this Court and assert the following as their claim against the United States.

J U R I S D I C T I O N

1. This action arises under Article III of the Constitution of the United States. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1491.

P L A I N T I F F S

2. (a) Plaintiff C. Clyde Atkins is a United States District Judge and a member of the United States District Court for the Southern District of Florida (Miami, Florida);

(b) Plaintiff William H. Becker is a United States District Judge and Chief Judge of the United States District Court for the Western District of Missouri (Kansas City, Missouri);

(c) Plaintiff Lloyd H. Burke is a United States District Judge and a member of the United States District Court for the Northern District of California (San Francisco, California);

(d) Plaintiff Oliver J. Carter is a United States District Judge and Chief Judge of the United States District Court for the Northern District of California (San Francisco, California);

(e) Plaintiff Fred J. Cassibry is a United States District Judge and a member of the United States District Court for the Eastern District of Louisiana (New Orleans, Louisiana);

(f) Plaintiff Samuel Conti is a United States District Judge and a member of the United States District Court for the Northern District of California (San Francisco, California);

(g) Plaintiff Howard F. Corcoran is a United States District Judge and a member of the United States District Court for the District of Columbia (District of Columbia);

(h) Plaintiff Walter Early Craig is a United States District Judge and Chief Judge of the United States District Court for the District of Arizona (Phoenix, Arizona);

(i) Plaintiff Jesse W. Curtis is a United States District Judge and a member of the United States District Court for the Central District of California (Los Angeles, California);

(j) Plaintiff Peter T. Fay is a United States District Judge and a member of the United States District Court for the Southern District of Florida (Miami, Florida);

(k) Plaintiff Warren J. Ferguson is a United States District Judge and a member of the United States District Court for the Central District of California (Los Angeles, California);

(l) Plaintiff Robert Firth is a United States District Judge and a member of the United States District Court for the Central District of California (Los Angeles, California);

(m) Plaintiff Roger D. Foley is a United States District Judge and Chief Judge of the United States District Court for the District of Nevada (Las Vegas, Nevada);

(n) Plaintiff Charles B. Fulton is a United States District Judge and Chief Judge of the United States District Court for the Southern District of Florida (West Palm Beach, Florida);

(o) Plaintiff Floyd R. Gibson is a United States Circuit Judge and Chief Judge of the United States Court of Appeals for the Eighth Circuit (Kansas City, Missouri);

(p) Plaintiff William P. Gray is a United States District Judge and a member of the United States District Court for the Central District of California (Los Angeles, California);

(q) Plaintiff George L. Hart, Jr., is a United States District Judge and a member of the United States District Court for the District of Columbia (District of Columbia);

(r) Plaintiff A. Andrew Hauk is a United States District Judge and a member of the United States District Court for the Central District of California (Los Angeles, California);

(s) Plaintiff Irving Hill is a United States District Judge and a member of the United States District Court for the Central District of California (Los Angeles, California);

(t) Plaintiff James Lawrence King is a United States District Judge and a member of the United States District Court for the Southern District of Florida (Miami, Florida);

(u) Plaintiff Samuel P. King is a United States District Judge and Chief Judge of the United States District Court for the District of Hawaii (Honolulu, Hawaii);

(v) Plaintiff Thomas D. Lambròs is a United States District Judge and a member of the United States District Court for the Northern District of Ohio (Cleveland, Ohio);

(w) Plaintiff Joseph S. Lord, III, is a United States District Judge and Chief Judge of the United States District Court for the Eastern District of Pennsylvania (Philadelphia, Pennsylvania);

(x) Plaintiff Malcolm M. Lucas is a United States District Judge and a member of the United States District Court for the Central District of California (Los Angeles, California);

(y) Plaintiff William J. Lynch is a United States District Judge and a member of the United States District Court for the Northern District of Illinois (Chicago, Illinois);

(z) Plaintiff Walter R. Mansfield is a United States Circuit Judge and a member of the United States Court of Appeals for the Second Circuit (New York, New York);

(aa) Plaintiff Thomas J. MacBride is a United States District Judge and Chief Judge of the United States District Court for the Eastern District of California (Sacramento, California);

(bb) Plaintiff Frank J. McGarr is a United States District Judge and a member of the United States District Court for the Northern District of Illinois (Chicago, Illinois);

(cc) Plaintiff James B. Parsons is a United States District Judge and Chief Judge of the United States District Court for the Northern District of Illinois (Chicago, Illinois);

(dd) Plaintiff Robert F. Peckham is a United States District Judge and a member of the United States District Court for the Northern District of California (San Francisco, California);

(ee) Plaintiff Norman C. Roettger, Jr., is a United States District Judge and a member of the United States District Court for the Southern District of Florida (Miami, Florida);

(ff) Plaintiff Donald R. Ross is a United States Circuit Judge and a member of the United States Court of Appeals for the Eighth Circuit (Omaha, Nebraska);

(gg) Plaintiff Robert A. Schnacke is a United States District Judge and a member of the United States District Court for the Northern District of California (San Francisco, California);

(hh) Plaintiff Collins J. Seitz is a United States Circuit Judge and Chief Judge of the United States Court of Appeals for the Third Circuit (Wilmington, Delaware);

(ii) Plaintiff John V. Singleton, Jr., is a United States District Judge and a member of the United States District Court for the Southern District of Texas (Houston, Texas);

(jj) Plaintiff Adrian A. Spears is a United States District Judge and Chief Judge of the United States District Court for the Western District of Texas (San Antonio, Texas);

(kk) Plaintiff Robert A. Sprecher is a United States Circuit Judge and a member of the United States Court of Appeals for the Seventh Circuit (Chicago, Illinois);

(ll) Plaintiff Albert Lee Stephens, Jr., is a United States District Judge and Chief Judge of the United States District Court for the Central District of California (Los Angeles, California);

(mm) Plaintiff Francis C. Whelan is a United States District Judge and a member of the United States District Court for the Central District of California (Los Angeles, California);

(nn) Plaintiff Hubert L. Will is a United States District Judge and a member of the United States District Court for the Northern District of Illinois (Chicago, Illinois);

(oo) Plaintiff David W. Williams is a United States District Judge and a member of the United States District Court for the Central District of California (Los Angeles, California);

(pp) Plaintiff Spencer Williams is a United States District Judge and a member of the United States District Court for the Northern District of California (San Francisco, California);

(qq) Plaintiff Harrison L. Winter is a United States Circuit Judge and a member of the United States Court of Appeals for the Fourth Circuit (Baltimore, Maryland);

(rr) Plaintiff Joseph H. Young is a United States District Judge and a member of the United States District Court for the District of Maryland (Baltimore, Maryland).

3. Each of the named plaintiffs was appointed to his present office within the United States Judiciary by the President of the United States with the advice and consent of the United States Senate pursuant to Article III, Section 2 of the Constitution of the United States and each has served as a Federal Judge pursuant to Article III of the Constitution of the United States during all or part of the period commencing March 15, 1969, through and including the present date.

C L A I M

4. Article III, Section 1 of the Constitution of the United States provides in pertinent part that Judges of

the United States Courts "shall . . . at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

5. This constitutional provision was designed to accomplish two purposes: first, to protect the independence of the federal judiciary by preventing federal judges from being placed in a position of financial dependence upon the coordinate branches of government; second, to insure that highly qualified members of the bar not be dissuaded from seeking or accepting appointment to the federal bench, and likewise that members of the federal judiciary not be encouraged to abandon their offices, by uncertainty that the real value of their salaries will be maintained, or by actual diminution of said value.

6. To serve the aforementioned purposes, Article III, Section 1 prohibits defendant's executive and legislative branches from reducing, directly or indirectly, the dollar amount of judicial salaries, and, further, places a duty upon said branches to take such action as may from time to time be necessary to prevent diminishment of judicial compensation resulting from substantial reductions in the value of money. Defendant's legislative branch retains discretion to determine the manner and means by which the latter duty is to be discharged but may not, consistent with Article III, decline to fulfill said obligation.

7. Effective March 15, 1969, upon the recommendation of the President of the United States, and pursuant to 2 U.S.C. Sec. 358 and Sec. 359, the annual salary for each United States District Court Judge was set at \$40,000 and the annual salary for each United States Court of Appeals Judge was set at \$42,500. These annual salary levels remained unchanged until October 1, 1975.

As a result of inflation, the compensation of federal judges has been substantially diminished each year since 1969, causing direct and continuing monetary harm to plaintiffs.

9. Between March 15, 1969 and October 1, 1970, the Consumer Price Index ("CPI"), the official government measure of the purchasing power of the dollar, increased by 9.4 percent; between October 1, 1970 and October 1, 1971, the CPI increased by 3.8 percent; between October 1, 1971 and October 1, 1972, the CPI increased 3.3 percent; between October 1, 1972 and October 1, 1973, the CPI increased 7.9 percent; between October 1, 1973 and October 1, 1974, the CPI increased by 12.2 percent; and between October 1, 1974 and October 1, 1975, the CPI increased by 7.5 percent. As measured by the CPI, the real value of the dollar decreased by approximately 34.5 percent from March 15, 1969 to October 1, 1975. However, unlike most citizens of the United States who are gainfully employed, including most federal employees, federal

judges received no increase in salary to adjust for this decrease. Thus, as measured by the CPI, the real value of the compensation for each United States District Court Judge was diminished from \$40,000 to approximately \$26,200 between March 15, 1969 and October 1, 1975; the real value of the compensation for each United States Court of Appeals Judge was diminished from \$42,500 to approximately \$27,800 between March 15, 1969 to October 1, 1975.

10. Both the executive and legislative branches of defendant have acted affirmatively to prevent federal judges from receiving increases in salary designed to offset the diminution in compensation caused by inflation.

(a) Pursuant to statute (2 U.S.C. Sections 351 et seq.), the Commission on Executive, Legislative and Judicial Salaries has been established and given the responsibility every fourth year, beginning in 1969, to evaluate and review the salaries of federal judges and to submit a report to the President together with recommendations for judicial salary adjustments. The President, in turn, has the duty to include in the next budget transmitted to the Congress after the Commission's report proposals respecting changes in judicial salaries. The proposals transmitted by the President automatically go into effect if the Congress takes no action within thirty (30) days.

(b) In 1973, the Commission voted to recommend that the salary level of federal judges be increased by at least 25 percent. Thus, the 1973 report of the Commission recommended that the annual salary of each United States District Court Judge be increased to \$50,000 and that the annual salary of each United States Court of Appeals Judge be increased to \$53,000. The Commission explicitly stated that this recommendation was designed only to offset the increase in the cost of living which had occurred since March of 1969.

(c) Notwithstanding the findings and recommendations of the Commission, the President, in the proposals he submitted to Congress, reduced the salary increases below the level necessary to offset the increase in the cost of living, as follows: a 7-1/2 percent increase, to be effective March, 1974; an additional 7-1/2 percent increase, to be effective March, 1975; and an additional 7-1/2 percent increase to be effective March, 1976.

(d) Had the Congress taken no action, the increases proposed by the President would automatically have gone into effect pursuant to 2 U.S.C. Sec. 359. Instead, the Congress voted to prevent federal judges from receiving even these constitutionally insufficient salary increases.

11. On August 9, 1975, the Congress enacted and the President signed legislation which incorporates and perpetuates the diminution in the real value of judicial compen-

sation which had occurred since March, 1969.

(a) The Executive Salary Cost-of-Living Adjustment Act (Pub. L. 94-82) provides, inter alia, that United States Judges shall henceforth be covered by the general statutory scheme which provides for annual salary adjustments for federal employees (see 5 U.S.C. Sec. 5305, Sec. 5318, and 28 U.S.C. Sec. 461). The mechanism established by this Act is designed, beginning October 1, 1975, to build annual salary adjustments upon the base of the 1969 salary levels. Accordingly, the diminution in the real value of those salary levels which has occurred since March 1969, was affirmatively ratified and perpetuated by this legislation.

(b) Furthermore, in implementing this new statutory scheme, the President and Congress acted to reject a duly recommended salary increase of 8.6 percent which would otherwise have gone into effect; instead, the President and Congress substituted a reduced increase of 5 percent which was not sufficient to offset the further diminution in the value of judicial salaries occurring in that year. As a result of these actions of the President and Congress, on October 1, 1975, the annual salary of a United States District Court Judge was set at \$42,000; expressed in real terms, using the CPI with 1969 as the base year, this amount is equal to \$27,510. The annual salary of a United States Court of Appeals Judge was set at \$44,625; expressed in real terms, using the CPI with 1969 as the base year, this amount is equal to \$29,230. Thus, the

Congress and the President have established new salary levels which constitute a diminution of the compensation to which United States Judges were constitutionally entitled.

12. The defendant has acted in violation of Article III, Section 1 of the Constitution in two respects: (1) permitting substantial diminishment of the compensation for Judges of the United States (see paragraphs 7, 8, and 9); and (2) affirmatively preventing required judicial salary adjustments from going into effect, and adopting and perpetuating a diminishment of the compensation of Judges of the United States (see paragraphs 10 and 11). As a result, plaintiffs have suffered an unconstitutional deprivation of earnings.

PRAYER FOR RELIEF

WHEREFORE, each plaintiff prays for the following relief:

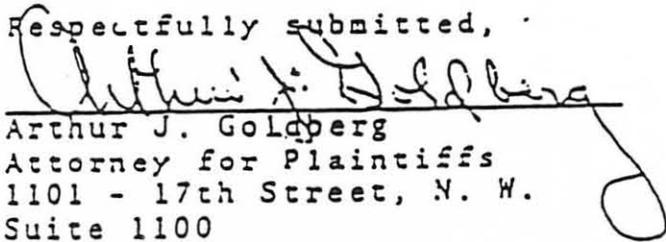
A. Damages for the constitutional violations enumerated above, measured as the diminution of his earnings for the entire period since March 15, 1969.

B. Interest.

C. Costs.

D. Such further or other relief as this Court should deem just and appropriate.

Respectfully submitted,


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[449 US 200]

UNITED STATES, Appellant,

v

HUBERT L. WILL et al. (No. 79-983)

UNITED STATES, Appellant,

v

HUBERT L. WILL et al. (No. 79-1689)

449 US 200, 66 L Ed 2d 392, 101 S Ct 471

[Nos. 79-983 and 79-1689]

Argued October 14, 1980. Decided December 15, 1980.

Decision: Federal laws of 1976 and 1979, but not federal laws of 1977 and 1978, stopping or reducing previously authorized cost-of-living increases for federal judges, held violative of Constitution's prohibition against diminishing judges' pay.

SUMMARY

Although various federal laws fixing the compensation of high-level federal officials, including federal judges, provide for annual cost-of-living adjustments in salary, Congress, in four consecutive years, enacted laws designed to prohibit or reduce cost-of-living increases for federal judges that were to be automatically operative: (1) in 1976, Congress enacted the Legislative Branch Appropriation Act, 1977 (90 Stat 1439), prohibiting a 4.8 percent raise for federal judges to be effective for fiscal year 1977 on October 1, 1976 (the President signed such law on October 1, 1976); (2) in 1977, Congress passed a statute (91 Stat 270), nullifying a contemplated 7.1 percent increase for federal judges in fiscal year 1978 (such law was signed by the President on July 12, 1977); in 1978 Congress enacted the Legislative Branch Appropriation Act, 1979 (92 Stat 763) prohibiting the paying of a 5.5 percent increase authorized for the fiscal year beginning October 1, 1978 (the President signed such law on September 30, 1978); in 1979, Congress passed the Executive Salary Cost-of-Living Adjustment Act (93 Stat 565) under which a proposed increase for federal judges for the fiscal year beginning October 1, 1979 was reduced from 12.9 percent to 5.5 percent

Briefs of Counsel, p 941, *infra*.

(such law was signed by the President on October 12, 1979). Various United States District Judges brought actions in the United States District Court for the Northern District of Illinois on behalf of classes of judges covered by Article III of the Constitution, challenging the four laws described above as violative of the Constitution's compensation clause (Art III, § 1), which provides that the compensation of federal judges "shall not be diminished during their Continuance in Office." Ultimately, the District Court granted summary judgment for the plaintiffs in the cases (478 F Supp 621).

On direct appeals, the United States Supreme Court affirmed in part, reversed in part, and remanded. In an opinion by BURGER, Ch. J., expressing the unanimous view of the eight participating members of the court, it was held—after initially determining that the court had jurisdiction of the appeals under 28 USCS § 1252, authorizing appeals to the Supreme Court from judgments holding federal laws unconstitutional in civil actions in which the United States is a party and that the federal statute requiring a federal judge to disqualify himself in proceedings in which his impartiality might be reasonably questioned or where he has a financial interest in the subject matter in controversy or is a party to the proceeding (28 USCS § 455) did not operate so as to disqualify all federal judges, including the Justices of the Supreme Court, from deciding the issues presented in the cases, their participation being allowable under the "rule of necessity" whereby a judge having a personal interest in a case not only may, but must, participate in the decision of the case if it cannot be heard otherwise—that the 1976 and 1979 laws at issue violated the Constitution's compensation clause since they became law after the previously authorized salary increases had taken effect, thus diminishing the compensation of federal judges, while the 1977 and 1978 laws did not violate the compensation clause, such statutes becoming law before the scheduled salary increases for federal judges had taken effect and thus not diminishing judges' compensation.

BLACKMUN, J., did not participate.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Judges § 13 — Constitution's compensation clause — cost-of-living increase for federal judiciary — 1976 and 1979 laws prohibiting and reducing increases

1a-1e. The Legislative Branch Appropriation Act, 1977 (90 Stat 1:39), prohibiting the payment of a 4.8 percent pay raise on October 1, 1976, to federal judges for fiscal year 1977, and the Executive Salary Cost-of-Living Adjustment Act (93 Stat 565), reducing a proposed salary increase for federal judges from 12.9 percent to 5.5 percent for fiscal year 1980, are both violative of the prohibition of the Constitution's compensation clause (Art III, § 1) against diminishing federal judges' salaries during their continuance in office, since both Acts became law after salary increases to which judges would otherwise be entitled had taken effect and purported to repeal or revoke such increases, thus diminishing federal judges' compensation.

Judges § 13 — Constitution's compensation clause — cost-of-living increases for federal judiciary —

1977 and 1978 laws prohibiting increases

2a-2e. Neither the federal statute prohibiting the payment of a planned cost-of-living adjustment for federal judges in fiscal year 1978 (91 Stat 270) nor the Legislative Branch Appropriation Act, 1979 (92 Stat 763), prohibiting the payment of a salary increase for federal judges in fiscal year 1979, violate the prohibition of the Constitution's compensation clause (Art III, § 1) against diminishing federal judges' compensation during their continuance in office, since both statutes became law before the increases to which judges would otherwise be entitled became effective and thus did not diminish federal judges' compensation.

Appeal and Error § 311 — Supreme Court review — federal law held unconstitutional — federal civil action involving government — Justices interested in case

3. The United States Supreme Court has jurisdiction under 28 USCS § 1252— providing for review by appeal in the Supreme Court from federal court deci-

TOTAL CLIENT-SERVICE LIBRARY⁺ REFERENCES

46 Am Jur 2d, Judges § 68

USCS, Constitution, Article III, Section 1

US L Ed Digest, Judges § 13

L Ed Index to Annos, Compensation; Judges

ALR Quick Index, Compensation; Judges

Federal Quick Index, Compensation; Judges

ANNOTATION REFERENCES

Supreme Court's views as to construction and application of 28 USCS § 1252 permitting direct appeals to Supreme Court from federal court decisions invalidating Acts of Congress in civil actions to which government is party. 63 L Ed 2d 832.

Construction and application of 28 USCS § 455(a) providing for disqualification of justice, judge, magistrate, or referee in bankruptcy in any proceeding in which his impartiality might reasonably be questioned. 40 ALR Fed 954.

sions holding federal laws unconstitutional in civil actions in which the federal government is a party—to review the decisions of a Federal District Court holding unconstitutional federal laws which stopped or reduced previously authorized cost-of-living increases for federal judges, notwithstanding that the Justices of the Supreme Court have an interest in the outcome of the litigation.

Claims § 77 — jurisdiction of Federal District Court — suit against government involving Constitution — interest of District Judge in litigation

4. A Federal District Court has jurisdiction under 28 USCS § 1346(a)(2)—confering jurisdiction on District Courts and the Court of Claims in actions against the federal government based on the Constitution when less than \$10,000 is in controversy—in actions brought on behalf of classes of federal judges to challenge the constitutionality of federal laws stopping or reducing previously authorized cost-of-living increases for federal judges, notwithstanding that in the actions the District Judge necessarily has an interest in the outcome of the litigation, where the complaints state that the claims of the individual members of the classes do not exceed \$10,000 and the government does not dispute such allegation.

Judges § 7 — disqualification — federal law

5. 28 USCS § 455, which provides for the disqualification of individual federal judges under specified circumstances, but which neither expressly nor by implication purports to deal with jurisdiction, does not affect the jurisdiction of a federal court.

Judges § 10 — federal judiciary — constitutionality of federal law — limiting judicial cost-of-living increases

6. Neither traditional judicial canons, nor 28 USCS § 455, governing the disqualification of a federal judge where his impartiality might reasonably be questioned, or where he has a financial inter-

est in the subject matter in controversy or is a party to the proceeding, require a Federal District Judge or each Justice of the United States Supreme Court to disqualify himself in litigation challenging the validity, under the United States Constitution, of federal laws stopping or reducing previously authorized cost-of-living increases for federal judges, such question being one which federal judges may consider under the "rule of necessity" whereby a judge not only may, but must, take part in a decision if the case cannot be heard otherwise.

Supreme Court of the United States § 71 — recusation — quorum of six Justices

7. In the United States Supreme Court, when one or more Justices are recused in a case but a statutory quorum of six Justices eligible to act remains available, the court may continue to hear the case.

Judges § 7 — disqualification statute — effect upon rule of necessity

8. The federal statute (28 USCS § 455) governing the disqualification of federal judges does not alter the time-honored rule of necessity whereby a judge not only may, but must, take part in the decision of a case if the case cannot be heard otherwise.

Courts § 92.5 — judicial department — province and duty concerning law

9. The province and duty of the judicial department is to say what the law is.

Judges § 13 — diminishing compensation — Federal Constitution

10. The compensation clause of the United States Constitution prohibiting the diminution of federal judges' compensation during their continuance in office (Art III, § 1) not only promotes judicial independence, but ensures a prospective judge that, in abandoning private practice (more often than not more lucrative than the bench), the compensation of the new post will not diminish, thus serving to attract able lawyers to

the bench and enhance the quality of justice.

Statutes §§ 229, 237, 261 — repeal — suspension — implication — appropriations law — legislative intent

11. The general rule of not favoring repeals by implication applies with especial force when the provision advanced as the repealing measure was enacted in an appropriations bill; nevertheless, when Congress desires to suspend or repeal a statute in force, it may accomplish its purpose by an amendment to an appropriations bill, or otherwise, and the whole question will depend on the intention of Congress as expressed in the statutes.

Time § 6 — fractions of day — effective date of federal law — judges' salaries — constitutional implications

12a, 12b. Although the law generally rejects all fractions of a day in order to avoid disputes, the United States Supreme Court—in view of the constitutional implications of the President of the United States signing, during the business day of October 1, 1976, a law prohibiting an increase in salaries for federal judges which had previously been authorized and which had already taken effect at the beginning of the day on October 1, 1976—must look to the precise time the statute purporting to repeal the salary increase became law in determining whether such law is violative of the prohibition of the compensation clause of the Constitution (Art III, § 1) against diminishing the compensation of federal judges during their continuance in office.

Judges § 13 — compensation — salary freeze for federal judiciary — effect of nondiscrimination

13. For purposes of determining validity, under the prohibition of the Constitution's compensation clause (Art III, § 1) against diminishing federal judges' compensation during their continuance in office, the mere fact that a law pur-

porting to stop or reduce previously authorized cost-of-living increases for judges also applies to various officials in the legislative and executive branches of the federal government does not save the law.

Judges § 13 — Constitution's compensation clause — general meaning

14. The compensation clause of the Federal Constitution (Art III, § 1), prohibiting the diminution of federal judges' compensation during their continuance in office, does not erect an absolute ban on all legislation that conceivably could have an adverse effect on the compensation of judges.

Judges § 13 — Constitution's compensation clause — vesting of salary increase

15. For purposes of the compensation clause of the Federal Constitution (Art III, § 1), prohibiting the diminution of federal judges' compensation during their continuance in office, a salary increase for judges covered under Article III of the Constitution "vests" only when it takes effect as part of the compensation due and payable to Article III judges, so that where Congress repeals a planned, but not yet effective cost-of-living increase for such judges prior to the time it was first scheduled to become part of the judges' compensation, the compensation clause is not contravened.

Judges § 13 — federal law governing executive salaries — adjustment — applicability to federal judiciary

16. The Executive Salary Cost-of-Living Adjustment Act (93 Stat 565)—under which funds available for payment for fiscal year 1980 are prohibited from being used to pay "executive employees, which includes Members of Congress," more than a 5.5 percent increase in existing pay even though under existing law they might be entitled to a 12.9 percent increase—is applicable to judges covered by Article III of the Federal Constitution.

UNITED STATES v WILL

449 US 200, 66 L Ed 2d 392, 101 S Ct 471

SYLLABUS BY REPORTER OF DECISIONS

An interlocking network of federal statutes fixes the compensation of high-level federal officials, including federal judges, and provides for annual cost-of-living adjustments in salary determined in the same way as those for federal employees generally. In four consecutive fiscal years (hereafter Years 1, 2, 3, and 4), Congress, with respect to these high-level officials, enacted statutes to stop or reduce previously authorized cost-of-living increases initially intended to be automatically operative under that statutory scheme. In Years 2 and 3, the statutes became law before the start of the fiscal year, and in Years 1 and 4 became law on or after the first day of the fiscal year. A number of United States District Court Judges (appellees) filed class actions against the United States in District Court, challenging the validity of the statutes under the Compensation Clause of the Constitution, which provides that federal judges shall receive compensation which "shall not be diminished during their Continuance in Office." The District Court granted summary judgments for appellees.

Held: 1. This Court has jurisdiction of the appeals under 28 USC § 1252 [28 USCS § 1252], providing for appeals to this Court from judgments holding an Act of Congress unconstitutional in any civil action to which the United States is a party. And the District Court had jurisdiction over the actions under 28 USC § 1346(a)(2) [28 USCS § 1346(a)(2)], which confers on district courts and the Court of Claims concurrent jurisdiction over actions against the United States based on the Constitution when the amount in controversy does not exceed \$10,000, none of the individual claims here having been alleged to have exceeded that amount.

2. Title 28 USC § 455 [28 USCS § 455]—which requires a federal judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned or where he has a financial interest in the subject matter in controversy or is a party to the proceeding—by reason of the Rule of Necessity

does not operate to disqualify all federal judges, including the Justices of this Court, from deciding the issues presented by these cases. Where, under the circumstances of these cases, all Article III judges have an interest in the outcome so that it was not possible to assign a substitute district judge or for the Chief Justice to remit the appeal, as he is authorized to do by statute, to a division of the Court of Appeals with judges who are not subject to the disqualification provisions of § 455, the common-law Rule of Necessity, under which a judge, even though he has an interest in the case, has a duty to hear and decide the case if it cannot otherwise be heard, prevails over the disqualification standards of § 455. Far from promoting § 455's purpose of reaching disqualification of an individual judge when there is another to whom the case may be assigned, failure to apply the Rule of Necessity in these cases would have a contrary effect by denying some litigants their right to a forum. And the public might be denied resolution of the crucial matter involved if first the District Judge and now all the Justices of this Court were to ignore the mandate of the Rule of Necessity and decline to answer the questions presented.

3. The statutes in question in Years 1 and 4, but not in Years 2 and 3, violated the Compensation Clause.

(a) In each of the four years in question, Congress intended in effect to repeal or postpone previously authorized salary increases for federal judges, not simply to consign such increases to the fiscal limbo of an account due but not payable.

(b) Since the statute applying to Year 1 became law on the first day of the fiscal year, by which time the salary increases already had taken effect, it purported to repeal a salary increase already in force and thus "diminished" the compensation of federal judges. That the statute included in the salary "freeze" other federal officials who are not protected by the Compensation

Clause did not insulate a direct diminution in judges' salaries from the clear mandate of that Clause.

(c) But the statutes applying to Years 2 and 3 became law before the scheduled salary increases for federal judges had taken effect, i.e., before they had become a part of the compensation due Article III judges, and hence in no sense diminished the compensation such judges were receiving.

(d) Even though the statute applying to Year 4 referred only to "executive employees, which includes Members of Congress," and did not expressly men-

tion judges, it appears that Congress intended to include Article III judges. Accordingly, where such statute, similarly to the statute applying to Year 1, purported to revoke an increase in judges' compensation after the statutes granting the increase had taken effect, it violated the Compensation Clause.

No. 79-983, 478 F Supp 621, and No. 79-1689, affirmed in part, reversed in part, and remanded.

Burger, C. J., delivered the opinion of the Court, in which all other Members joined, except Blackmun, J., who took no part in the decision of the cases.

APPEARANCES OF COUNSEL

Kenneth S. Geller argued the cause for appellant.

Kevin M. Forde argued the cause for appellees.

Briefs of Counsel, p 941, *infra*.

OPINION OF THE COURT

[449 US 202]

Chief Justice Burger delivered the opinion of the Court.

[1a, 2a] These appeals present the questions whether under the Compensation Clause, Art III, § 1, Congress may repeal or modify a statutorily defined formula for annual cost-of-living increases in the compensation of federal judges, and, if so, whether it must act before the particular increases take effect.

I

Congress has enacted an interlocking network of statutes to fix the compensation of high-level officials in the Executive, Legislative, and Judicial Branches, including federal judges. It provides for quadrennial review of overall salary levels and annual cost-of-living adjustments determined in the same fashion as those for federal employees generally. In four consecutive fiscal years, Congress, with respect to these high-level

[449 US 203]

Executive Branch, legislative,

and judicial salaries, enacted statutes to stop or to reduce previously authorized cost-of-living increases initially intended to be automatically operative under that statutory scheme, once the Executive had determined the amount. In two of these years, the legislation was signed by the President and became law before the start of the fiscal year; in the other two years, on or after the first day of the fiscal year.

A

The salaries of high-level Executive, Legislative, and Judicial officials are set under the Postal Revenue and Federal Salary Act of 1967, 81 Stat 642, as amended, 2 USC §§ 351-361 (1976 ed and Supp III) [2 USCS §§ 351-361]. The Salary Act provides for a quadrennial review, starting in 1969, of these officials' compensation. A Commission on Executive, Legislative, and Judicial Salaries periodically examines the salary levels for these positions in relation to one another and to the General Schedule (GS), the matrix of

grades and steps that determines the salaries of most federal employees. Its recommendations are submitted to the President, who in turn submits that report with his recommendations to Congress in the next budget. Each House of Congress must vote on the President's proposal within 60 days. If both Houses approve, the adjustment takes effect at the start of the first pay period beginning 30 days thereafter.¹

In 1975, Congress adopted the Executive Salary Cost-of-Living Adjustment Act, Pub L 94-82, 89 Stat 419. The Adjustment Act subjects the salaries covered by the Salary Act to the same annual adjustment made in the General Schedule under the Federal Pay Comparability Act of 1970, 5 USC §§ 5305-5306 [5 USCS §§ 5305-5306]. The Comparability Act requires that each year the President designate an agent to compare federal salaries to data on private-sector salaries compiled by
[449 US 204]

the Bureau of Labor Statistics. The agent must undertake certain steps in his investigation and, ultimately, submit a report to the President recommending adjustments as deemed appropriate to bring federal employees' salaries in line with prevailing rates in the private sector. A separate Advisory Committee on Federal Pay then reviews that report and makes its own independent recommendation. Thereafter, the President issues an order adjusting the salaries of federal employees and submits a report to Congress listing the overall percentage of the adjust-

ment and including the reports and recommendations submitted to him on the subject. If the President believes that economic conditions or conditions of national emergency make the planned adjustment inappropriate, he may submit to Congress before September 1 an alternative plan for adjusting federal employees' salaries. This alternative plan controls unless within 30 days of continuous legislative session either House of Congress adopts a resolution disapproving of the President's proposed plan. If one House disapproves, the agent's recommendation governs. The increases take effect with the start of the first pay period starting on or after the beginning of the federal fiscal year on October 1.

This complex web of base salaries adjusted annually for civil service employees and again quadrennially for higher-rank positions has led to the following statutory definition of a United States District Judge's compensation:

"Each judge of a district court of the United States shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 USC 351-361 [2 USCS §§ 351-361]), as adjusted by section 461 of this title." 28 USC § 135 [28 USCS § 135].

Similarly phrased statutes apply to all other Article III judges.² Title 28 USC § 461 in turn provides that the annual

[449 US 205]

GS adjustment, rounded to the nearest multiple of \$100, shall apply to

1. The Salary Act, as amended, does not expressly prescribe what occurs if either House of Congress disapproves. See 2 USC § 359 (1976 Supp III) [2 USCS § 359].

2. See 28 USC § 5 [28 USCS § 5] (the Chief Justice and each Associate Justice of the

Supreme Court); 28 USC § 44(d) [28 USCS § 44(d)] (circuit judges); 28 USC § 173 [28 USCS § 173] (Court of Claims); 28 USC § 213 [28 USCS § 213] (Court of Customs and Patent Appeals); 28 USC § 252 [28 USCS § 252] (Court of International Trade (formerly Customs Court)).

salaries subject to that section, effective at the start of the next pay period. Compensation of judges is set at an annual figure and paid monthly, with each pay period coinciding with the calendar month. See 5 USC § 5505 [5 USCS § 5505]. Accordingly, any annual change in salary under the Adjustment Act takes effect at the beginning of October, the start of the fiscal year.

B

In October 1975, GS salaries were increased by an average of 5% under the terms of the Comparability Act. Federal judges and the other officials covered by the Adjustment Act received similar increases. In each of the following four years, however, Congress adopted a statute that altered the application of the Adjustment Act for the officials of the three branches subject to it. To avoid the confusion generated by a fiscal year's having a number different from the calendar year in which it begins, we refer to these as Years 1, 2, 3, and 4. We turn now to the specific actions taken for each of the four years in question.

Year 1

[1b] In October 1976, GS salaries were increased by an average of 4.3% under the procedures of the Comparability Act outlined earlier. On October 1, the first day of the new fiscal year and the first day of the relevant pay period, the President signed the Legislative Branch Appropriation Act, 1977, Pub L 94-440, 90 Stat 1439. Title II of that statute provided:

"[N]one of the funds contained in this Act shall be used to increase salaries of Members of the House of Representatives No part of the funds appropriated in
[449 US 206]

this Act or any other Act shall be used to pay the salary of an individual in a position or office referred to in section 225(f) of the Federal Salary Act of 1967, as amended (2 USC 356 [2 USCS § 356]), including a Delegate to the House of Representatives, at a rate which exceeds the salary rate in effect on September 30, 1976, for such position or office"

By virtue of the reference to the Salary Act, this statute applied to federal judges; its import, therefore, was to prohibit paying the 4.8% raise on October 1, 1976, under the Adjustment Act to federal judges, as well as Members of Congress and high-level officials in the Executive Branch.

In March 1977, Members of Congress, federal judges, and high-ranking employees in the Executive Branch received raises pursuant to the quadrennial review under the Salary Act. The salary of a United States District Judge, for example, increased to \$54,500; circuit judges and special appellate judges, to \$57,500; Associate Justices of the Supreme Court, to \$72,000. 42 Fed Reg 10297 (1977).³

Year 2

[2b] In October 1977, GS salaries, which generally are not subject to the quadrennial review under the

3. These amounts exceeded the levels these salaries would have achieved had Congress left in effect the 4.8% increase from October 1, 1976. Therefore, appellees' complaint in No.

79-983 challenged the statute in Year 1 only insofar as it affected judicial compensation from October 1, 1976, to March 1, 1977. See n 6, *infra*.

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449 US 200, 66 L Ed 2d 392, 101 S Ct 471

Salary Act, were increased an average of 7.1% under the Comparability Act. On July 11, 1977, the President signed Pub L 95-66, 91 Stat 270, which provided:

"[T]he first adjustment which, but for this Act, would be made after the date of enactment of this Act under the following provisions of law in the salary or rate of pay [449 US 207]

of positions or individuals to which such provisions apply [the 7.1% in October 1977], shall not take effect:

"(3) section 461 of title 28, United States Code [28 USCS § 461], relating to comparability adjustments in the salary and rate of pay of justices, judges, commissioners, and referees"

Parallel subdivisions applied to the other officials under the Salary Act. According to the House Report on this measure, an Adjustment Act increase would be inappropriate following the Comparability Act increase earlier in the same calendar year. HR Rep No. 95-458, p 2 (1977).⁴ The effect of this statute was to nullify the contemplated 7.1% increase for these high-level executive employees, Members of Congress, and federal judges.

Year 3

[2c] For the fiscal year beginning October 1, 1978, the President approved the recommendation to increase GS salaries an average of

4. See also 123 Cong Rec 7126 (1977) (remarks of Sen. Scott) ("prevents people . . . from receiving two pay raises in 1 year"; id., at 21121 (remarks of Rep. Solarz) ("individuals who have already received one increase

5.5%. On September 30, 1978, the final day of the preceding fiscal year, however, the President signed the Legislative Branch Appropriation Act, 1979, Pub L 95-391, 92 Stat 763. Section 304(a) of that Act stated:

"No part of the funds appropriated for the fiscal year ending September 30, 1979, by this Act or any other Act may be used to pay the salary or pay of any individual in any office or position in the legislative, executive, or judicial branch, or in the government of the District of Columbia, at a rate which exceeds the rate (or maximum rate, if higher) of salary or basic pay payable for such office or position for September 30, 1978"

[449 US 208]

The effect of this provision was to prohibit paying the 5.5% increase authorized by the Adjustment Act for the fiscal year beginning October 1, 1978.

Year 4

[1c] For the fiscal year beginning October 1, 1979, the President's statutory agent transmitted a recommendation for an average increase of 10.41%. However, on August 31, the President invoked his power under the Comparability Act to alter this rate; he reduced the proposed increase to 7% from the 10.41% recommended. These increases, the Government concedes, took effect on October 1, 1979. Moreover, because the September 30, 1978, statute (Year 3) prohibited paying the 5.5% increase only during fiscal year

during the course of the current year should not be entitled to receive a second increase as well"; infra, at 222, 65 L Ed 2d, at 410, and n 24.

1979, that increase took effect as well; along with the 7% adjustment, this brought the total to 12.9%.¹ Nevertheless, the Government now contends that this increase was in effect for only 11 days, since on October 12, the President signed Pub L 96-86, 93 Stat 565. Section 101(c) of this statute stated, in relevant part:

"For fiscal year 1980, funds available for payment to executive employees, which includes Members of Congress, who under existing law are entitled to approximately 12.9 percent increase in pay, shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year."

None of the appellees have exercised the statutory option to accept the 5.5% increase pursuant to the final clause of this statute; in terms that statute provides such acceptance of the 5.5% operates as a waiver of all claims to rates higher than

[449 US 209]

the 5.5%. The Government concedes the 5.5% increase has continued in effect.

C

On February 7, 1978, 13 United

States District Judges filed an action (No. 79-983 in this Court) in the District Court for the Northern District of Illinois. The complaint, which named the United States as defendant, challenged the validity of the statutes in Years 1 and 2 under the Compensation Clause, U. S. Const Art III, § 1.⁶ The plaintiff judges were certified as representatives of two classes of Article III judges, the classes defined with reference to Years 1 and 2.⁷ The Government, while not opposing certification of the classes, defended the validity of both statutes.

In an opinion filed August 29, 1979, the District Court granted summary judgment for the plaintiffs, appellees here. 478 F Supp 621. A corresponding judgment order was entered September 24. On appeal by the Government, we postponed decision on jurisdiction to the hearing on the merits and directed the parties to address the effect of 28 USC § 455 [28 USCS § 455], if any, on the jurisdiction of the District Court and this Court. 444 US 1068, 62 L Ed 2d 749, 100 S Ct 1010 (1980).

No. 79-1689 comes to us from a similar complaint filed in the United States District Court for the Northern District of

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Illinois on October 19,

5. The 7% increase was computed on the salary levels as they stood after the addition of the 5.5% increase deferred from Year 3. The compounding of the two increases means that the employees affected felt a combined increase of 12.9%. This explains the additional 0.4%.

6. The plaintiffs challenged the statute in Year 1 only insofar as it applied to compensation earned from October 1, 1976, until March 1, 1977, the date the quadrennial increase under the Comparability Act took effect. See n 3, supra.

7. For Year 1, the class was defined as all

Article III judges serving during part or all of the period October 1, 1976, to March 1, 1977, the date the quadrennial increase under the Comparability Act took effect. See n 6, supra. For Year 2, the class was defined as all Article III judges taking office prior to July 11, 1977, the date the statute was passed, and continuing in office after October 1, 1977, the date the Adjustment Act increase was due to take effect.

The case was referred to a newly appointed member of the District Court who had taken office after October 1, 1977, and thus was not a member of either class.

1979, after the District Court had entered judgment in No. 79-983. At issue this time were the statutes in Years 3 and 4. The same 13 judges, joined by one other, again sought to represent two classes of Article III judges defined by the years.⁸ The United States is defendant. The case was referred to the same member of the District Court who had presided over the proceedings in No. 79-983.

On January 31, 1980, the District Court entered an order certifying the classes and granting summary judgment for the plaintiffs, appellees in No. 79-1689. Based on its decision in No. 79-983, the court held that the statute in Year 3 violated the Compensation Clause. The court noted with respect to Year 4 that the relevant statute referred only to "executive employees." It then held that while it was doubtful Congress intended it to apply the statute to judges, the statute would be unconstitutional if Congress did so intend. In either case, the Adjustment Act increase for Year 4 took effect. Judg-

ment for appellees was formally entered February 12. On the Government's appeal to this Court, we postponed consideration of jurisdiction to the merits and consolidated this case with No. 79-983 for briefing and oral argument. 447 US 919, 65 L Ed 2d 1111, 100 S Ct 3008 (1980).

II

A

Jurisdiction

[3-5] Although it is clear that the District Judge and all Justices of this Court have an interest in the outcome of these cases, there is no doubt whatever as to this Court's jurisdiction

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under 28 USC § 1252 [28 USCS § 1252] or that of the District Court under 28 USC § 1346(a)(2) (1976 ed Supp III) [28 USCS § 1346(a)(2)].⁹ Section 455 of Title 28 [28 USCS § 455]¹⁰ neither expressly nor by implication purports to deal with jurisdiction. On its face § 455

8. For Year 3, the class was defined as all Article III judges in office on October 1, 1978, the date of the scheduled Adjustment Act increase, and continuing in office thereafter. For Year 4, the class was defined as all Article III judges in office on October 1, 1979, the date the Adjustment Act increase took effect, and continuing in office through October 12, 1979, the date the Year 4 statute was signed.

9. This section provides in part:
"Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."

10. This provision confers on the District Courts and the Court of Claims concurrent

jurisdiction over actions against the United States based on the Constitution when the amount in controversy does not exceed \$10,000. The complaints in both No. 79-983 and No. 79-1689 state that the claims of individual members of the classes do not exceed \$10,000, an allegation the Government has not disputed. See App 9a, 62a.

11. This section provides in relevant part:

"(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

"(b) He shall also disqualify himself in the following circumstances:

"(4) He knows that he . . . has a financial interest in the subject matter in controversy

"(5) He . . .

"(i) Is a party to the proceeding . . ."

provides for disqualification of individual judges under specified circumstances; it does not affect the jurisdiction of the court. Nothing in the text or the history of § 455 suggests that Congress intended, by that section, to amend the vast array of statutes conferring jurisdiction over certain matters on various federal courts.

B

Disqualification

[6] Jurisdiction being clear, our next inquiry is whether traditional judicial canons¹² or 28 USC § 455 [28 USCS § 455] operate to

[449 US 212]

disqualify all United States judges, including the Justices of this Court, from deciding these issues. This threshold question reaches us with both the Government and the appellees in full agreement that § 455 did not require the District Judge, and does not now require each Justice of this Court, to disqualify himself. Rather, they agree the ancient Rule of Necessity prevails over the disqualification standards of § 455. Notwithstanding this concurrence of views resulting from the Government's concession, the sensitivity of the issues leads us to address the applicability of § 455

with the same degree of care and attention we would employ if the Government asserted that the District Court lacked jurisdiction or that § 455 mandates disqualification of all judges and Justices without exception.

[7] In federal courts generally, when an individual judge is disqualified from a particular case by reason of § 455, the disqualified judge simply steps aside and allows the normal administrative processes of the court to assign the case to another judge not disqualified. In the cases now before us, however, all Article III judges have an interest in the outcome; assignment of a substitute District Judge was not possible. And in this Court, when one or more Justices are recused but a statutory quorum of six Justices eligible to act remains available, see 28 USC § 1 [28 USCS § 1], the Court may continue to hear the case. Even if all Justices are disqualified in a particular case under § 455, 28 USC § 2109 [28 USCS § 2109] authorizes the Chief Justice to remit a direct appeal to the Court of Appeals for final decision by judges not so disqualified.¹³

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However, in the highly un-

12. See, e.g., ABA, Code of Judicial Conduct, Canon 3(C).

13. Section 2109 provides, in relevant part:

"If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting in banc or specially constituted and composed of the three circuit judges senior in commission who are able to sit, as such order may direct. The decision of such court shall be final and conclusive. In the event of the disqualification or disability of one or more of such circuit judges, such court

shall be filled as provided in chapter 15 of this title."

The second paragraph of the section provides that, in all other cases when a quorum of qualified Justices is unable to sit, the Court shall enter an order affirming the judgment extant, which shall have the precedential effect of an affirmance by an equally divided Court.

The original version of this section was designed to ensure that the parties in anti-trust and Interstate Commerce Commission cases, which at that time could be appealed directly to this Court, would always have some form of appellate review. See HR Rep No. 1317, 78th Cong. 2d Sess. 2 (1944). Congress broadened this right in the 1948 revision of Title 28 to include all cases of direct review. HR Rep No. 308, 80th Cong. 1st Sess. A175-A176 (1947).

sual setting of these cases, even with the authority to assign other federal judges to sit temporarily under 28 USC §§ 291-296 (1976 ed and Supp III) [28 USCS §§ 291-296], it is not possible to convene a division of the Court of Appeals with judges who are not subject to the disqualification provisions of § 455. It was precisely considerations of this kind that gave rise to the Rule of Necessity, a well-settled principle at common law that, as Pollack put it, "although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise." F. Pollack, A First Book of Jurisprudence 270 (6th ed 1929).

8 Hen VI, f 19, pl 6.¹⁴ Early cases in this country confirmed the vitality of the Rule.¹⁵

The Rule of Necessity has been consistently applied in this country in both state and federal courts. In *State ex rel. Mitchell v Sage Stores Co.*, 1578 Kan 622, 143 P2d 652 (1933), the Supreme Court of Kansas observed:

"It is well established that actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated." *Id.*, at 629, 143 P2d, at 656.

Similarly, the Supreme Court of Pennsylvania held:

"The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest—where no provision is made for calling another in, or where no one else can take his place—it is his duty to hear and decide, however disagreeable it may be." *Philadelphia v Fox*, 64 Pa 169, 185 (1870).

Other state¹⁶ and federal¹⁷ courts

C



The Rule of Necessity had its genesis at least five and a half centuries ago. Its earliest recorded invocation was in 1430, when it was held that the Chancellor of Oxford could act as judge of a case in which he was a party when there was no provision for appointment of another judge. *Y. B. 1430*, 101 S Ct 471.

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14. Rolle's Abridgment summarized this holding as follows:

"If an action is sued in the bench against all the Judges there, then by necessity they shall be their own Judges." 2 H. Rolle, *An Abridgment of Many Cases and Resolutions at Common Law* 93 (1669) (translation).

15. For example, in *Mooers v White*, 6 Johns Ch 360 (NY 1822), Chancellor Kent continued to sit despite his brother-in-law's being a party; New York law made no provision for a substitute chancellor. See *In re Leefe*, 2 Barb Ch 39 (NY 1846). See also cases cited in Annot., 39 ALR 1476 (1925).

16. E. g., *Moulton v Byrd*, 224 Ala 403, 140 So 384 (1932); *Olson v Cory*, 26 Cal 3d 672, 609 P2d 991 (1980); *Nellius v Stiffler*, 402 A2d

359 (Del 1978); *Dacey v Connecticut Bar Assn.*, 170 Conn 520, 368 A2d 125 (1976); *Wheeler v Board of Trustees of Fargo Consol. School Dist.*, 200 Ga 323, 37 SE2d 322 (1946); *Schward v Ariyoshi*, 57 Haw 348, 555 P2d 1329 (1976); *Higer v Hansen*, 67 Idaho 45, 170 P2d 411 (1946); *Gordy v Dennis*, 176 Md 106, 5 A2d 69 (1936); *State ex rel. Gardner v Holm*, 241 Minn 125, 62 NW2d 52 (1954); *State ex rel. West Jersey Traction Co. v Board of Public Works*, 56 NJL 431, 29 A 163 (1894); *Long v Watts*, 183 NC 99, 110 SE 765 (1922); *First American Bank & Trust Co. v Ellwein*; 221 NW2d 509 (ND), cert denied, 419 US 1026, 42 L Ed 2d 301, 95 S Ct 505 (1974); *McCoy v Handlin*, 35 SD 487, 153 NW 361 (1915); *Alamo Title Co. v San Antonio Bar*

All the judges in U.S. had been disqualified in this case

also have recognized the Rule.

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The concept of the absolute duty of judges to hear and decide cases within their jurisdiction revealed in *Pollack, supra*, and *Philadelphia v Fox, supra*, is reflected in decisions of this Court. Our earlier cases dealing with the Compensation Clause did not directly involve the compensation of Justices or name them as parties, and no express reference to the Rule is found. See, e. g., *O'Malley v Woodrough*, 307 US 277, 83 L Ed 1289, 59 S Ct 838, 122 ALR 1379 (1939); *O'Donoghue v United States*, 289 US 516, 77 L Ed 1356, 53 S Ct 749 (1933); *Evans v Gore*, 253 US 245, 64 L Ed 887, 40 S Ct 550, 11 ALR 519 (1920). In *Evans*, however, an action brought by an individual judge in his own behalf, the Court by clear implication dealt with the Rule:

Because of the individual relation of the members of this court to the question . . . , we cannot but regret that its solution falls to us But jurisdiction of the present case cannot be declined or renounced. The plaintiff was enti-

Assn., 360 SW2d 814 (Tex Civ App), writ refd., no rev error (Tex 1962).

7. E. g., *Atkins v United States*, 214 Ct Cl 186, 556 F2d 1028 (1977), cert denied, 434 US 1009, 54 L Ed 2d 751, 98 S Ct 718 (1978); *Pilla v American Bar Assn.*, 542 F2d 56 (CA8 1976); *Brinkley v Hassig*, 83 F2d 351 (CA10 1936); *United States v Corrigan*, 401 F Supp 795 (Wyo 1975).

18. *O'Malley* cast doubt on the substantive holding of *Evans*, see n 31, *infra*, but the fact that the Court reached the issue indicates that it did not question this aspect of the *Evans* opinion.

19. In another, not unrelated context, Chief Justice Marshall's exposition in *Cohens v Vir-*

gined by law to invoke our decision on the question as respects his own compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which under the law he could go." *Id.*, at 247-248, 64 L Ed 887, 40 S Ct 550, 11 ALR 519.¹⁸

[449 US 216]

It would appear, therefore, that this Court so took for granted the continuing validity of the Rule of Necessity that no express reference to it or extended discussion of it was needed.¹⁹

D

Limited Purpose of Section 455

The objective of § 455 was to deal with the reality of a positive disqualification by reason of an interest or the appearance of possible bias. The House and Senate Reports on § 455 reflect a constant assumption that upon disqualification of a particular judge, another would be assigned to the case. For example:

"[I]f there is [any] reasonable factual basis for doubting the judge's

ginius, 6 Wheat, 264, 5 L Ed 257, (1821), could well have been the explanation of the Rule of Necessity; he wrote that a court "must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them." *Id.*, at 404, 5 L Ed 257 (emphasis added).

impartiality, he should disqualify himself and let another judge preside over the case." S Rep No. 93-419, p 5 (1973) (emphasis added); HR Rep No. 93-1453, p 5 (1973) (emphasis added).

The Reports of the two Houses continued:

"The statutes contain ample authority for chief judges to assign other judges to replace either a circuit or district court judge who become disqualified [under § 455]." S Rep No. 93-419, supra, at 7 (emphasis added); HR Rep No. 93-1453, supra, at 7 (emphasis added).

[449 US 217]

The congressional purpose so clearly expressed in the Reports gives no hint of altering the ancient Rule of Necessity, a doctrine that had not been questioned under prior judicial disqualification statutes.²⁰ The declared purpose of § 455 is to guarantee litigants a fair forum in which they can pursue their claims. Far from promoting this purpose, failure to apply the Rule of Necessity would have a contrary effect, for without the Rule, some litigants would be denied their right to a forum. The availability of a forum becomes especially important in these cases. As this Court has observed elsewhere, the Compensation Clause is designed to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary. *Evans v Gore*, supra, at 253, 64 L Ed 887, 40 S Ct 550, 11 ALR 519. The public might be denied resolution of this crucial matter if first the District Judge, and now all the Justices of this Court, were to

ignore the mandate of the Rule of Necessity and decline to answer the questions presented. On balance, the public interest would not be served by requiring disqualification under § 455.

[8, 9] We therefore hold that § 455 was not intended by Congress to alter the time-honored Rule of Necessity. And we would not casually infer that the Legislative and Executive Branches sought by the enactment of § 455 to foreclose federal courts from exercising "the province and duty of the judicial department to say what the law is." *Marbury v Madison*, 1 Cranch 137, 177, 2 L Ed 60 (1803).

III

The Compensation Clause

The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary. A

[449 US 218]

Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government. Our Constitution promotes that independence specifically by providing:

"The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Art III, § 1.

20. See Act of Mar. 3, 1911, ch 231, §§ 20, 21, 36 Stat 1090 (current version at 28 USC §§ 144, 455 (1976 ed and Supp III) (28 USC §§ 144, 455)). This statute applied only to

district judges, but its existence demonstrates that the Rule of Necessity has continued in force side by side with statutory disqualification standards.

Hamilton, in *The Federalist* No. 79, p 491 (1818) (emphasis deleted), emphasized the importance of protecting judicial compensation:

"In the general course of human nature, a power over a man's subsistence amounts to a power over his will."

The relationship of judges' compensation to their independence was by no means a new idea initiated by the authors of the Constitution. The Act of Settlement in 1701, designed to correct abuses prevalent under the reign of the Stuart Kings, includes a provision that, upon the accession of the successor to then Princess Anne,

"Judges Commissions be made *Quamdiu se bene gesserint* [during good behavior], and their Salaries ascertained and established . . ." 12 & 13 Will III, ch 2, § III, cl 7 (1701).

This English statute is the earliest legislative acknowledgment that control over the tenure and compensation of judges is incompatible with a truly independent judiciary, free of improper influence from other forces within government. Later, Parliament passed, and the King assented to, a statute implementing the Act of Settlement providing that a judge's salary would not be decreased "so long as the Patents and Commissions of them, or any of them respectively, shall
(449 US 219)

continue and remain in force." 1 Geo III, ch 23, § III (1760). These two statutes were designed "to maintain both the dignity and independence of the judges." 1 W. Blackstone, *Commentaries* *267.

Originally, these same protections applied to colonial judges as well. In 1761, however, the King converted the tenure of colonial judges to service at his pleasure.²¹ The interference this change brought to the administration of justice in the Colonies soon became one of the major objections voiced against the Crown. Indeed, the Declaration of Independence, in listing the grievances against the King, complained:

"He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

Independence won, the colonists did not forget the reasons that caused them to separate from the Mother Country. Thus, when the Framers met in Philadelphia in 1787 to draft our organic law, they made certain that in the judicial articles both the tenure and the compensation of judges would be protected from one of the evils that had brought on the Revolution and separation.

Madison's notes of the Constitutional Convention reveal that the draftsmen first reached a tentative arrangement whereby the Congress could neither increase nor decrease the compensation of judges. Later, Gouverneur Morris succeeded in striking the prohibition on increases; with others, he believed the Congress should be at liberty to raise salaries to meet such contingencies as inflation, a phenomenon known in that day as it is in ours. Madison opposed the change on the ground judges might tend to defer unduly to the Congress when that body was considering pay increases.

21. See, e.g., W. Carpenter, *Judicial Tenure in the United States* 2-3 (1918).

[449 US 220]

The concern for the ravages of inflation is revealed in Madison's comment:

"The variations in the value of money, may be guarded agst. by taking for a standard wheat or some other thing of permanent value." 2 M. Farrand, *The Records of the Federal Convention of 1787*, p 45 (1911).

Morris criticized the proposal for overlooking changes in the state of the economy; the value of wheat may change, he said, and leave the judges undercompensated. The Convention finally adopted Morris' motion to allow increases by the Congress, thereby accepting a limited risk of external influence in order to accommodate the need to raise judges' salaries when times changed.²² As Hamilton later explained:

"It will readily be understood, that the fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation [of judges] in the Constitution inadmissible. What might be extravagant to-day might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse." *The Federalist* No. 79, pp 491-492 (1818).

22. The rejection of Madison's suggestion of tying judicial salaries to the price of some commodity may have arisen from colonial Virginia's unsatisfactory experience with a similar scheme for paying the clergy with a set amount of tobacco. See generally L. Gipson, *The Coming of the Revolution, 1763-1775*, pp 46-54 (1954); Scutt, *The Constitu-*

[10] This Court has recognized that the Compensation Clause
[449 US 221]

also serves another, related purpose. As well as promoting judicial independence, it ensures a prospective judge that, in abandoning private practice—more often than not more lucrative than the bench—the compensation of the new post will not diminish. Beyond doubt, such assurance has served to attract able lawyers to the bench and thereby enhances the quality of justice. *Evans v Gore*, 253 US, at 253, 64 L Ed 887, 40 S Ct 550, 11 ALR 519; 1 J. Kent, *Commentaries on American Law* 276 (1826).

IV

The four statutes now before us present an issue never before addressed by this Court: when, if ever, does the Compensation Clause prohibit the Congress from repealing salary increases that otherwise take effect automatically pursuant to a formula previously enacted? We must decide when a salary increase authorized by Congress under such a formula "vests"—i.e., becomes irreversible under the Compensation Clause. Is the protection of the Clause first invoked when the formula is *enacted* or when increases *take effect*?

A

Appellees argue that we need not reach this constitutional question.

tional Aspects of the "Parson's Cause." 31 *Pol Sci Q* 558 (1916). Although ultimately the tobacco statutes and the subsequent cases are more important as indications of early dissatisfaction with the Crown, the widespread publicity surrounding them surely made the Framers wary of indexing salaries by reference to some commodity.

They contend that Congress intended these four statutes do no more than halt *funding* for the salary increases under the Adjustment Act. If, as appellees contend, the statutes are appropriations measures that do not alter substantive law, the increases in all four years nevertheless are now in effect and the Government is obliged to pay them; it has simply to authorize that payment. Accordingly, appellees submit, these congressional actions violate the Compensation Clause regardless of whether Congress could have rescinded increases previously passed.

[11] As a general rule, "repeals by implication are not favored." *Posadas v National City Bank*, 296 US 497, 503, 80 L Ed 351, 56 S Ct 349 (1936). See also *TVA v Hill*, 437 US 153, 189, 57 L Ed 2d 117, 98 S Ct 2279 (1978), and *Morton v Mancari*, 417 US 535, 549, 41 L Ed 2d 290, 94 S Ct 2474 (1974). This rule applies

[449 US 222]

with especial force when the provision advanced as the repealing measure was enacted in an appropriations bill. *TVA v Hill*, supra, at 190, 57 L Ed 2d 117, 98 S Ct 2279. Indeed, the rules of both Houses limit the ability to change substantive law through appropriations measures. See Senate Standing Rule XVI(4); House of Representatives Rule XXI (2). Nevertheless, when Congress desires to suspend or repeal a statute in force, "[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill,

23. Indeed, in both *Mitchell* and *Belknap*, the Court held that provisions in appropriations statutes funding certain officials' salaries at amounts below those established under previous statutes operated to repeal the relevant provisions of those statutes and set new salary levels.

24. See, e.g., 123 Cong Rec 7095 (1977)

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or otherwise." *United States v Dickerson*, 310 US 554, 555, 84 L Ed 1356, 60 S Ct 1034 (1940). "The whole question depends on the intention of Congress as expressed in the statutes." *United States v Mitchell*, 109 US 146, 150, 27 L Ed 887, 3 S Ct 151 (1883). See also *Belknap v United States*, 150 US 588, 594, 37 L Ed 1191, 14 S Ct 183 (1893).²³

In the cases now before us, we conclude that in each of the four years in question Congress intended to repeal or postpone previously authorized increases. In the statute for Year 2, Congress expressly stated that the Adjustment Act increase due the following October "shall not take effect." Pub L 95-66, 91 Stat 270. Thus, the plain words of the statute reveal an intention to repeal the Adjustment Act insofar as it would increase salaries in October 1977. This reading finds support in the House Report on the bill, which repeatedly uses language such as "eliminate the expected October 1977 comparability adjustment." See HR Rep No. 95-458, pp 1, 3 (1977). The floor remarks of Senators and Representatives confirm that this construction was generally understood.²⁴

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The statutes in Years 1, 3, and 4, although phrased in terms of limiting funds, see supra, at 205-206, 207, 208, 66 L Ed 2d, at 400, 401, 402, nevertheless were intended by Congress to block the increases the Adjust-

(remarks of Sen. Byrd) ("salaries . . . shall not be increased . . . thus obviat[ing] the effect of the comparability pay provisions"; ibid. (remarks of Sen. Baker) ("forgo and rescind that adjustment"; id., at 21121 (remarks of Rep. Solarz) ("knock[s] out the comparability increase for this year"; id., at 21125 (remarks of Rep. Ammerman) ("deny the October 1 cost-of-living pay increase").

ment Act otherwise would generate. Representative Shipley introduced the rider in relation to Year 1 to "preven[t] the automatic cost-of-living pay increase" 122 Cong Rec 28872 (1976).²⁵ Floor remarks in both Houses reflected this view.²⁶ In Year 3, the House Report characterized the statute as a "change [in] the application of existing law." HR Rep No. 95-1254, p 31 (1978), and described its effect as creating a one-year "pay freeze," *id.*, at 35. The Senate Report

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stated that the statute would "continu[e] . . . the so called 'cap' " on salaries for the next fiscal year. S Rep No. 95-1024, p 50 (1978). Floor debate once again expressed agreement with this construction.²⁷ The House Report on the statute for Year 4 characterized it as

"reduc[ing] Federal executive pay increases from the mandatory entitlement of 12.9 per centum to 5.5 per centum." HR Rep No. 96-500, p 7 (1979). The Report referred to the bill as a change in existing law. See *id.*, at 3. Later the Conference Report stated that the statute "restricts Cost-of-Living increases to 5.5 percent" for the fiscal year just begun. HR Conf Rep No. 96-513, p 3 (1979). The floor debates also confirm this understanding.²⁸

These passages indicate clearly that Congress intended to rescind these raises entirely, not simply to consign them to the fiscal limbo of an account due but not payable. The clear intent of Congress in each year was to stop for that year the application of the Adjustment Act. The issue thus resolves itself into whether

25. Representative Shipley's original amendment applied only to Members of the House of Representatives. The provision was expanded to cover all officials subject to the Salary Act. See 122 Cong Rec 28877 (1976). The Senate Committee studying the bill recommended the provision be deleted altogether, see S Rep No. 94-1201, p 2 (1976), but the Senate ultimately passed a version applying the freeze to all Members of Congress, see 122 Cong Rec 29132-29133 (1976). The Conference Committee recommended that the freeze apply to all Salary Act positions, see HR Conf Rep No. 94-1559, p 3 (1976). This recommendation prevailed.

26. See, e.g., 122 Cong Rec 28865 (1976) (remarks of Rep. Armstrong) ("freeze of the salaries"); *ibid.* (remarks of Rep. Yates) ("freeze the salaries"); *ibid.* (remarks of Rep. McClory) ("effectively eliminate the . . . cost-of-living increases"); *id.*, at 28870 (remarks of Rep. Derwinski) ("freezing . . . pay at its current level"); *id.*, at 28871 (remarks of Rep. Miller) ("stopping the pay raise"); *id.*, at 28879 (remarks of Rep. Anderson) ("block a cost-of-living pay increase"); *id.*, at 29132 (remarks of Sen. Taft) ("effectively freeze those salaries—the employees would not be given a cost-of-living raise on October 1, or a salary increase"); *id.*, at 29164 (remarks of Sen. Al-

len) ("freezing the compensation"); *id.*, at 29172 (remarks of Sen. Allen) ("denied the upcoming increase"; "salaries frozen at the September 30, 1976, level"); *id.*, at 29372 (remarks of Sen. Bartlett) ("automatic pay raises . . . eliminated"); *id.*, at 31892 (remarks of Rep. Shipley) ("no October cost-of-living increases would be made"; bill "proscribe[s] . . . the October cost-of-living pay increase[s]"); *id.*, at 31896 (remarks of Rep. Riegle) ("elimination of the cost-of-living raise").

27. See, e.g., 124 Cong Rec 17603 (1978) (remarks of Rep. Shipley) ("pay freeze"); *id.*, at 17604 (remarks of Rep. Armstrong) ("automatic cost-of-living increases will not be permitted"); *id.*, at 24375 (remarks of Sen. Sasser) ("freeze, during fiscal year 1979, the pay").

28. See, e.g., 125 Cong Rec 27532 (1979) (remarks of Rep. Whitten) ("sharply decrease[s] such automatic increases"); *id.*, at 27533 (remarks of Rep. Jacobs) ("rollback of the automatic 12.9-percent salary increase"); *id.*, at 28019 (remarks of Sen. Byrd) ("put a cap on that pay increase"); *id.*, at 28020 (remarks of Sen. Magnuson) ("this is in the nature of a cap, a limitation"); *id.*, at 28103 (remarks of Rep. Conte) ("reduces from 12.9 to 5.5 percent the increase in pay").

Congress could do so without violating the Compensation Clause.

B

Year 1

[1d, 12a] The statute applying to Year 1 was signed by the President during the business day of October 1, 1976. By that time, the 4.8% increase under the Adjustment Act already had

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taken effect, since it was operative with the start of the month—and the new fiscal year—at the beginning of the day. The statute became law only upon the President's signing it on October 1; it therefore purported to repeal a salary increase already in force. Thus it "diminished" the compensation of federal judges.²⁹

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[13] The Government contends that Congress could reduce compensation as long as it did not "discrimi-

nate" against judges, as such, during the process. That the "freeze" applied to various officials in the Legislative and the Executive Branches, as well as judges, does not save the statute, however. This is quite different from the situation in *O'Malley v Woodrough*, 307 US 277, 83 L Ed 1289, 59 S Ct 838, 122 ALR 1379 (1939). There the Court held that the Compensation Clause was not offended by an income tax levied on Article III judges as well as on all other taxpayers; there was no discrimination against the plaintiff judge. Federal judges, like all citizens, must share "the material burden of the government . . ." *Id.*, at 282, 83 L Ed 1289, 59 S Ct 838, 122 ALR 1379. The inclusion in the freeze of other officials who are not protected by the Compensation Clause does not insulate a direct diminution in judges' salaries from the clear mandate of that Clause; the Constitution makes no exceptions for "nondiscriminatory" reduc-

29. [12b] The Government asks us to invoke the rule that the law does not recognize fractions of a day, see, e.g., *Lapeyre v United States*, 17 Wall 191, 21 L Ed 606 (1873); it is argued that we should treat the President's assent as having been given at the start of October 1, the same time the Year 1 increase was to take effect. It is correct that "the law generally reject[s] all fractions of a day, in order to avoid disputes." 2 W. Blackstone, *Commentaries* *141. Here, however, the Government acknowledges that the statute was signed by the President *after* the Year 1 increase had taken effect. This Court, almost a century ago, stated:

"[W]henver it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day, as readily as into the fractions of any other unit of time. The rule is purely one of convenience, which must give way whenever the rights of parties require it. . . . The law is not made of such unreasonable and arbitrary rules." *Louisville v Savings Bank*, 104 US 469, 474-475, 28 L Ed 775 (1881) (quoting *Grosvenor v Magill*, 37 Ill 239, 240-241 (1865); citations omitted).

Accord, *Combe v Pitt*, 3 Burr 1423; 97 Eng Rep 907 (KB 1763); 2 C. Sands, *Sutherland on Statutory Construction* § 33.10 (4th ed 1973).

In *Burgess v Salmon*, 97 US 381, 24 L Ed 1104 (1878), this Court was required to look to the time of day when a statute was enacted as compared to another and related event. This Court held that, notwithstanding the general rule, a person could not be subjected to a civil fine for violating a statute passed on the same day he engaged in the conduct but after that conduct had occurred. To impose a penalty on an act innocent when performed would render the statute an *ex post facto* law. *Id.*, at 384-385, 24 L Ed 1104. Thus *Burgess* dealt not so much with benefits and penalties as it did with constitutional limitations on the legislative authority of Congress and the Executive. In the context of periodic increases, the Compensation Clause, like the *Ex Post Facto* Clause of Art I, § 9, places limits on Congress and the President. Because of the constitutional implications, the logic of *Burgess* applies to the statute for Year 1 and requires us to look to the precise time the statute became law by the President's action.

tions.³⁰ Accordingly, we hold that the statute with respect to Year 1, as applied to compensation of members of the certified class, violates the Compensation Clause of Art III.

Year 2

[2d] Unlike the statute for Year 1, the statute for Year 2 was signed by the President before October 1, when the 7.1% raise under the Comparability Act was due to take effect. Year 2 thus confronts us squarely with the question of whether Congress may, before the effective date of a salary increase, rescind such an increase scheduled to take effect at a later date. The District Court held that by including an annual cost-of-living adjustment in the statutory definitions of the salaries of Article III judges, see *supra*, at 204, 66 L Ed 2d, at 399, and n 2, Congress made the annual adjustment, from that moment on,

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a part of judges' compensation for constitutional purposes. Subsequent action reducing those adjustments "diminishes" compensation within the meaning of the Compensation Clause. Relying on *Evans v Gore*, 253 US, at 254, 64 L Ed 887, 40 S Ct 550, 11 ALR 519, the District Court held that such action reduces the amount "a judge . . . has been promised," and all amounts thus promised fall within the protection of the Clause.

30. We need not address the question of whether evidence of an intent to influence the Judiciary would invalidate a statute that on its face does not directly reduce judicial compensation. See *Evans v Gore*, 253 US 245, 252, 64 L Ed 887, 40 S Ct 550, 11 ALR 519 (1920).

31. In *O'Malley v Woodrough*, 307 US 277, 83 L Ed 1289, 59 S Ct 838, 122 ALR 1379 (1939), this Court held that the immunity in the Compensation Clause would not extend to exempting judges from paying taxes, a duty

[14] We are unable to agree with the District Court's analysis and result. Our discussion of the Framers' debates over the Compensation Clause, *supra*, at 219-220, 66 L Ed 2d, at 408-409, led to a conclusion that the Compensation Clause does not erect an absolute ban on all legislation that conceivably could have an adverse effect on compensation of judges.³¹ Rather, that provision embodies a clear rule prohibiting decreases but allowing increases, a practical balancing by the Framers of the need to increase compensation to meet economic changes, such as substantial inflation, against the need for judges to be free from undue congressional influence. The Constitution delegated to Congress the discretion to fix salaries and of necessity placed faith in the integrity and sound judgment of the elected representatives to enact increases when changing conditions demand.

Congress enacted the Adjustment Act based on this delegated power to fix and, periodically, increase judicial compensation. It did not thereby alter the *compensation* of judges; it modified only the *formula* for determining that compensation. Later, Congress decided to abandon the formula

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as to the particular years in question. For Year 2, as opposed to Year 1, the statute was passed before the Adjustment Act increases

shared by all citizens. The Court thus recognized that the Compensation Clause does not forbid everything that might adversely affect judges. The opinion concluded by saying that to the extent *Miles v Graham*, 268 US 501, 69 L Ed 1067, 45 S Ct 601 (1925), was inconsistent, it "cannot survive." 307 US at 282-283, 83 L Ed 1289, 59 S Ct 838, 122 ALR 1379. Because *Miles* relied on *Evans v Gore*, *O'Malley* must also be read to undermine the reasoning of *Evans*, on which the District Court relied in reaching its decision.

had taken effect—before they had become a part of the compensation due Article III judges. Thus, the departure from the Adjustment Act policy in no sense diminished the compensation Article III judges were receiving; it refused only to apply a previously enacted formula.³²

[15] A paramount—indeed, an indispensable—ingredient of the concept of powers delegated to coequal branches is that each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches. To say that the Congress could not alter a method of calculating salaries before it was executed would mean the Judicial Branch could command Congress to carry out an announced future intent as to a decision the Constitution vests exclusively in the Congress.³³ We therefore conclude

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that a salary increase “vests” for purposes of the Compensation Clause only when it takes effect as part of the compensation due and payable to Article III judges. With regard to Year 2, we hold that the Compensation Clause did not prohibit Congress from re-

pealing the planned but not yet effective cost-of-living adjustment of October 1, 1977, when it did so before October 1, the time it first was scheduled to become part of judges' compensation. The statute in Year 2 thus represents a constitutionally valid exercise of legislative authority.

Year 3

[2e] For our purposes, the legal issues presented by the statute in Year 3 are indistinguishable from those in Year 2. Each statute eliminated—before October 1—the Adjustment Act salary increases contemplated but not yet implemented. Each statute was passed and signed by the President *before* the Adjustment Act increases took effect, in the case of Year 3, on September 30. For the reasons set forth in our discussion of the issues for Year 2, we hold that the statute in Year 3 did not violate the Compensation Clause.

Year 4

[16] Before reaching the constitutional issues implicated in Year 4,

32. *United States v More* (CC DC 1803), writ of error dismissed for want of jurisdiction, 3 Cranch 159, 2 L Ed 397 (1805), is not to the contrary. Congress had enacted a system of fees for compensating justices of the peace in the District of Columbia but subsequently abolished the fees. The Government brought an indictment against a justice of the peace who had continued to charge the fees, and the defendant demurred. The Circuit Court for the District of Columbia held that the compensation of justices of the peace in the District of Columbia was subject to the Compensation Clause and that a statute diminishing (there, abolishing) the fees violated the Constitution. *Id.*, at 161, n. 2 L Ed 397. In *More*, the fee system was already in place as part of the

justices' compensation when Congress repealed it. Here, by contrast, the increase in Year 2 had not yet become part of the compensation of Article III judges when the statute repealing it was passed and signed by the President.

33. Indeed, it would be particularly ironic if we were to bind Congress to an indexing scheme for salaries when the Framers themselves rejected an indexing proposal. See *supra*, at 220, 66 L Ed 2d, at 409. Of course, indexing techniques have improved since 1787. Nevertheless, Congress' repeated rejections of specific adjustments indicates some dissatisfaction with automatic adjustments according to a predetermined formula, even if not with the formula itself.

we must resolve a problem of statutory construction. On its face, the statute in Year 4 applies in terms to "executive employees, which includes Members of Congress." See *supra*, at 208, 66 L Ed 2d, at 402. It does not expressly mention judges. Appellees contend that even if Congress constitutionally could freeze the salaries of Article III judges, it did not do so in this statute.

We are satisfied that Congress' use of the phrase "executive employees," in context, was intended to include Article III judges. The full title of the Adjustment Act is the *Executive Salary Cost-of-Living Adjustment Act*, but it is clear that it was intended to apply to officials in the Legislative and the

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Judicial Branches as well.³⁴ The title does not control over the terms of the statute. The statutes in the three preceding years undeniably applied to judges, and we can discern no indication that the Congress chose to single them out for an exemption when it was including Executive and Legislative officials. Most important, both the Conference Report and the Chairman of the House Appropriations Committee, speaking on the floor, made explicit what already was implicit: the limiting statute would apply to judges as well. See HR Conf Rep No. 96-513, p 3 (1979); 125 Cong Rec 27530, 27532 (1979) (remarks of Rep. Whitten).³⁵

34. Most positions covered, of course, are in the Executive Branch, which may explain the limited title.

35. Several Members of Congress acknowledged the potential constitutional problem with rolling back the salary increase already in effect for judges. See 125 Cong Rec 27529-

[1e] Having concluded that the statute in Year 4 was intended to apply to judges as well as other high-level federal officials, we are confronted with a situation similar to that in Year 1. Here again, the statute purported to revoke an increase in judges' compensation after those statutes had taken effect. For the reasons governing the statute as to Year 1, we hold that the statute revoking the increase for Year 4 violated the Compensation Clause insofar as it applied to members of the certified class.

V

The District Court has not yet calculated the precise dollar amounts involved in Years 1 and 4, the years in which we hold the statutes violated the Compensation Clause. Further proceedings are required to resolve these questions. Accordingly, the judgment of the District Court in No. 79-983

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is affirmed in part and reversed in part, the judgment in No. 79-1689 is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice Blackmun took no part in the decision of these cases.

27530 (1979) (remarks of Rep. Latta; *id.*, at 27531-27533 (remarks of Rep. Whitten; *id.*, at 27533 (remarks of Rep. Jacobson; *id.*, at 28022 (1979) (remarks of Sen. Stevens). Representative Whitten, the Chairman of the House Appropriations Committee, stated that "the courts will have to make a final determination regarding this issue." *Id.*, at 27532.

COCHRAN et al. v. ST. PAUL & TACOMA LUMBER CO.

CRAWFORD et al. v. WEYERHAEUSER TIMBER CO. (two cases).

SAME v. SAGINAW LOGGING CO.
Nos. 805, 801, 882, 885.

District Court, W. D. Washington, S. D.
May 20, 1947.

1. Constitutional law ⇨70(3)

The District Court cannot determine wisdom or lack of wisdom in acts of Congress.

2. Courts ⇨255

A United States District Court is purely a creature of legislative branch of government, generally provided for by Constitution, but not a constitutional court in stricter sense, and its jurisdiction comes from Congress.

3. Constitutional law ⇨48

Courts' duty is to interpret statute so as to uphold, rather than find against, its constitutionality.

4. Master and servant ⇨69

An employee's right of action for portal to portal pay is not common-law action, either ex contractu or ex delicto, but purely creature of Fair Labor Standards Act, and may be taken away by Congress. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; Portal-to-Portal Act of 1947, § 1 et seq., 29 U.S.C.A. § 251 et seq.

5. Statutes ⇨263

A statute should not be construed as retrospective unless words thereof are so clear, strong, and imperative that no other meaning can be annexed to them or Legislature's intention cannot be otherwise satisfied.

6. Constitutional law ⇨48

A District Court should hesitate to find an act of Congress unconstitutional.

7. Constitutional law ⇨92

Master and servant ⇨69

The Portal-to-Portal Act is not unconstitutional as destroying employees' vested contractual rights. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. §

201 et seq.; Portal-to-Portal Act of 1947, §§ 1 et seq., 2 (a) (1, 2), (d), 29 U.S.C.A. §§ 251 et seq., 252 (a) (1, 2), (d); U.S.C.A. Const. Amends. 5, 14.

Four actions, consolidated for the purpose of hearing motions to dismiss, by Freeman Cochran and others against the St. Paul & Tacoma Lumber Company, and by William Crawford against the Weyerhaeuser Timber Company in two cases and against the Saginaw Logging Company.

Motions granted, and actions dismissed.

Houghton, Cluck & Coughlin, of Seattle, Wash., for plaintiffs Cochran and others.

Houghton, Cluck & Coughlin, of Seattle, Wash., for plaintiffs Crawford and others.

Crosscup, Ambler & Stephan, of Seattle, Wash., for defendant St. Paul & Tacoma Lumber Co.

W. E. Heidinger, of Tacoma, Wash., for defendant Weyerhaeuser Timber Co.

Hart, Spencer, McCulloch & Rockwood, of Portland, Or., for defendant Saginaw Logging Co.

LEAVY, District Judge.

We have here four cases that are consolidated for the purpose of considering the motions which are similar in all of them, and the consolidation of course was made with the thought that it would expedite disposition of the issues that have been raised by these motions. All of these cases are at issue. They have been on file in this court for almost a year. Their origin followed shortly after the Supreme Court pronouncement in the Anderson v. Mount Clemens Pottery, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515, interpreting the language of the Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 et seq., in reference to time immediately before and immediately after the regular eight hour period now known as "Portal to Portal" time.

The issue presented is a novel one. I say "novel" because, in the first instance, in all of our experience, legislative and judicial, we never have had legislation to deal with, similar to the Fair Labor Standards Act of 1938, and in dealing with it we have had,

of necessity, many of its features construed by the courts. As a result of judicial construction in this Mount Clemens Pottery case there are a large number of suits similar to the four that we have here today which have been instituted throughout the United States—I cannot even hazard a guess as to the number, but I imagine they run into the thousands.

[1] It is not for this court to determine the wisdom or lack of wisdom in the acts of Congress in attempting to remedy the wrong that they felt existed, but they did attempt by the Portal-to-Portal Act of 1947, 29 U.S.C.A. § 251 et seq., to remedy a situation that they recite in the preamble of the act is the result of a misconstruction of their intention when it enacted the original Fair Labor Standards Act of 1938. In order to remedy a situation that they in their wisdom thought required remedial legislation, they went much further—I think all parties will concede this—than they had ever gone in the enactment of legislation which dealt with a situation similar to the one we have here.

These four cases are cases involving a very large amount of money. If the compensation claimed were allowed, and then that doubled and costs and attorneys' fees, the sum would be substantially in excess of a million dollars.

There are involved here approximately three hundred employees. They are appearing in a number of these cases in a representative capacity. No precedent can be cited that tends to construe the act that Congress has just recently passed and is now identified as Public Law 49, because the effective date is of May 14, 1947. The decision of this Court might well be the first of its kind in the United States involving hundreds or thousands of other cases. By the very nature of the matter involved, its importance and its significance to labor and to industry, and to the general economy of the nation, I have no reason to believe that a determination made by this court today of the issue is going to be one that will be universally accepted throughout the United States. The question ought to be disposed of at the earliest possible date. Feeling that way, still I do not mean

to imply that I would feel warranted in holding that the motions of the various defendants were well taken unless I could be persuaded that there is sufficient merit in the position they take to justify such a holding.

To deny the motions would, if not directly at least by implication, require findings that the act—this Portal-to-Portal Act—is unconstitutional. I say that because its language is so plain, direct, simple and unequivocal that it leaves no room for construction or doubt as to what was intended or what was meant. We are placed in a position where we need not endeavor to determine what the Congress meant when it spoke, because, as I say, it leaves no room whatever for construction.

Part I of the Act consists of an exceptionally lengthy preamble setting forth the objectives sought to be attained and the purposes for the enactment of the legislation.

Part II, section 2, subsection (a), provides that no employer shall be subject to any liability under the Fair Labor Standards Act of 1938, as amended, "in any action or proceeding commenced prior to or on or after the date of the enactment of this act."

The instant cases were all commenced prior to the date of the enactment of this act. There is no room whatever for doubt as to what was meant by that language—no room to draw different inferences from it, and Congress apparently being fearful that the courts might do just that, saw fit to amplify it by some further language. I refer particularly to subsections (1) and (2), of subsection (a), of section 2, Part II of the Act. Then, in order to further make clear their intention, in subsection (d) of section 2 and Part II of the Act, they provide:

"No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this act, to enforce liability"—and I am omitting the reference to punishment because we are not here concerned with the crimina-

al features of the act—"to enforce liability for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, . . . to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section"—and subsection (a) and (b) of course put us back to the position where we were prior to the enactment of the Fair Labor Standards Act in 1938. And then to make doubly sure, again in subsection (c) there is a provision: that

"No cause of action based on unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, . . . which accrued prior to the date of the enactment of this act, or any interest in such cause of action, shall hereafter be assignable."

While that language does not directly go to the immediate issue we have before us, yet it does involve a construction placed upon the act by the courts in a number of decisions.

I must grant that this Congressional enactment is drastic. It is exceptional, it is extraordinary, and it is unusual. I have examined the briefs that were submitted by counsel—very able briefs on both sides, and have done considerable independent research work in addition. I have carefully tried to analyze the three outstanding cases cited by counsel for the plaintiffs, which are: *Ettor v. City of Tacoma*, 228 U.S. 148, 33 S.Ct. 428, 57 L. Ed. 773, dealing with the subject of vested rights, wherein the Supreme Court of the United States reversed the supreme court of the State of Washington, concerning liability of the city for certain public improvements, and they had this to say, and I am only quoting a small part of that opinion:

"At the time the grading was done there was in force an act of the Washington legislature which required the city to make compensation for consequential damages due to an original street grading. Pending these suits, and while they were actually

being heard, the provision of the act referred to which expressly required the city to provide for or make compensation for all such damage was amended so as to provide that the act should not apply to the original grading of any street."

There is a substantial degree of similarity in that respect to the matter that we have currently before us. The state Court directed a verdict for the city. The Supreme Court goes on to say:

"When the attention of the trial court was called to this repealing act, it directed a verdict for the city upon the theory that the right of action was statutory and fell with the statute, there being no saving clause."

That case does lend considerable support to the position taken by the plaintiffs in these cases, but the legislation there involved was quite different from the legislation that we have here. Here it is not a question of whether there was or was not a saving clause, because the Portal-to-Portal bill is positive, direct, and unequivocal as to what its purpose is. It was not to save, but it was to obliterate or destroy any rights of the type that are asserted in these actions which we now have before us.

We take up another case cited and relied upon by the plaintiffs. It is the early case of *Steamship Co. v. Joliffe*, 2 Wall. 450, 69 U.S. 450, 17 L. Ed. 805, decided back in 1864. The facts of that case have already been discussed. I will not further mention them, other than the holding there was that an enactment by the State of California, after a right had arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so perfected that nothing else remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right, and stands independent of the statute. It isn't an entirely wild assertion to say that, in respect to the situation we have immediately presented to us, it is a situation similar to the one outlined by this rule of law as announced by the Supreme Court.

There is the third case, that of *Coombr v. Getz*, 285 U.S. 434, 52 S.Ct. 435, 76 L. Ed.

366, that deals with a contractual liability. This case also arose in California and came up from the courts there to the United States Supreme Court, and the Supreme Court reversed the court of last resort in California and held that there was a contract; that the contract clause of the federal Constitution and the Fifth Amendment was involved and the right of enforcement of the liability was part of the creditors' contracts where the liability of the stockholder arose to creditors of a corporation, before the cause of action in the case cited was commenced. There had been a repeal and they held it involved both the Fourteenth and the Fifth Amendment.

[2] When we go to the other side of this question we begin first with the statement that is not subject to dispute or contradiction; which is that a United States District Court is purely a creature of the legislative branch of the government, generally provided for by the Constitution, but not, in a stricter sense, a constitutional court. Congress undoubtedly has the power to abolish these courts entirely, give them another name, or dispense with the services that they render. Certainly; in the lifetime of some of us we know we have changed what was once the Circuit Courts and gave them a new name, outlined their duties, and made them the "District Courts"; provided for an appellate court, designated the Circuit Court of Appeals. Now there is some legislation pending to change the name again somewhat, if not, the powers. This Court is a creature of the Congress, and its jurisdiction, in reference to conferring and depriving it of jurisdiction comes from the Congress. Authority, by way of precedent, and much of it made very recently, in the last five years, under the Emergency Price Control Act, 50 U.S.C. Appendix, § 901 et seq. when the Office of Price Administration was established and maximum and minimum prices were fixed. In the act itself is to found language dealing with this subject. The District Courts and even the Circuit Courts were deprived of jurisdiction that theretofore had been conferred upon them. It was placed in a new court, called the Emergency Court of Appeals, and the act even went so far as to deny District Courts the right

to pass upon any feature of constitutionality in either civil or criminal litigation involved in the O.P.A. law and regulations. There are scores of cases to the effect that legislation such as the Emergency Price Control Act is constitutional even though it does deprive the District and Circuit Courts of jurisdiction previously had. Among these numerous cases might be cited the very recent cases of Bowles v. Carothers, 5 Cir., 152 F.2d 603; Bowles v. Mannie & Co., 7 Cir., 155 F.2d 129; Superior Packing Co. v. Porter, 8 Cir., 156 F.2d 193."

There is a substantial amount of authority to be found on what Congress can do and what it cannot do with reference to the courts and still be within constitutional limits.

I am going to cite, as I have already suggested to you, a case that made a strong appeal to me. That is the case of Assessors v. Osborne. It is found in 9 Wall. 567, 76 U.S. 567, 19 L.Ed. 748. This is an early case, 1869, and it seems to be a leading case, and has not been distinguished, modified, or over-ruled. The Court said, 9 Wall. on page 574, 76 U.S. on page 574, 19 L.Ed. 748:

If the action is originally commenced in the Circuit Court—which would be here the District Court—"the cause must be dismissed for want of jurisdiction, unless it appears that the parties were citizens of different States. . . . When the jurisdiction of the District Court depends upon citizenship of the parties it is not enough that it does not appear that they are not citizens of the same state, but the facts necessary to give the District Court jurisdiction must be distinctly alleged. ~~District Courts are courts of special jurisdiction, and therefore they cannot take jurisdiction of any case, either civil or criminal, where they are not authorized to do so by an Act of Congress.~~"

Expanding that language just a little to meet the situation we have here, where, by the Act of Congress, it is stated that this court and all courts are deprived of jurisdiction, not alone of what may occur in a certain line of litigation in the future, or what may be in existence at the moment of

enactment of the law, but of everything that has taken place by reason of an earlier enactment, then there is a striking parallel.

[3] I grant that it is an unusual measure, but this court, must under the rule of construction which asserts that it is the duty of the courts, when constitutionality of a legislative enactment is brought into question, so to interpret the issue of constitutionality that it would result in upholding the same, rather than in finding against it.

Another case, which is an early case, is *Collector v. Hubbard*, 79 U.S. 1, 12 Wall. 1, 20 L.Ed. 272. This was an action for recovery back of money illegally exacted as Internal Revenue duties. The Supreme Court held that such actions cannot be commenced in the District Court. The question being: Did the Act of Congress of 1866 incapacitate Hubbard from bringing a second suit.

On page 14 of 79 U.S., on page 14 of 12 Wall., 20 L.Ed. 272, in that opinion, the Court says:

"Remedies of the kind, given by Congress, may be changed or modified, or they may be withdrawn altogether at the pleasure of the lawmaker, as the taxpayer cannot have any vested right in the remedy granted by Congress for the correction of an error."

[4] It seems to me this is quite in point here. I know that, in passing upon the issues which I have before me, it is quite difficult to make a clear-cut distinction between rights and remedies. They have always been more or less confusing. I think, to the best of lawyers and judges, but until the Fair Labor Standards Act of 1938 was enacted by Congress, no rights whatever existed in any employee to maintain actions such as we have here. It is not an action *ex contractu* nor an action *ex delicto*. It is not a common law action. The action is purely a creature of the statute. The power that gave it, according to this holding, has the power to take it away, and that is exactly what Congress did so far as the Portal-to-Portal Act is concerned.

[5] Let me go on to one or two other cases that were very persuasive. *United*

States Fidelity Company v. United States for use and benefit of *Struthers Wells Company*, 209 U.S. 306, 28 S.Ct. 537, 539, 52 L.Ed. 804. This was an action brought upon a contract bond, and the Supreme Court says this:

"There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes, as to whether they are or are not retroactive in their effect." The Court goes on to state: "The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." In the instant case, we have words that are so clear, strong, and imperative that no other meaning can be applied to them. A holding along the same line is *United States v. St. Louis, San Francisco & Texas Railway Co.*, 270 U.S. 1, 46 S.Ct. 182, 183, 70 L.Ed. 435, where it was stated:

"A statute shall not be given retroactive effect, unless such a construction is required by explicit language or by necessary implication, is a rule of general application. It has been applied by this court to statutes governing procedure."

I am not going to attempt to discuss the question as to whether these claims are procedural ones or not. I merely mention these cases in support of the position that I have taken that we have here an Act of Congress that is not open to construction as to what the language means nor the Congress means.

In *Moore Ice Cream Company v. Rose*, 289 U.S. 373, 53 S.Ct. 620, 621, 77 L.Ed. 1265, the petitioner brought suit against the Collector of Internal Revenue to recover income and profit taxes alleged to have been wrongfully collected. The statute under which the action was brought had been amended as to filing protests. It provided "This section shall not affect any proceeding in court instituted prior to the enactment of this act." Of course, there

was a saving clause. The Court said: "Of the tokens within the statute, the saving clause, . . . is entitled to a leading place. This section shall not affect any proceeding in court instituted prior to the enactment of this act." The implication is that any proceeding not covered by the exception is to be subject to the rule."

Applying this decision to the situation we have for disposition here, why, certainly, it is so clear that I feel that it is a waste of words to reiterate that Congress intended to save no rights of action. It intended to take rights and remedies away, and that is exactly what it has done. Now, as to whether the way is left open for a litigant to go into the state court is really not a matter to be passed upon in this case. I might, as dicta, say that Congress intended to bar all such actions, but I do not know how that is going to be helpful to either side here, because it is really not one for consideration here.

[6.7] The only possible ground upon which this Court could base a denial of these motions to dismiss would be upon the fundamental ground of constitutionality. I think a District Court should always hesitate to find an act of the Congress unconstitutional, but, in a matter of such great moment as is here involved, not alone to the litigants but to the nation as a whole, I cannot bring myself to a finding that the Congress, after many weeks of labor, did not seriously consider the question of constitutionality. By reason of my own service in that body, I know that the judiciary committees of both houses are made up generally of eminent lawyers and have very excellent staffs. This is not hastily considered legislation, but carefully and thoughtfully and deliberately planned and prepared legislation. The issue of constitutionality, I am sure, was given further consideration, after the Congress had enacted the legislation, when it went to the Executive branch of the government. I have before me here the message of the President returned with the signed bill, indicating that it was not signed with a feeling on the part of the Executive that he desired such legislation, but, rather, the message would indicate that it was signed

with some degree of reluctance. Had there been doubt in the minds of those in the Department of Justice or other identified with the Executive Departments of the government that this legislation was really unconstitutional, they undoubtedly would have advised the Chief Executive to that effect. I shall assume that they did not so advise him.

I would not hesitate, if fully persuaded that there was only one side to this question, to hold it unconstitutional, but I am persuaded that the weight of authority and the logic lying back of these arguments is on the side of constitutionality, rather than unconstitutionality. I shall have to grant the motions and dismiss the actions and allow exceptions. You will have the matter in such shape that if you desire to take it to an appellate court you may expeditiously do so.



JOSEPH MARTINELLI & CO., Inc. v. L. GILLARDE CO.

Civil Action No. 5800.

District Court, D. Massachusetts.

Aug. 27, 1947.

1. Frauds, statute of \S 118(2)

Buyer's telegram which incorporated by reference terms of seller's previous telegram was a sufficient memorandum to satisfy the statute of frauds. Ann. Laws Mass. c. 106, \S 6.

2. Sales \S 201(4)

Where cantaloups were shipped to buyer "F. O. B. rolling acceptance final", title passed to buyer at point of shipment and, from that point, all risk of normal deterioration and damage in transit fell upon buyer, but seller remained liable for any inherent or latent defects which would render cantaloups nonconformable to the warranties of the contract.

See Words and Phrases, Permanent Edition, for all other definitions of "F. O. B."

BRIEF IN SUPPORT OF COMMON LAW

The Constitution is declared to be the "Supreme Law of the Land" by the Sovereign Body of "We The People"; and as specified and enumerated therein, Ordained to "Establish Justice", "Ensure the Domestic Tranquillity", "Provide For The Common Defense", "Promote The General Welfare", and "Secure The Blessings Of Liberty To Ourselves And Our Posterity."
(See: Article VI, Clause 2, and the Preamble to the United States Constitution)

The Constitution MANDATES four (4) distinct and specified Jurisdictions, to wit, "Cases In LAW, "Equity", "Admiralty" and "Maritime." and are clearly, unambiguously and undeniably set forth in Article III, Section 2.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies between two or more States; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury and such Trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place as the Congress may by Law have directed."

The mandated, specified and enumerated Jurisdictions, were

clearly explained in the Federalist Papers No. 83, to wit:

"The judicial authority of the federal judicature is declared by the Constitution to comprehend Certain Case Particularly Specified. These Expressions Mark The Precise Limits Beyond Which The Federal Courts CANNOT Extend Their Jurisdiction, BECAUSE OF THE OBJECT OF THEIR COGNIZANCE BEING ENUMERATED, THE SPECIFICATIONS WOULD BE NUGATORY IF IT DID NOT EXCLUDE ALL IDEAS OF MORE EXTENSIVE AUTHORITY."

The long train of abuses, usurpations and Mischiefs which affected the Colonies are a matter of Public Record, and were accomplished by and through a "Hodge Podge Act", combining Admiralty with the two (2) other known and recognized, Jurisdictions. The confounding of the judicature was one of the causes of the "Declaration And Resolves Of The First Continental Congress" of October 14, 1774. Upon the numerous grievances set forth in the DECLARATION it is noted that:

"...and Extended The Jurisdiction of the Courts of Admiralty, not only for collecting the said duties, but for Trial of Causes merely arising within the Body Of The Country."

These type of acts compounded the problems of Disunion, and although properly Declared before the English Crown, and Parliament, fell on deaf ears. The negligence of the body politic in England to correct the abuses, directly aided by an indolent and corrupt judicature, resulted in the "Declaration Of The Cause And Necessity Of Taking Up Arms" of July 6, 1775, which upon solemn deliberation and circumspect, again Declared the Mischief that:

"....statutes have been passed for extending the

Jurisdiction of the courts of admiralty and
vice-admiralty beyond their ancient limits."
MARITIME ↗

The indignant delusions of the body politic to correct the
despotic abuses and usurpations became deafeningly clear. On July
1776, upon unanimous Declaration of the Thirteen United States
of America, "The Declaration Of Independence" was issued,
Declaring numerous reasons for separating from the corrupt and
despotic design of the individuals in Government, and the
necessity of exercising "Their Right" and "Their Duty" to throw
off their evil and Tyrannical designs. Among these were counted
many injuries and usurpations, which by necessity, had to be
aided, abetted, counseled, commanded and procure by and through
the judiciary, in direct violation of the established laws. These
were submitted to a candid world:

*King George &
the parliament*

"He has refused his Assent to Laws, the most wholesome
and necessary for the public good."

"He has obstructed the Administration of Justice, by
refusing his Assent to Laws for establishing Judiciary
powers." *Executive Order 12778*

"He has erected a multitude of New Offices, and sent
hither swarms of Officers to harass our people, and eat
out their substance."

"He has combined with others to subject us to a
Jurisdiction Foreign To Our Constitution, and
Acknowledged By Our Laws, giving his Assent to their
Acts of pretended Legislation."

"From protecting them, by mock Trial, from punishment
for any Murders which they should commit on the
inhabitants of these States."

"For depriving us in many cases, of the benefits of
Trial by Jury."

"For taking away our Charters, abolishing our most

valuable Laws," and altering FUNDAMENTALLY the Forms of our Governments "

The redundant and repetitive nature of usurpation, injuries and the mode of accomplishment, can be noted in very recent time. A direct repeat of the prior mischief of "Extending Admiralty Jurisdiction" appears in the 1982 Ed. of Federal Rules Of Civil Procedure, pg 17, to wit:

"This is the FUNDAMENTAL CHANGE Necessary to effect unification of CIVIL and ADMIRALTY PROCEDURE. Just as the 1938 Rules ABOLISHED THE DISTINCTION between Actions AT LAW and Suits In EQUITY, this Change Would ABOLISH THE DISTINCTION Between CIVIL ACTIONS And Suits In ADMIRALTY."

Look at Title 28 under Seizures

The founders of the duly Ordained Republic, upon sober reflection, debate and reason, set forth in clear, unambiguous language, the intent and import of the Declaratory and Restrictive Clauses in the Constitution of the United States of America. The Judicature was established with extreme reserve, due to its direct and intentional involvement in history with corrupt and barbaric practices. The Office and Powers of Judge and Jurisdiction of the Courts, were mandate under Article III, and further, restricted those individual Citizens holding and exercising the powers of the Office to such things as "...SHALL HOLD THEIR OFFICES DURING GOOD BEHAVIOR..."

The enumerated Jurisdictions properly qualified and restricted the Judicature to certain specified Jurisdictions because of their proper cognizance and scope. The sobering effect was well noted by Thomas Jefferson:

Before the revolution, a judgment could not be obtained under eight years in the Supreme Court (of Virginia) where the suit was in that department of the common law, which department embraces about nine-tenths of the subject of legal contestation. In that of the chancery, from twelve to twenty years were requisite. This did not proceed from any vice in the laws, but from the influence of judges appointed by the king; and these judges holding their offices during his will only he could have reformed the evil at any time. This reformation was among the first works of the Legislature after our independence. A judgment can now be obtained in the Supreme Court in one year at the common law, and in about three years in the chancery."

(Paul Leicester Ford, Ed., The Writings Of Thomas Jefferson, volume 4, page 126)

It's now up to 11 - 22 years

The Judicature, deservedly suspect, was observed with some scrutiny even after the ordaining of the Constitution, and displayed its redundant nature at a very early stage in the history of the Union of States.

"Our government is now taking so steady a course as to show by what road it will pass to destruction, to wit, by CONSOLIDATION first, then CORRUPTION, its necessary consequence. The Engine Of Consolidation will be the Federal Judiciary; the two other branches the corrupting and the corrupted instruments."

(Albert Ellery Bergh, Ed., The Writings Of Thomas Jefferson, volume 15 pg. 331)

The first 12 Amendments to the Constitution of the United States of America, as submitted for ratification, contained a brief but adequate description of the intent of those framing and ratifying them.

**RESOLUTION OF THE FIRST CONGRESS SUBMITTING
TWELVE AMENDMENTS TO THE CONSTITUTION.**

Congress of the United States,
begun and held at the City of New York, on
Wednesday the fourth of March, one thousand
seven hundred and eighty nine

"The Conventions of a number of States, having at the

time of their adopting the Constitution, expressed a desire, in order to prevent Misconstruction or Abuse Of Its Powers, that further DECLARATORY AND RESTRICTIVE CLAUSES Should Be Added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution."

Ten of the twelve Amendments submitted were subsequently ratified, among which was the Declaratory and Restrictive Clauses set forth in [REDACTED]

[REDACTED] its AT COMMON LAW, where the value in controversy exceeds twenty dollars, the Right of TRIAL BY JURY Shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in Any Court of the United States, than according to the RULES OF COMMON LAW."

The "At Law" Jurisdiction was therefore mandate a RIGHT reserved by the Citizens and States, being clearly distinguished from Equity, Admiralty and Maritime Jurisdictions.

The cognizance of "At Law" jurisdiction, was long established in antiquity, as are the Principles of law upon which it operates. The Common Law was briefly but adequately defined by Sir William Balckstone, which includes its areas of cognizance.

This unwritten, or Common Law is properly distinguishable into three kinds. 1. General Customs; which are the Universal Rule of the whole kingdom, and form the Common Law, in its stricter and more usual significations. 2. Particular Customs; which for the most part, affect only the inhabitants of particular districts. 3. Certain Particular Laws; which by custom, are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

I. As to General Customs, or The Common Law, properly so called; this is that law, by which proceedings and determinations in the King's ordinary courts of justice are guided and directed. This, for the most part, settles the course in which lands decend by inheritance; the manner and form of acquiring and transferring

^{criminal}
Property; the solemnities and obligation of contracts; the rules expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offenses; with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus for example, that there shall be four Superior Courts of Record, Chancery, the King's Bench, the Common Pleas, and the Exchequer; that the eldest son alone is heir to his ancestor; - that property may be acquired and transferred by writing; - that a deed is of no validity unless sealed and delivered; - that wills shall be construed most liberally, and deeds more strictly; - that money lent upon bond is recoverable by an action of Debt; - that breaking the public peace is an offense, and is punishable by fine and imprisonment; - all these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is upon Common Law for their support."
(Blackstone's Commentaries, Section II, pp. 33, 34.)

The cognizance and authority of the Common Law as stated in Kent's Commentaries, i., p. 471, is well worthy of note and consideration.

The Common-Law includes those Principles, Usages, and Rules Of Action applicable to the Government and Security of Person and Property, which Do Not Rest For Their Authority upon Any express and positive declaration of the will of the legislature."

The Constitution of the United States of America, was formed upon the serious deliberation of the Statesmen and People of that day; and with a personal view of the Prior Mischiefs, fully intended a Remedy, for themselves and their posterity. The extent of the specified and enumerated Jurisdiction of "At Law" i.e. "At Common Law", was discussed in the conventions of the States prior to the Ordaining of the Constitution, and included such statements and common understandings as:

*Supreme Court Justice
brought up in Jones Case*

Byrdell: "It is evident that an officer may be tried by a Court of Common Law. He may be tried in such a Court for Common Law Offenses, Whether Impeached Or Not."
(The Debates In The Several State Conventions On The Adoption Of The Federal Constitution, Johnathan Elliot Edition, volume 4, pg. 37)

McLaine: "Notwithstanding the mode pointed out for impeaching and trying, there is not a single officer but may be tried and indicted At Common Law."
(The Debates In The Several State Conventions On The Adoption Of The Federal Constitution, Supra, volume 4, pg. 45)

The Common Law is the very fountain source of Substantive and Remedial Rights, if not our very Liberties.
(See; Stephen, A Treaties On The Principles Of Pleading, Introduction, pg. 23; Hemingway, History Of Common Law Pleading As Evidence Of The Growth Of Individual Liberty And Power Of The Courts; 5 Alabama Law Journal 1.)

The Common Law is our heritage and Birth-Right, and not subject to the delusions and arbitrary misconstructions of any person, natural or fictitious. The individual Citizens holding and exercising the Powers of Government, being bound by Oath, and by their own word and signature, to uphold the specific performance set forth in the Express and Conditional Contract as Ordained and Established by "We The People", does not leave "Suits At Common Law", and its separate, distinct, specified, and enumerated Jurisdiction to the discretion of any Officer, Agent, or Agency of Any Branch of the De jure Government.

The Constitution recognizes the distinction between Law and Equity, and it must be observed in Federal Courts."
(Bennett vs. Butterworth, 52 U.S. 669)

The Common Law is based upon Principles established through

the course of human history, and society. It includes such basic principles as:

"EVERY JURISDICTION HAS ITS BOUNDS" (See: 3 Coke On Littleton 220)

"EQUITY FOLLOWS THE LAW." (See: 1 Story's Commentaries On Equity Jurisprudence § 64; 3 Wooddesson's Vinerian Lectures 479, 482)

"WHERE THERE IS A RIGHT THERE IS A REMEDY." (See: 1 Term Reports 512; Coke On Littleton 197, b; 3 Bouvier's Institutes of American Law, n. 2411; 4 Bouvier's Institutes of American Law, n. 3726)

"LET THE PRINCIPAL ANSWER." (See: 4 Coke's Institutes 114; 2 Bouvier's Institutes On American Law, n. 1337; 4 Bouvier's Institutes. Of American Law, n. 3586)

"A Judgment given by an improper Judge is of no moment." (See: 11 Coke's Reports 76)

"THE ORDER OF THINGS IS CONFOUNDED IF EVERY ONE PRESERVES NOT HIS JURISDICITION." (See: 4 Coke's Institutes Proem.)

"TO A JUDGE WHO EXCEEDS HIS OFFICE OR JURISDICTION NO OBEDIENCE IS DUE." (See: Jenkin's Eight Centuries Of Reports, 139)

"HE WHO CAN AND OUGHT TO FORBID, AND DOES NOT, COMMANDS." (See: 2 Rolle's Reports 17)

The Rights, Privileges and Immunities of CITIZENS are preserved and protected under the Mandates of the United States Constitution, Article IV, Section 2. (See: Corfield vs. Coryell, 6 U.S. 546, 550)

The Constitutionally Secured RIGHT to the COURT "AT LAW", i.e. "SUITS AT COMMON LAW", like unto other Rights, Privileges and Immunities of Citizens, is not dependent upon an act of the Legislature, nor subject to abrogation by any other Department, Officer, Agent or Employee, of the Government. (See: Medina vs. People, 379 U.S. 848; Miranda vs. Arizona 384 U.S. 436, 491;)

To assume by any fiction of law, or abuse of procedure, that

the Common Law, is without effect, is to subvert the very foundation and principles of the Constitution of the United States of America.

(See: State vs. Simmon, 2 Spears 761; Taylor vs. Porter, 4 Mill. 140, 146; Ex parte Grossman, 267 U.S. 87, 108)

It is further to be noted that it is outside of the Jurisdiction of the Court to restrain the obvious meaning of the Constitution.

(See: Cook vs. Iverson, 122 N.M. 251)

"To ascertain the scope and meaning of the Seventh Amendment, preserving Trial By Jury in Suits At Common Law where the value in controversy exceeds Twenty Dollars, RESORT MUST BE HAD To The Appropriate RULES OF COMMON LAW established at the time of the adoption of the Constitutional Amendment in 1791."

(Dimmick vs. Schiedt, 55 S. Ct. 296, 293 U.S. 474)

"If the different parts of the same instrument ought to be so expounded as to give meaning to every part which will bear it, shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatsoever? For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either the authors of the objection or the authors of the Constitution, WE MUST TAKE THE LIBERTY OF SUPPOSING HAD NOT ITS ORIGIN WITH THE LATTER."

(James Madison, Federalist Papers No. 41)

The enumeration of Rights set forth in the Constitution, is not meant to disparage others retained by "We The People", and

upon Ordaining and Establishing the De jure Government, endowed it with Powers and Limitations, and properly Declared and Restricted those exercising the Powers to the specific performance set forth therein.

"There is no position which depends on clearer principle than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised is void. No Legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principle; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

Nor does this conclusion by means suppose a superiority of the Judicial to the Legislative Power. It only supposes that the power of the people is superior to both, and that where the will of the Legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the Judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the Fundamental Laws rather than by those which are not fundamental."

(Hamilton, Federalist Papers No. 78)

The Court "At Law" is clearly a matter of: "CONSTITUTIONAL RIGHT" and Public Policy to "ESTABLISH JUSTICE."

**LETTER IN SUPPORT OF
TRIAL BY JURY**

"The language of the Constitution cannot be interpreted safely, except where reference to the Common Law and to British Institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the convention who submitted it to the ratification of the thirteen States, were born and brought up in the atmosphere of the Common Law and thought and spoke in its vocabulary... when they came to put their conclusions into the form of the Fundamental Law in a compact draft, they expressed them in terms of Common Law, confident that they could be shortly and easily understood."

(Ex Parte Grossman, 267 U.S. 87)

On June 15, 1215, A.D., King John, of England, signed the "Magna Carta" or "Great Charter", at Runnymede. Contained therein, were the Demands and Rights of Citizens, of that kingdom. This of course included the RIGHT to "Trial By Jury."

Magna Carta, Section 39:

"No freeman shall be taken, or imprisoned, or decessized, or outlawed, or exiled, or IN ANY MANNER HARMED -- nor will we go upon or send upon him - SAVE BY THE LAWFUL JUDGMENT OF HIS PEERS OR BY THE LAW OF THE LAND."

And further provided a Protective Mandate for these enumerated Demands and Rights, to wit:

Magna Carta, Section 40:

"To none will we Sell, to none Deny or Delay, Right or Justice."

The provisions of the Mangna Carta stated above, set forth

the Proper and Lawful Right to "Trial By Jury", and the Mandated "Due Process."

"The words 'Due Process' are intended to convey the same meaning as the words 'By The Law Of The Land', in the Magna Carta.

(Murray vs. Hoboken Land Co., 59 U.S. (16 How) 272)

The Mandated provision of "Trial By Jury" and its necessary import, were described in Blackstone's Commentaries, to wit:

Chapter XXV, Section IV, (pg. 1023):

"The 'Trial By Jury', or 'The Country', per patriam, is also that Trial by the Peers of every Englishman, which, as the Grand Bulwark Of His Liberties, is secured to him by the Great Charter..."

Sir William Blackstone, went on to say that:

"When the trial is called on, the jurors are to be sworn as they appear, to the number Twelve, unless they are challenged by the party...."

Some of the powers of the Jury were described on page 1030, Blackstone's, Supra, to wit:

"When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged (unless in case of evident necessity) till they have given in their verdict; but are to consider it, and deliver it in, with the same forms as upon civil causes: only they cannot, in a criminal case which touches life or member, give a privy verdict. But the judges may adjourn while the jury are withdrawn to confer, and return to receive the verdict in open court. And such public or open verdict may be general,

Guilty, or Not Guilty; or Special, setting forth all the circumstances of the case, and praying the judgment of the court, whether for instance, on the facts stated, it be murder, manslaughter, or No Crime At All. This is where they doubt the matter of the law, and therefore choose to leave it to the determination of the court.

If the jury therefore find the prisoner not guilty, he is then and for ever quit and discharged of the accusation. And upon such acquittal, or discharge for want of prosecution, he shall be immediately set at large without payment of any fee to the jailer. But if the jury find him guilty, he is then said to be convicted of the crime whereof he stands indicted. Which conviction may accrue two ways; either by his confessing the offense and pleading guilty; or by his being found so by verdict of his country."

Trial By Jury was known, introduced and practiced in England long before the formation of the Magna Carta or Great Charter.

"The origin of this venerable institution of the Common Law is lost in the obscurity of the middle ages. antiquarians trace it back to an early period of English history; but if known to the Saxons, it must have existed in a very crude form, and may have been derived from them from the mode of administering justice by peers of litigant parties, under the feudal institutions of France, Germany and other northern nations of Europe. The ancient ordeals of red-hot iron and boiling water, practiced by the Anglo-Saxons to test innocence of a party accused of a crime, gradually gave way to a wager of battle, in the days of Normans; while this latter mode of trial disappeared in Civil cases in the thirteenth century, when Henry II, introduced into the assize a Trial By Jury. It is referred to in the Magna Carta as an institution existing in England at the time; and its subsequent history is well known.

(See: Grand Assize; 3 Blackstone's Commentaries, 349; 1 Reeve, History of English Law, 23, 84; Glanville, c. 9; Bracton 155)

"This mode of Trial By Jury was adopted soon after the conquest of England, by William, and was fully established for the trial of civil suits in the reign of

Henry II."
(Crabb's C.L., 50, 51)

This Bulkward of Liberty, was the established Rule and Law in England and the Colonies, although in the latter, Grossly Abused by and through Usurpation by the English Crown, and the Magistrates under his direct influence and control. This fact was noted in the Declaration of Rights, in Congress, at New York, on October 19, 1765, to wit:

"The Congress...upon mature deliberation, agreed to the following Declaration Of Rights and grievances of the colonists in America...

2d That his Majesty's liege subjects in these colonies are entitled to all the inherent rights and privileges of his natural born subjects within the kingdom of Great Britain.

7th That TRIAL BY JURY is the Inherent and Invaluable Right of Every British subject in these colonies."

The pleadings and Petitions of the colonists, were as a matter of history and record, ignored, and their Rights were further violated and usurped, as noted by the Declaration Of Rights, in Congress, at Philadelphia, on October 14, 1774, to wit:

"....Resolved N. C. D. 5. That the respective colonies are entitled to the Common Law of England, and more especially to the great inestimable privilege of being Tried By Their Peers of the vicinage, according to the course of that Law...."

The continued Arbitrary acts of the Crown, were greatly

expedited by a corrupt and prejudicial Judiciary, which resulted in the "Declaration Of Independence" which was adopted in Congress, July 4, 1776.

"When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Law of Nature and Nature's God Entitle Them, a decent respect to the opinions of mankind requires that they should declare the cause which impel them to separate...."

"....To prove this, let facts be submitted to a candid world."

"He has refused his assent to laws, the most wholesome and necessary for the public good."

"He has obstructed the administration of justice, by refusing his assent to laws establishing judiciary powers."

"He has made judges dependent on his will alone, for the tenure of their office, and the amount and payment of their salaries."

"He has combined with others to subject us to a jurisdiction foreign to Our Constitution, and unacknowledged by Our Laws; giving his assent to their acts of pretended legislation:"

"For depriving us in many cases, of the benefits of Trial By Jury:"

"For taking away our charters, Abolishing Our Most Valuable Laws, and altering fundamentally the form of our governments....."

It is held that in order to understand the provisions set forth in the Constitution, numerous areas must be examined.

"In the construction of the Constitution, we must look

to the history of the times, and examine the state of things existing when it was framed and adopted."
(2 Wheat 354; 6 Wheat 416; 4 Poters 431, 432)

This is of course necessary:

"To ascertain the old Law, the Mischief, and the Remedy."

(The State of Rhode Island vs. The State of Massachusetts, 37 U.S. 657)

The Fundamental Law was commonly understood by the people, and this of course included Trial By Jury. The concept and provision set forth in Article III, Section 2, was discussed in the Constitutional Convention, on August 28, 1787, and the provisions stated therein were amended, Nemine Contradicente, no one dissenting.

In presenting the Constitutional concepts to the States and to the people, Alexander Hamilton, expounded on the sentiment of those present at the Constitutional Convention, concerning Trial By Jury.

"The friends and adversaries of the plan of the Convention, if they agree on nothing else, concur at least in the value they set upon Trial By Jury; or if there are any differences between them it consists in this: the former regard it as A VALUABLE SAFEGUARD TO LIBERTY; the latter represent it as THE PALLADIUM OF FREE GOVERNMENT. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a

Representative Republic, or how much more merit it may be entitled to as a defense against the oppression of an hereditary monarch, than as A Barrier To The Tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial, AS ALL ARE SATISFIED OF THE UTILITY OF THE INSTITUTION, AND ITS FRIENDLY ASPECT TO LIBERTY. But I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty and the Trial By Jury in civil cases. Arbitrary impeachments, Arbitrary methods of prosecuting pretended offenses, and Arbitrary punishments upon Arbitrary convictions have ever appeared to me to be the Engines Of Judicial Despotism; and these have all relation to criminal cases, aided by the Habeas Corpus Act, seems therefore to be alone concerned in the question. And Both Of These Are Provided For in the most ample manner in the plan of the Convention."
(Federalist Papers No. 83)

The Founding Fathers, the State Legislatures and the People, ratifying the Constitution, having experienced the Mischiefs, and seeing the evils, perpetrated upon them personally and their neighbors, and the Colonies as a whole, set forth a Remedy, for themselves and their Posterity, to wit:

Constitution of the United States of America,

Article IV, Section 2:

"The Citizens of each State shall be entitled to all Privileges and Immunities of the Citizens in the Several States."

It is therefore properly held that:

"A clause in the Constitution must be given Full Force and Effect through out the Union."
(King vs. Mullins, 171 U.S. 404, 18 S.Ct. 925)

The institution of Trial By Jury, was binding throughout the Union. This Mandate was further noted by Alexander Hamilton, in the Federalist Papers No. 83, to wit:

"The power to constitute courts is a power to prescribe the mode of trial; and consequently, if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or let it alone. This discretion, in regard to criminal causes, is abridged by the express injunction of Trial By Jury In ALL Criminal Cases; but it is, of course, left at large in relation to civil cases, there being a total silence on this head. The specification of an obligation to try All Criminal Cases in a particular mode excludes indeed the obligation or necessity of employing the same mode in civil cases, but Does Not Abridge The Power of the legislature to exercise that mode if it should be thought proper..."

Hamilton went on to say that:

"From these observations this conclusion results: that the Trial By Jury in civil cases Would Not Be Abolished; and that the use attempted to be made of the maxims which have been quoted is contrary to Reason and Common Sense, and therefore not admissible."

This line of Reasoning was formed on the premise that:

"The rules of legal interpretation are rules of common sense, adopted by the courts in the construction of the laws. The True Test, therefore, of a just application of them is its Conformity To The Source from which they are derived. This being the case, let me ask if it is consistent with Reason or Common Sense to suppose that A Provision Obliging the legislative power to commit the Trial of Criminal Cases to Juries is a Privation Of Its Right To Authorize or permit That Mode Of Trial In Other Cases?"

(Hamilton, Federalist Papers, No. 83)

Thomas Jefferson's, knowledge and understanding of "Trial By Jury", and the Proper Function and Power of the People sitting therein, including but not limited to, Trying Both The Law and The Facts, was based on "Ensuring Justice."

"These magistrates have jurisdiction both criminal and civil. If the question before them be a question of law only, they decide on it themselves; but if it be of fact, or of fact and law combined, it must be referred to a jury. In the latter case, of a combination of law and fact, it is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject Lies Within Their Discretion Only. And if the question relate to any point of Public Liberty, or if it be one of those which The Judges may be suspected of Bias, THE JURY UNDERTAKE TO DECIDE BOTH THE LAW AND THE FACT. If they be mistaken, a decision against right, which is casual only, is less dangerous to the State, and less afflicting to the loser, than one which makes part of a regular and uniform system. In truth, it is better to toss up cross and pile in a cause, than to refer it to a judge whose mind is warped by any motive whatever, in that particular case. But the common sense of twelve honest men gives still a better chance of just decision, than cross and pile."
(The Complete Jefferson, Padover, pg. 656)

The Constitutional Mandates were soberly discussed in the State Legislatures, taking into account the past usurpations and corruption, and fully intending to provide a Remedy for the same.

"The People themselves have it in their Power effectually to resist usurpation, Without Being Driven To An Appeal In Arms. AN ACT OF USURPATION IS NOT OBLIGATORY: IT IS NOT LAW: AND ANY MAN MAY BE JUSTIFIED IN HIS RESISTANCE. Let him be considered as a criminal by the general government; yet only his fellow Citizens can convict him. They Are His Jury, and if

they pronounce him innocent, not all the power of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation."

(Johnathan Elliot Ed., "The Debates In The Several State Conventions On The Adoption Of The Federal Constitution" 2:93-94)

The Mischief and Remedy were discussed with the same intent and due diligence.

"Iredell: "The greatest danger from ambition is in criminal cases. But here they have no option. THE TRIAL MUST BE BY JURY, in the State where the offense is committed; and the Writ of Habeas Corpus will in the meantime secure the Citizen against Arbitrary imprisonment, which has been the principle source of Tyranny In ALL Ages."

(4: 144-145, Debates In The Several State Conventions, Supra)

And at Volume 4, Page 71, Supra,

"As to criminal cases, I must observe that the great instrument of Arbitrary Power is criminal prosecutions... There is No Safe Mode to try these But By Jury. If Any Man had means of trying another his own way, or Were It Left To The Control Of Arbitrary Judges, NO MAN WOULD HAVE THAT SECURITY FOR LIFE AND LIBERTY WHICH EVERY FREEMAN OUGHT TO HAVE."

It was further noted, that Usurpation by an Arbitrary Legislative Enactment, would be met with an almost certain reaction by the People, to wit:

Iredell: "Can we believe that Congress either Would Or Could take it away?...Were They To Attempt It, Their Authority Would Be Instantly Resisted. They would draw down on themselves the Resentment And Detestation Of

The People. They...Would Be Held In Eternal Infamy, And The Attempt Prove As Unsuccessful As IT IS WICKED."
(Vol. 4, pg. 148, Debates In The Several State Conventions, Supra)

Fully comprehending the possible need for improvements and alterations, the Founders had common sense enough to set forth a provision for the same in Article V, Section 1, and was expounded on by James Madison, to wit:

"That useful alterations will be suggested by experience could not be foreseen...The mode preferred by the convention...guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the General and State governments to originate the Amendment Of Errors, as they may be pointed out by the experience on one side, or on the other."
(Federalist Papers, No. 43)

Therefore Amendments to the Constitution of the United States of America were proposed and ratified by the several States on December 15, 1791, (Annals of Congress, 88, 913), setting forth the RIGHTS retained by "We The People", and Proper Limitations on ALL branches of Government, their Agencies, and the Agents thereof. This included the provisional Mandate of "Due Process", to wit:

Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or the Militia, when in actual service in time of War or public danger; nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; nor shall private property be taken for public use, without just compensation."

The "Bill Of Rights", further Mandated the provision of "Trial By Jury", In ALL Criminal Cases, to wit:

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted by witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The provisional Mandate of "Trial By Jury", was extended to Private Law suites by authority of Amendment VII, to wit:

"In suites at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be re-examined in any Court of the United States, than according to the common law."

In view of the above-mentioned History and Constitutional Mandates, it is properly held that:

"The basic purpose of a written Constitution has twofold aspect, first, the Securing To The People of certain Rights and Remedies, and second, the Curtailment of Unrestricted Governmental Activity within certain Defined Fields."

(Du Pont vs. Du Pont, Sup. Ded. Ch. 413; 85 A. 2d 724)

The power of the Common Law Jury, was stated by Chief Justice, John Jay, in the first Trial By Jury before the Supreme Court, in 1794. The Civil Case, was entitled Georgia vs. Brailsford, 3 Dal. 1, 156 U.S. 51. In his instructions to the jury, the Chief Justice outlined the Independent Authority and Power of the Jury.

"It may not be amiss, here, gentleman, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves To Judge Both, and to Determine The Law as well as The Fact Controversy. On this, and on every other occasion, however, we have no doubt you will pay that respect which is due to the opinion of the court; for, as on one hand, it is presumed that juries are the best judge of the facts; it is, on the other hand, presumable that the courts are the best judges of the law. BUT STILL, BOTH OBJECTS ARE LAWFULLY WITHIN YOUR POWER OF DECISION."

It is most obvious that the concept and practice of "Trial By Jury" has been, and is , maintained as a Fundamental Right, pursuant to the Constitutional Compact, to wit:

1849 - State vs. Croteau, 23 Vt. 14, 54 Am. Dec. 90.

"The Common Law Right of the Jury to Determine The Law As Well As The Facts REMAINS UNIMPAIRED."

The 1816, Constitution of the State of Indiana, was Amended

in 1851, by the People thereof, due to the inconsistent ruling by the Courts on Trial By Jury and the Power of the Jury.

"In all criminal cases whatever the jury shall have the right to determine the Law and the Facts; and this Right has since been maintained by that court, even when the constitutionality of a statute was involved." (Lynch vs. State, 9 Ind. 541 (1857); Sparf and Hansen vs. U.S., 156 U.S. 51)

"It seems that the court instructs the juries, in criminal cases, not to bind their conscience, but to inform their judgments, but they Are Not Duty Bound to adopt its opinion as their own." (Lynch vs. State (1857), Supra)

It was also held proper, that:

"Where the Jury are made the Judges of the Law, as well as the Facts, it is within the discretion of the trial court to permit counsel to read judicial opinions, and legal text books to the jury." (Wohlford vs. People, 45 Ill. App. (1892)

As early as 1896, it was settled that a statute is Not to abrogate the Common Law Jury Power and Duties.

"Now unanimity was one of the peculiar and essential features of Trial By Jury at the Common Law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes Any Mere Details of a Jury Trial, it is clear that A Statute Which Destroys This Substantial And Essential Feature Thereof Is One Abridging The Right." (American Publishing Co. vs. Fisher (1896), 166 U.S. 464)

The true and inherent nature of Trial By Jury has been decided in numerous cases.

"Jury Trial Is A Right."
(Kansas vs. Colorado, 206 U.S. 46 (1907); U.S. vs. Murdock, 209 U.S. 389 (1933); U.S. vs. Tarlowski, 305 F. Supp. 112 (1969))

The Jury has Undisputed Powers, as held in U.S. vs. Moylan, 417 F. 2d, 1002, 1006 (1969), to wit:

"We recognize, as appellants urge, the Undisputed Power of the Jury to acquit, even if its verdict is contrary to the law as given by the judge, and contrary to evidence. This is a power that must exist as long as we adhere to the general verdict in criminal cases, for the courts cannot search the minds of jurors to find the basis on which they judge. If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or any reason which appeals to their logic or passion, the jury has power to acquit, and the court must abide by the decision."

It is also Undisputed that:

"The Jury has the Power to bring in a verdict in the teeth of both the Law and the Facts."
(Horning vs. DC, 254 U.S. 135)

Other specifications were necessary to constitute a proper Common Law Jury, which date as far into antiquity as early Norman Tradition.

"The Trial By Jury of Twelve men was the usual trial among the Normans in most suits, especially in assize, et juris uturum."
(1 Hale's History Of Common Law, 218, 219)

This was further stated by Coke, to wit:

"...And it seemeth to me, that the law in this case delighteth herself in The Number Twelve; for there Must not only be Twelve Jurors for the matters of fact, but Twelve Judges of ancient time for trial of matters of law in the exchequer chambers. Also for matters of State there were in ancient times Twelve Counsellors of State. He that wagheth his law must have eleven others with him, which think he says true. And that number Twelve is much respected in Holy Writ, as Twelve Apostles, Twelve stones, Twelve tribes, etc."

Coke further qualified the Twelve Man Jury:

"He that is of a jury must be a liber homo, that is not only a Freeman and not bond, but also one that hath such Freedom Of Mind as he stands indifferent as he stands unsworn. Secondly, he must be legalis. And by law, every juror that is returned for trial of any issue or cause, ought to have three properties.

First, he ought to be dwelling most near to the place where the question is moved.

Secondly, he ought to be most sufficient both for understanding, and competency of estate.

Thirdly, he ought to be least suspicious, that is, to be indifferent as he stands unsworn: and then he is accounted in the law liber et legalis homo; otherwise he may be challenged, and not suffer to be sworn."

The proper number of jurors was established before the Constitution of the United States of America, and held to the same standards as those of antiquity.

"...we must first inquire what is embraced by the phrase 'Trial By Jury.' That it means Trial By Jury as understood and applied at Common Law, and includes ALL THE ESSENTIAL ELEMENTS as they were Recognized In This

Country and England when the Constitution was adopted, IT IS NOT OPEN TO Question. Those elements were - (1) that the jury should consist of Twelve men, Neither More Or Less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous."
(Patton et al vs. United States, 281 U.S. 276)

This was further upheld in Maxwell vs. Dow, 176 U.S. 581, 586, which states as follows:

"That a Jury composed, as at Common Law, of Twelve Jurors was intended by the Sixth Amendment to the Federal Constitution, there can be no doubt."

An act, by Any Branch of Government, to change the requisites or remove any essential element, is Unconstitutional and Void. The expanse of the Prohibition Extends to any Legislative Act and to mere Territorial Jurisdictions.

"An act of Congress adopting a criminal code for Alaska providing that in trials for misdemeanors six persons shall constitute a legal jury, is repugnant to the Constitution and Void."
(Rasmussen vs. United States, 197 U.S. 56)

The Mandated "Trial By Jury" was extended to suits at Common Law, by the provisions set forth in Amendment VII, of the Constitution of the United States of America. To further understand this provision, it is necessary:

"To ascertain the scope and meaning of the Seventh Amendment, preserving 'Trial By Jury' in Suits at

Common Law where the Value in controversy exceeds Twenty Dollars, resort must be had to the appropriate rules of the Common Law established at the time of the adoption of the Constitutional Amendment in 1791."
(Dimick vs. Schiedt, 55 S. Ct. 296, 293 U.S. 474, 79 L. Ed. 603)

This provision of course is as stated, "IN SUITS AT COMMON LAW" being different than Suits In Equity. The division is noted in Root vs. Lake Shore 7 S.R. Co., 105 U.S. 189, 26 L. Ed. 975, to wit:

"The distinction between Law and Equity Jurisdiction Is Constitutional to the extent to which the Seventh Amendment FORBIDS ANY INFRINGEMENT OF TRIAL BY JURY, as fixed by the Common Law."

The Common Law was defined by Sir William Blackstone, and how it is determined.

"This unwritten, or Common Law is properly distinguishable into three kinds. 1. General Customs; which are the universal rule of the whole kingdom, and form the Common Law, in its stricter and more usual signification. 2. Particular Customs; which for the most part, affect only the inhabitants of particular districts. 3. Certain Particular Laws; which By Custom, are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

I. As to General Customs, or The Common Law, properly so called; this is that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offenses; with the manner and degree of

punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Courts Of Record, Chancery, the King's Bench, the Common Pleas, and the Exchequer; - that the eldest son alone is heir to his ancestor; - that property may be acquired and transferred by writing; - that wills shall be construed most favorably, and deeds more strictly; - that money lent upon bond is recoverable by an action of Debt; - that breaking the public peace is an offense, and is punishable by fine and imprisonment; - all these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon Common Law for their support."
(Blackstone's Commentaries, Section II, pg. 33, 34)

This is a reiteration of Kent's Commentaries, i., p. 471, to wit:

"The Common-Law includes those Principles, Usages, and Rules of Action applicable to the Government and Security Of Person and Property, which Do Not rest for their authority upon any express and positive declaration of the will of the legislature."

These Immemorial Concepts include, of course, such Socially necessary concepts as: Thou Shalt Not Steal, which is sometimes called Theft or Larceny, Thou Shalt Not Lie, which is sometimes called Perjury, Fraud, etc., Thou Shalt Not Bear False Witness, which is sometimes called Libel or Slander. The changing of names does not supersede the reality of the concepts.

"The Constitution was Intended to PROHIBIT THINGS, Not Names, and its provisions cannot be evaded by giving a new name to an old thing."
(Craig vs. Missouri, 4 Pet. 410, S. Ct. Digest, L. Ed.)

The provision specifically set forth in the Amendment VII, provides for the sanctity of the decision of the Jury, as stated in Baltimore 7 Carolina Line vs. Redman, 55 S. Ct. 890, 295 U.S. 654, 79 L. Ed. 1636.

"Seventh Amendment to the Constitution preserves the Right of Jury Trial existing under English Common Law when Amendment was adopted and protects it from Indirect Impairment through possible enlargement of courts power of re-examination under such law."

It is here, therefore, that the words of Sir William Blackstone are reiterated, concerning "Trial By Jury."

"Here therefore a competent number of sensible and upright jurymen, chosen from among those of middle rank, will be the found best investigators of truth, and be found the surest guardians of public justice. For the most powerful individuals in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by Twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachment of the powerful and wealthy without the intervention of a jury (whether composed of Justices of the Peace, Commissioners of the Revenue, Judges of a Court of conscience, or Any Other standing Magistrates), IS A STEP TOWARDS ESTABLISHING ARISTOCRACY, THE MOST OPPRESSIVE OF ABSOLUTE GOVERNMENTS."

"....It is, therefore, upon the whole, a Duty Every Man Owes His Country, His Friends, His Posterity, and Himself, TO MAINTAIN TO THE UTMOST OF HIS POWER THIS VALUABLE CONSTITUTION IN ALL ITS RIGHTS; To Restore It To Its Ancient Dignity, If At All Impaired by different value of property, or Otherwise Deviated From its first institution; to amend it, wherever it is defective;

and, ABOVE ALL, TO GUARD WITH THE MOST JEALOUS CIRCUMSPECTION AGAINST THE INTRODUCTION OF NEW AND ARBITRARY METHODS OF TRIAL, which, under a variety of possible pretenses, may in time imperceptibly undermine this Best Preservation of English Liberty."

"Upon these accounts, the TRIAL BY JURY ever has been, and I trust ever will be, looked upon as the glory of English law. And if it has so great an advantage over other, in regulating Civil Property, how much must that advantage be heightened, when it is applied in criminal cases . . . It is the most transcendent privilege which Any Subject Can Enjoy, or wish for, that he cannot be effected either in his property, his liberty, or his person, But By The UNANIMOUS CONSENT OF TWELVE OF HIS NEIGHBORS AND EQUALS." A constitution, that I may venture to affirm has, under providence, secured the just liberties of this nation for a long succession of ages. And therefore a celebrated French writer, who concluded, that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta and Carthage, at the time when their liberties were lost, were strangers to the TRIAL BY JURY."
(Blackstone's Commentaries, Supra)

"TRIAL BY JURY" is a "RIGHT", established in antiquity, and secure and guaranteed by the Constitution, and like other Rights, is not subject to abrogation by any branch of Government, Agency or Officer, Employee or Agent thereof.

"Where RIGHTS SECURED BY THE Constitution are involved, there can be no rule making or legislation which would abrogate them."
(Miranda v. Arizona, 384 U.S. 436, 491)

Trial by Jury is hereby RIGHTFULLY DEMANDED.

CODE OF PROFESSIONAL RESPONSIBILITY

9-102. Preserving Identity of Funds and Property of a Client; Interest-Bearing Accounts to Be Established for the Benefit of the Client or the Colorado Lawyer Trust Account Foundation.

Ethical Considerations

Index Follows This Appendix

PREAMBLE

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.

The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

CODE OF PROF. RESPONSIBILITY

PRELIMINARY STATEMENT

In furtherance of the principles stated in the Preamble, the American Bar Association has promulgated this Code of Professional Responsibility, consisting of three separate but interrelated parts: Canons, Disciplinary Rules, and Ethical Considerations. The Code is designed both as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules.

Obviously the Canons, Disciplinary Rules, and Ethical Considerations cannot apply to nonlawyers; however, they do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their nonprofessional employees and associates in all matters pertaining to professional employment. A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representations of the client.

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities. The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances. In applying the Disciplinary Rules, interpretive guidance may be found in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

DEFINITIONS *

As used in the Disciplinary Rules of the Code of Professional Responsibility:

(1) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.



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April 19, 1989

~~Ms. George Hayes
P.O. Box 292
Briery, Colorado 81092~~

~~Dear Ms. Hayes:~~

The Colorado State Treasurer has referred your letter of February 10, 1989 to the Denver Branch of the Federal Reserve Bank of Kansas City. In your letter you have requested that you receive gold or silver coins in exchange for \$5,000 of Federal Reserve Notes.

Although the dollar as a standard unit of value has been previously defined in terms of a gold or silver content, there is no constitutional requirement that the currency of the United States consist of gold and silver coins or of currency backed by gold or silver. Even though statutes of the United States, in the past, have specified a formal gold or silver content of the dollar, these statutes were rendered obsolete when the United States officially abandoned the domestic gold standard with the passage of the Gold Reserve Act of 1934. This Act effectively withdrew all gold from monetary circulation by requiring that it be tendered to the Federal Government. All persons who tendered their gold received compensation in dollars. The Act also amended the Federal Reserve Act to provide that Federal Reserve notes would be redeemable only in lawful money. Prior to that amendment, the Federal Reserve Act provided that Federal Reserve notes were also redeemable in gold. For all practical purposes the dollar was completely removed from the gold standard in 1970 when the requirement that the Treasury maintain a 25% gold backing for all Federal Reserve notes was dropped. Similarly in view of the demonetization of silver by Congress in the 1960's under several public laws, there is no longer any requirement that currency be redeemable in silver.

Consequently, a holder of Federal Reserve notes who presents them for redemption in lawful money at a Federal Reserve Bank is most likely to receive in exchange lawful money in the form of other Federal Reserve notes. A holder of Federal Reserve notes presenting them for redemption in lawful money at a Federal Reserve Bank may request a particular type of money, such as silver dollars, and, if it is available, the request may be

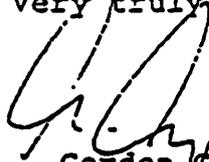
DENVER BRANCH
Federal Reserve Bank of Kansas City

Ms. Grace Hayes
April 19, 1989
Page 2

granted. But the holder has no legal right in this respect and the Reserve Bank need only give other Federal Reserve notes in redemption of such notes.

I note that as Exhibit A to your letter, you have included a copy of Title 31, United States Code, Section 449 which defines a particular relationship between dollars and gold. As noted on your exhibit immediately below the text to Section 449, Section 449 was repealed by Public Law 94-564 on October 19, 1976.

Very truly yours,



Gordon Gregg
Manager
Cash Services Department

cc: Ms. Gail S. Schoettler,
Colorado State Treasurer



Received
2-17-90

Colorado Secretary of State
Corporations Office

1560 Broadway, Suite 200
Denver, Colorado 80202
(303) 894-2251

NAME OF CORPORATION

World Bank

COLORADO (DOMESTIC) CORPORATION

1. Date of Incorporation _____
2. Suspended On _____
3. Date Dissolved _____
4. Term of Existence expired on _____

NON-COLORADO (FOREIGN) CORPORATION

1. Date authorized to do business in Colorado _____
2. Date Certificate of Authority to do business in Colorado was revoked _____
3. Date corporation withdrew authority to do business in Colorado _____

OTHER

1. This office has no record of the corporation as named on your inquiry.
2. This office has no current record except as noted above. You may contact State Archives, 1313 Sherman, 1-B, Denver, CO 80203. THIS WILL BE OLD INFORMATION.
3. This office keeps no records on the value of shares of stock. Four sources for such information are:

R.M. Smythe & Co., Inc.
24 Broadway
New York, NY 10004

B.S. Lichtenstein
101 Maiden Lane
New York, NY 10038

Tracers
39 Broadway
New York, NY 10006

Jack Lewin
8014 Kenneth Avenue
Skokie, IL 60076



Received
2-17-90

Colorado Secretary of State
Corporations Office

1560 Broadway, Suite 200
Denver, Colorado 80202
(303) 894-2251

NAME OF CORPORATION International Development Associate

COLORADO (DOMESTIC) CORPORATION

- 1. Date of Incorporation _____
- 2. Suspended On _____
- 3. Date Dissolved _____
- 4. Term of Existence expired on _____

NON-COLORADO (FOREIGN) CORPORATION

- 1. Date authorized to do business in Colorado _____
- 2. Date Certificate of Authority to do business in Colorado was revoked _____
- 3. Date corporation withdrew authority to do business in Colorado _____

OTHER

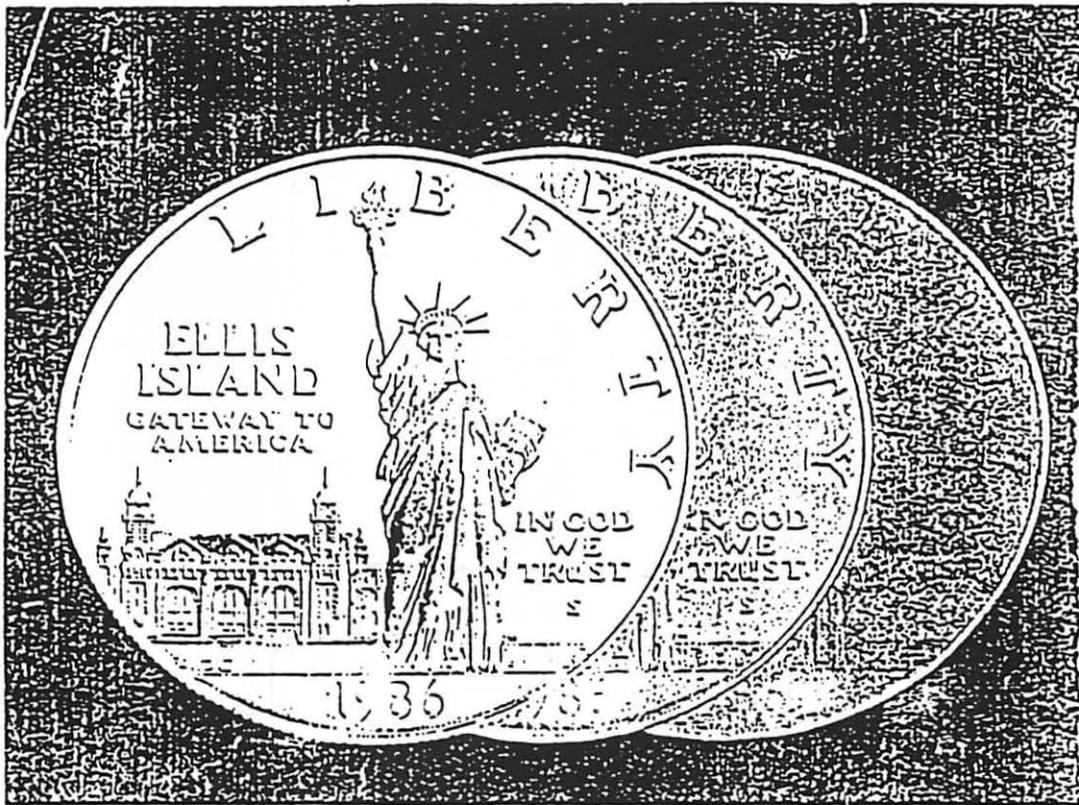
- 1. This office has no record of the corporation as *named* on your inquiry.
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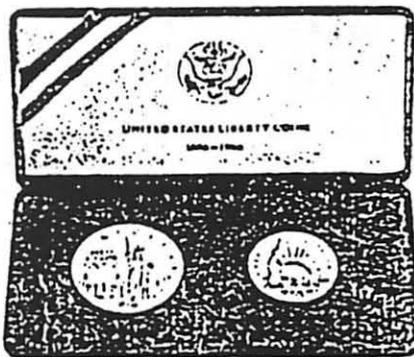
Now or never.

1986 will be remembered as the year of Liberty. And Congress marked the occasion for all time, by minting United States Liberty Coins.

But the Treasury will mint no more coins after the end of 1986, so buy your Liberty Coins now.

They're available singly or in sets. Silver dollar, \$24.00; half dollar, \$7.50 at banks, savings and loans, K Mart, Montgomery Ward, Sears and Service Merchandise stores.

They make ideal holiday gifts but remember,  the holidays will come again, Liberty Coins never will.



UNITED STATES LIBERTY COINS

OBVERSE DESIGN BY

Edgar I. Steever I

Sculptor Engraver,
United States Mint

BORN

Waltham, Massachusetts

EDUCATION

Public School, Easton, Pennsylvania;
Deerfield Academy, Yale University,
and Yale School of Fine Arts

WORK

Employed since 1965 as a Sculptor
Engraver at the U.S. Mint,
Philadelphia, Pennsylvania. Recent
work in both coins and medals:
Frank Lloyd Wright medal; obverses
of Louis L'Amour, Eke Wiesel,
Donald T. Regan (former Secretary
of the Treasury), and Donna Pope
(Director of the Mint); obverses of the
\$5.00 Liberia and 1 peso Philippine
Bataan Days

REVERSE DESIGN BY

Sheri J. Winter

Sculptor Engraver, United
States Mint

BORN

Dayton, Ohio, 1934

EDUCATION

Master of Fine Arts,
University of
Pennsylvania, 1959,
Pennsylvania Academy of
Fine Arts, Barnes
Foundation

WORK

Director of Sculpture, Mt.
Everest Mint; teacher of
sculpture; sculptural and
medallic commissions;
U.S. Mint since 1970; Mint
work includes: Willa Cather
gold medallion, reverses of
Danny Thomas medal,
and others.

OBVERSE DESIGN BY

John Mercanti

Sculptor Engraver, United States
Mint

BORN

Philadelphia, Pennsylvania, 1943

EDUCATION

Pennsylvania Academy of Fine
Arts; Philadelphia College of Art

WORK

Designed the 1984 Olympic gold
medal and assisted with the design
of the reverse of the 1983 Olympic
silver dollar; illustrations for the
U.S. Army, Navy, Air Force, and
Marine Corps; commissions for
commercial art work and for book
illustrations; designed many Mint
medals and medallions including
the Louis Armstrong medal;
Director of the Mint medal, John
Steinbeck and Helen Hayes gold
medallions; obverse of the U.S./
Netherlands medal; reverses of the
J. Edgar Hoover and Harry S.
Truman medals.

REVERSE DESIGN BY

John Mercanti

Sculptor Engraver, United
States Mint

BORN

Salerno, Italy, 1918

EDUCATION

Cooper Union, Ecole de Beaux-
Arts, Fineart School of Sculpture;
Maryland Institute College
of Art

WORK

Free-lance sculptural
commissions; teacher of sculpture;
U.S. Mint since 1973, designer of
reverse of the George Washington
Commemorative half dollar and of
many Mint medals, including the
obverses of the Army Bicentennial
and Harry S. Truman medals and
the Mark Twain gold medallion,
and the reverses of the Colorado
Centennial, President Gerald R.
Ford, Navy Bicentennial, and
Hubert H. Humphrey medals.



The 1986 Liberty Half Dollar is composed of 92%
Copper and 8% Nickel. This coin is the first Statue of
Liberty—Ellis Island Commemorative Half Dollar ever
issued by the United States Government.

Donna Pope

Donna Pope
Director
United States Mint



HALF DOLLAR
PROOF



UNITED STATES LIBERTY COINS

Dear Liberty Coin Owner:

Thank you for purchasing United States Liberty Coins. In 1986 our greatest lady, the Statue of Liberty, will be one hundred years old. To celebrate this great event, the United States Mint, by Act of Congress, has produced United States Liberty Coins. These precious commemoratives symbolize your continuing support of liberty, for part of the purchase price of each coin will be used to restore the Statue and Ellis Island, and to create an endowment for the future maintenance of these national monuments.

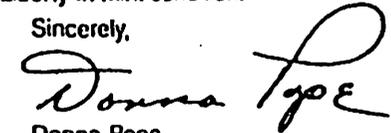
All coins minted under the Act are legal tender of the United States and have been produced with specially prepared dies and blanks to assure the highest quality, brilliant luster and magnificent detail. The gold coin honors and features the Statue of Liberty. The silver dollar features the Statue as a beacon to immigrants, and Ellis Island as a gateway to America. The half-dollar coin commemorates the contributions of immigrants to our Nation's heritage and achievements.

These are the first coins ever issued by the United States Government depicting the Statue and Ellis Island. This is also the first time since 1929 that the United States has issued a \$5.00 gold coin.

You will be proud to pass these striking commemoratives on from generation to generation.

Thank you for helping to keep Liberty in Mint condition.

Sincerely,



Donna Pope
Director
United States Mint

P.S. The coins have been encapsulated to preserve their beauty and protect their condition. Removing the coins from their protective capsules may damage their mint condition.

1986 LIBERTY SILVER DOLLAR SPECIFICATIONS

CONDITION: Proof
DATE: 1986
MINT: San Francisco
DIAMETER: 1.500 inches
FINENESS: .900 fine
WEIGHT: .86 troy oz. 26.73 g
CONTENT: Silver .77 troy oz.
Copper .09 troy oz.
~~Treasury content of U.S. Silver Dollar~~
DESIGN: OBV. The Statue of Liberty Silver Dollar was created from the artist's feeling of majesty derived from the frontal view of the Statue.
REV. Liberty's torch and the words of Emma Lazarus' poem, "The New Colossus," cited as the inspiration for the reverse.

1986 LIBERTY HALF DOLLAR SPECIFICATIONS

CONDITION: Proof
DATE: 1986
MINT: San Francisco
DIAMETER: 1.205 inches
FINENESS: N/A
WEIGHT: .36 troy oz. 11.34 g
CONTENT: Copper .33 troy oz.
Nickel .03 troy oz.
~~Treasury content of U.S. Half Dollar~~
DESIGN: OBV. Focuses on the growing New York skyline at about 1913, with the Statue's uplifting gesture welcoming an in-bound liner. The scene is set against the sun rising in the east to convey the start of a different life in the New World.
REV. Derived from a photograph of immigrants at Ellis Island, waiting to go to New York.

Montgomery Ward

STORE #

9627-47

SOLD BY DEF/FUTURE BILL DATE

DATE SOLD DELIVERY DATE

DELIVERY INSTRUCTIONS

8646/0 1394 1748 8295

999733 MO SE 1 24.00

SUBTOTAL 24.00

MTX .00

AMT TEND 25.00

CHNG OUE 1.00

CASH TOTAL 24.00

TTL

12/16/86 01 12/18/86 50

SHIP WITH SALES CHECK NO

CUSTOMER ORDER NO

DATE SCHEDULED TRIP SHEET NO.

TYPE OF SALE

STORE STOCK MATRO WARE POOL STOCK DOOR TAKE

CASH CUG VISA MSTR L/A COD CDM JMCN

This purchase is subject to the terms of my credit agreement with you. You will retain a PURCHASE MONEY SECURITY INTEREST in this merchandise until paid in full, including related finance charges.

CUSTOMER'S SIGNATURE

SKU NUMBER

DESCRIPTION

UNIT PRICE

QTY

TOTALS

999733

24 / 24.00

SEWELL CONTACT 623 3 3 3 ONLY OTHER RETAIL HOME
LOVELACE 3 MOS 21 MOS 33 MOS 1 YEAR 2 YEARS SHOP
CUSTOMER ACCOUNT NUMBER ACCT. LOC. CR. APP. AUTH.

CUSTOMER NAME

ADDRESS

CITY

STATE

ZIP CODE

PHONE

SUB TOTAL

SALES TAX

WIC / COST OF HANDLING

TOTAL

AMOUNT PAID

UNPAID BALANCE

Please Imprint charge plate above.

SHIPPER COPY

33711-9

THANK YOU! Please present this sales check in case of error, exchange or return.

9627-47



The Credit River Money Opinion

State of Minnesota
County of Scott

In Justice Court
Township of Credit River
Martin V. Mahoney, Justice

First National Bank of Montgomery
Plaintiff,

vs.

Judgment and Decree

Jerome Daly
Defendant.

The above entitled action came on before the Court and a Jury of 12 on December 7, 1968 at 10:00 a.m. Plaintiff appeared by its President Lawrence V. Morgan and was represented by its Counsel Theodore R. Mellby. Defendant appeared on his own behalf.

A Jury of Talesmen were called impaneled and sworn to try the issues in this Case. Lawrence V. Morgan was the only witness called for Plaintiff and Defendant testified as the only witness in his own behalf.

Plaintiff brought this as a Common Law action for the recovery of the possession of Lot 19, Fairview Beach Scott County, Minn. Plaintiff claimed title to the Real Property in question by foreclosure of a Note and Mortgage Deed dated May 8, 1964 which Plaintiff claimed was in default at the time foreclosure proceedings were started.

Defendant appeared and answered that the Plaintiff created the money and credit upon its own books by bookkeeping entry as the consideration for the Note and Mortgage of May 8, 1964 and alleged failure of consideration for the Mortgage Deed and alleged that the Sheriff's sale passed no title to plaintiff.

The issues tried to the Jury were whether there was a lawful consideration and whether Defendant had waived his rights to complain about the consideration having paid on the Note for almost 3 years.

Mr. Morgan admitted that all of the money or credit which was used as a consideration was created upon their books that this was standard banking practice exercised by their bank in combination with the Federal Reserve Bank of Minneapolis, another private Bank, further that he knew of no United States Statute or Law that gave the Plaintiff the authority to do this. Plaintiff further claimed that Defendant, using a ledger book created credit and by paying on the Note and Mortgage waived any right to complain about the Consideration and that Defendant was estopped from doing so.

At 12:15 on December 7, 1968 the Jury returned a unanimous verdict for the Defendant.

Now therefore, by virtue of the authority vested in me pursuant to the Declaration of Independence, the Northwest Ordinance of 1787, the Constitution of the United States and the Constitution and laws of the State of Minnesota not inconsistent therewith:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That Plaintiff is not entitled to recover the possession of Lot 19, Fairview Beach, Scott County, Minnesota according to the Plat thereof on file in the Register of Deeds office.
2. That because of failure of a lawful consideration the Note and Mortgage dated May 8, 1964 are null and void.
3. That the Sheriff's sale of the above described premises held on June 26, 1967 is null and void, of no effect.
4. That Plaintiff has no right, title or interest in said premises or lien thereon, as is above described.

5. That any provision in the Minnesota Constitution and any Minnesota Statute limiting the Jurisdiction of this Court is repugnant to the Constitution of the United States and to the Bill of Rights of the Minnesota Constitution and is null and void and that this Court has Jurisdiction to render complete Justice in this Cause.

6. That Defendant is awarded costs in the sum of \$75.00 and execution is hereby issued therefore.

7. A 10 day stay is granted.

8. The following memoranda and supplemental memorandum made and filed by this Court in support of this Judgment is hereby made a part hereof by reference.

BY THE COURT
MARTIN V. MAHONEY
Justice of the Peace
Credit River Township
Scott County, Minnesota

Dated December 9, 1968

MEMORANDUM

The issues in this case were simple. There was no material dispute on the facts for the Jury to resolve.

Plaintiff admitted that it in combination with the Federal Reserve Bank of Minneapolis, which are for all practical purposes because of their interlocking activity and practices and both being Banking institutions incorporated under the Laws of the United States, are in the Law to be treated as one and the same Bank did create the entire \$14,000.00 in money or credit upon its own books by bookkeeping entry. That this was the Consideration used to support the Note dated May 8, 1964 and the Mortgage of the same date. The money and credit first came into existence when they created it. Mr. Morgan admitted that no United States Law or Statute existed which gave him the right to do this. A lawful consideration must exist and be tendered to support the Note. See Anheuser-Busch Brewing Co. v. Emma Mason, 44 Minn. 318, 46 N.W. 558. The Jury found there was no lawful consideration and I agree. Only God can create something of value out of nothing.

Even if Defendant could be charged with waiver or estoppel as a matter of Law this is no defense to the Plaintiff. The Law leaves wrongdoers where it finds them. See sections 50, 51 and 52 of Am Jr 2d "Actions" on page 584—"no action will lie to recover on a claim based upon, or in any manner depending upon, a fraudulent illegal, or immoral transaction or contract to which Plaintiff was a party.

Plaintiff's act of creating credit is not authorized by the Constitution and Laws of the United States, is unconstitutional and void, and is not a lawful consideration in the eyes of the Law to support any thing or upon which any lawful rights can be built.

Nothing in the Constitution of the United States limits the Jurisdiction of this Court which is one of original Jurisdiction with right of trial by Jury guaranteed. This is a Common Law Action. Minnesota cannot limit or impair the power of this Court to render Complete Justice between the parties. Any provisions in the Constitution and laws of Minnesota which attempt to do so is repugnant to the Constitution of the United States and void. No question as to the Jurisdiction of this Court was raised by either party at the trial. Both parties were given complete liberty to submit any and all facts and law to the Jury, at least in so far as they saw fit.

No complaint was made by Plaintiff that Plaintiff did not receive a fair trial. From the admissions made by Mr. Morgan the path of duty was made direct and clear for the Jury. Their Verdict could not reasonably have been otherwise. Justice was rendered completely and without denial, promptly and without delay, freely and without purchase, conformable to the laws in this Court on December 7, 1968.

December 9, 1968

BY THE COURT
MARTIN V. MAHONEY
Justice of the Peace
Credit River Township
Scott County, Minnesota

*found that to
leave I was
after this decision
was rendered*

Note: It has never been doubted that a Note given on a Consideration which is prohibited by law is void. It has been determined, independent of Acts of Congress, that sailing under the license of an enemy is illegal. The emission of Bills of Credit upon the books of these private Corporations for the purposes of private gain is not warranted by the Constitution of the United States and is unlawful. See Craig v. Mo. 4 Peters Reports 912. This Court can tread only that path which is marked out by duty.

M.V.M.

do not file

a writ

SUPREME COURT
STATE OF COLORADO

CASE NO. _____

EDWARD G. NOVOTNY

Petitioner

v.

FIRST NATIONAL BANK, CITIZENS STATE BANK, VALLEY NATIONAL BANK

Respondents

vs.

22ND JUDICIAL DISTRICT COURT, GRACE S. MERLO.

Respondent

MOTION TO EXCEED THE 12 PAGE LIMIT FOR WRIT OF CERTIORARI

Comes now the Petitioner EDWARD G. NOVOTNY, In Propria Persona, who does hereby move the Court for leave to file a Writ of Certiorari in excess of the 12 page limit.

Respectfully Submitted,



In Propria Persona
Edward G. Novotny
912 Brookside
Cortez, Colo. 81321
(303) 565-9394

CERTIFICATE OF SERVICE

I, Edward G. Novotny, do hereby CERTIFY that I deposited in the U.S. Mail, first class, a true and correct copy of this MOTION TO EXCEED THE 12 PAGE LIMIT FOR WRIT OF CERTIORARI, to the following named persons, and to the Colorado Supreme Court in Denver Colorado, on this date, March 5, 1990.

Edward G. Novotny
Edward G. Novotny

District Court, 22nd Judicial District,
Judge, Grace S. Merlo
Cortez, Colo. 81321

Guy B Dyer, Jr.
140 West First Street
Cortez, Colo. 81321

Clifford C. Fossum
208 West North Street
Cortez, Colo. 81321

Dated the 5th day of March, 1990

Edward G. Novotny
Edward G. Novotny

EDWARD G. NOVOTNY
Petitioner

v.

FIRST NATIONAL BANK, CITIZENS STATE BANK, VALLEY NATIONAL BANK.
Respondents

vs.

22ND JUDICIAL DISTRICT COURT, GRACE S. MERLO.
Resopndent

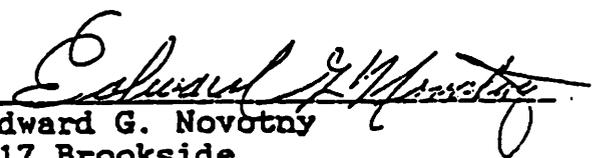
NOTICE OF APPEAL IN THE NATURE OF CERTIORARI

To, FIRST NATIONAL BANK, CITIZENS STATE BANK, VALLEY NATIONAL BANK, 22ND JUDICIAL DISTRICT COURT, GRACE S. MERLO, Respondents:

You will please take notice that upon verified Petition, a copy of which is served herewith, the undersigned will apply to the Supreme Court in and for the State of Colorado, for Writ of Certiorari, and Court Order directed to the District Court of the 22nd Judicial District, Grace S. Merlo, commanding said District Court to certify and return to Supreme Court certain proceedings had before judge Grace S. Merlo, as follows:

Hearing held before Grace S. Merlo, on October 27, 1989, case, 89CV168, and subsequent Orders of the District Court, of the 22nd Judicial District, dismissing Petitioner's claim for injunctive relief from the acts of Respondents, FIRST NATIONAL BANK, CITIZENS STATE BANK, VALLEY NATIONAL BANK, and that said Hearing and Orders are in excess of the powers and authority vested in said office by the Constitution of the State of Colorado, and the laws made in pursuance thereof, and for such other and further relief as may be just.

Dated Febuary 28 th, 1990


Edward G. Novotny
917 Brookside
Cortez, Colo. 81321
303-565-9394

SUPREME COURT
STATE OF COLORADO

CASE NO. _____

EDWARD G. NOVOTNY
Petitioner

vs.

FIRST NATIONAL BANK, CITIZENS STATE BANK
VALLEY NATIONAL BANK
Respondents

vs.

DISTRICT COURT, 22nd JUDICIAL DISTRICT,
GRACE S. MERLO
Respondent

IN THE SUPREME COURT
STATE OF COLORADO

- FROM -

DISTRICT COURT
22nd JUDICIAL DISTRICT
IN AND FOR MONTEZUMA COUNTY, COLORADO
(CASE NO. 89-CV-168)

PETITION FOR COMMON LAW WRIT OF CERTIORARI

In Propria Persona
Edward G. Novotny
917 Brookside
Cortez, Colorado 81321
303-565-9394
Petitioner

QUESTIONS PRESENTED

I

Did the inferior District Court exceed its vested powers, authority and jurisdiction, by granting special privileges and immunities to Respondent Corporations?

II

Did the inferior District Court exceed its vested powers, authority and jurisdiction by entering surprise, hearsay, proffered evidence upon the record, without timely notice to petitioner of the same, and thereby violating Petitioner's substantial rights to "Due Process"?

III

Did the inferior District Court exceed its vested powers, authority and jurisdiction by conveying and granting special privileges and immunities to Respondent corporations, above and beyond that of a Citizens rights, Privileges and Immunities as secured, guaranteed and protected by the Constitution of the union of states of the United States of America, and the Constitution of the State of Colorado?

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OTHER AUTHORITIES

Proceedings Of The Colorado State Constitutional
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Brooks Printers (1907) Page 728, 10

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SUPREME COURT
STATE OF COLORADO

CASE NO. _____

EDWARD G. NOVOTNY

Petitioner

v.

FIRST NATIONAL BANK, CITIZENS STATE BANK, VALLEY NATIONAL BANK

Respondents

vs.

22ND JUDICIAL DISTRICT COURT, GRACE S. MERLO.

Respondent

PETITION FOR COMMON LAW WRIT OF CERTIORARI

Comes now the Petitioner EDWARD G. NOVOTNY, pursuant to Haines v. Kerner, 404 U.S. 519, In Propria Persona, who does hereby timely file this "Petition" for common law Writ of Certiorari, to issue, pursuant to C.R.Civ.P. Rule 106, and requesting this Court to review the records on file in Case No. 89-CV-168, and to secure and protect his Constitutional Rights, Privileges and Immunities, and the use and enjoyment of the same, to which he is entitled as a matter of law, and as cause thereto would state as follows:

JURISDICTION

The inferior District Court, for the 22nd Judicial District, in and for Montezuma County Colorado, entered its

Orders and findings on October 27, 1989, and upon second Court Order denying Petitioner's "Motion For Appeal, and For Relief From Judgment Or Order Pursuant To C.R. Civ.P. 60 (b)", as entered on January 2, 1990, and attached hereto as Appendix A-1 and A-2. Jurisdiction of this Court was invoked pursuant to the ordained Constitution of the State of Colorado, Article II, Section 1, 3, 6, 7, 25, Article V, Section 25, and C.R. Civ.P. Rule 106.

STATEMENT OF FACTS

I.

Petitioner, Edward G. Novotny, commenced an action in the District Court, of the 22nd Judicial District, in and for Montezuma County, Colorado, on September 13, 1989, which was designated as case No. 89-CV-168, and therein petitioned for injunction and restraining orders against the named Respondents, First National Bank, Citizens State Bank, and Valley National Bank, all being Corporations engaged in doing business in the said State of Colorado, and further, being Agents of a Foreign Principal.

Petitioner, Edward G. Novotny, is in fact, a natural born Citizen, inhabitant of the said State of Colorado.

The District Court of the 22nd Judicial District, Grace S. Merlo, ordered a Jurisdictional hearing on October 10, 1989, and thereafter moved it to October 27, 1989, to allow timely Notice of the same to Petitioner.

II.

Petitioner, Edward G. Novotny did in fact, appear in his

proper person, on October 27, 1989, in the said Respondent District Court, before Judge Grace S. Merlo, for a Hearing upon Jurisdiction of the said Court over Respondent Corporations.

Petitioner, Edward G. Novotny, only sought injunctive relief against the said Respondent Corporations, to secure his Constitutional Rights Privileges and Immunities as mandated by the "Due Process Clause", and obtain "Equal Protection Of The Law", in the privacy of his person, papers and effects.

Jurisdiction of the Court was denied by said District Court, Grace S. Merlo and entered on record October 27, 1989. (Appendix A1) Petitioner filed a Motion For Appeal And Relief From Judgment Order, which was timely entered upon the District Court record on January 2, 1990. This Appeal was denied by Respondent District Court, Grace S. Merlo, on January 25, 1990. (Appendix A2).

III.

All Respondent Corporations being fictitious entities and being represented by attorneys, made appearances on said date, in said Court, and have admitted being subject to the Constitution, Laws and Regulations of the said State of Colorado.

Respondents Corporations, and Respondent District Court, Grace S. Merlo, continually brought up the the Internal Revenue Service, to which Petitioner continually objected upon the grounds that they were not named parties in the instant action, nor did a representative of said Internal Revenue Service, enter as an Interpleader, Amicus Curiae, nor make an appearance to

testify or make any claim before the Respondent District Court on said date.

Respondent Corporation's attorneys, apparently proffered certain surprise, hearsay, documentary evidence to the said Respondent District Court, which was not timely presented to Petitioner, nor shown to him by said court, thereby denying Petitioner of his Right to "Notice", "Opportunity To Defend", "Due Process", and "Equal Protection Of The Law."

This entry of evidence violated Petitioner's substantial Rights to challenge and rebut the same, and subpoena witnesses and or documents in his defense, under the mandates of the Constitution of the United States of America, Amendment VI, the Constitution of the State of Colorado, Article II, Section 16, and C.R.E. 103 and 106.

IV.

Petitioner, Edward G. Novotny, objected to the irregular proceeding held in said Respondent District Court, under direction and control of Respondent, Grace S. Merlo, upon which said Respondent, District Court, Grace S. Merlo, dismissed Petitioner's claim for injunctive relief, (Appendix A1) and thereby granted special privileges and immunities to domestic and foreign corporations, above and beyond the Rights of the said Citizen Petitioner, as secured, guaranteed and protected under the mandates of the ordained Constitution of the United States of America, and the Constitution of the said State of Colorado, and the laws made in pursuance thereof.

REASONS WHY WRIT SHOULD BE GRANTED

I.

On September 13, 1989, Petitioner Edward G. Novotny commenced an action for Injunction And Restraining order, in the Respondent District Court, against Respondent Corporations, First National Bank, Citizens State Bank, and Valley National Bank, all of whom are engaged in business within the State of Colorado.

Petitioner sought injunctive relief against said Respondent Corporations, to prevent their Officers, Employees and or Agents from surrendering and or divulging any books papers, records or effects pertaining to Petitioner, over to the use and or control of anyone without a lawful Court Order, issued by a lawful Court of Competent Jurisdiction.

Corporations are not, nor can they obtain citizenship status, rights, privileges or immunities. D. D. B. Reality Corp. vs. Merrill, 232 F. Supp. 629, 637. The privileges of Corporations Foreign and Domestic were placed under restrictions by the Constitution of the State of Colorado.

"Probably no subject has come before the Convention causing more anxiety and concern than the troublesome and vexed question pertaining to corporations. The Legislatures of other States have, in most cases, been found unequal to the task of preventing abuses and protecting the people from the grasping and monopolizing tendencies of railroads and other corporations.

To this end we have provided for the wiping out of all dormant and sham corporations claiming special and exclusive privileges..., and have required all foreign corporations, as a condition of their doing business here, to have one or more known places of business, and an agent or representative within the State, upon whom the process of our courts can be served at any and all times. We have also retained jurisdiction of our courts in cases of consolidation of a corporation within the State with any foreign corporation, over that part of the corporate property

within the limits of this State...." (see: Proceedings Of The Constitutional Convention Held In Denver, December 20, 1875 To Frame A Constitution For The State Of Colorado, Published By Authority Of Timothy O'Connor, Secretary Of State, The Smith-Brooks Press, State Printers (1907), page 728)

The Constitution of the State of Colorado, placed numerous restrictions on Corporations and the government, including but not limited to, Article V, Section 25, which prohibited the Legislative body from passing ANY Special or Local Laws granting ANY Corporation, etc. special or exclusive privileges, immunities or franchises whatever, to wit:

"Section 25. Special legislation prohibited. The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say;... grant to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever...."

Respondent Corporations do not fall within the exceptions expressed and clearly stated in Article XVI, Section 2, to wit:

"Section 2. Corporate charters created by general law. No charter of incorporation shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations as are or may be under control of the state; but the general assembly shall provide by general laws for the organization of corporations hereafter to be created.

This included Foreign Corporations, as clearly stated in the Constitution of the State of Colorado, Article XVI, section 10, to wit:

Section 10. Foreign corporations - place - agent. No Foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served.

(Also See: Constitution of the State of Colorado,
Page 11

Article XI. Sections 1 and 2)

The said Respondent Corporations, First National Bank, and Valley National Bank, have both failed, neglected and refused to comply with the said Constitution of the State of Colorado, and the Laws made in Pursuance thereof, by not being certified to do business in the State of Colorado, pursuant to C.R.S. 7-9-101 and 7-9-103, and the Constitution of the State of Colorado, Article V. Section 25, nor maintaining resgistrered agents as mandated pursuant to the Constitution of the State of Colorado Article XVI. Section 10. (See: Transcript, Page 35, Line 15, through Page 36, Line 10, Apendix B, and Appendix C-1, C-2))

Arguendo, this does not prevent said Foreign Corporations from defending an action in the said State Courts, but evidences a design to willfully violate the same said Constitution and Laws, and to claim special privileges immunities and franchises, not Constitutionally authorized, within said sovereign State.

The said Respondent District Court, Grace S. Merlo, is not authorized to grant or convey a special privilege, immunity and franchise whatever, upon said Respondent Corporations, their officers, Employees or Agents, or subsidiary Agencies, including but not limited to, granting any corporation privileges and/or immunities, above and beyond those Rights, Privileges and Immunities retained by the people and citizens of the sovereign State of Colorado.

No exclusive privilege or immunity can be claimed by Respondent Corporations within the said boundaries of the

sovereign State of Colorado, who are clearly doing business in the same, and not exclusively within a Federal enclave.

The said Respondent District Court, Grace S. Merlo, is further forbidden from acts of pretended legislation by the express and conditional terms of the Office, by and through the said ordained Constitution of the State of Colorado, Article III, "Separation Of Powers" doctrine.

II.

The said Respondent Court ordered a jurisdictional hearing on October 10, 1989, but upon objection of Petitioner that he had not received timely Notice of the same, said hearing was rescheduled for October 27th, 1989.

All Respondent Corporations made appearance by and through attorneys, on October 27, 1989, at said Jurisdictional Hearing, at which Respondent Grace S. Merlo was presiding.

All Respondent Corporations have admitted by and through their attorneys that, they are subject to the Constitution of the United States, the Constitution of the State of Colorado, the Laws made in Pursuance thereof, and the regulations pertaining to their business as mandated by the State of Colorado. (See: Transcript, page 3, lines 24 through page 4, line 6.)

Respondent Corporation's attorneys, and Respondent Court, Grace S. Merlo, continually brought up an immaterial collateral issue upon proffered evidence, pertaining to the Internal Revenue Service, who were not named parties to the action, and made no attempt to enter the same said action as an

Interpleader, Amicus Curiae, nor did a representative of the same make an appearance on said date.

The said collateral issue, was both untimely and wholly misrepresented to the Court. The said Respondent Corporations are in fact, Agents of a Foreign Principal and its subsidiary Corporations. (See: 22 U.S.C. 611) The said National Banking Corporations, are the fiscal and depository Agents of the International Organizations and Corporations under the Bretton Woods Agreement. (See: 22 U.S.C. 284, 285, 286 etc.)

Agruendo, the Internal Revenue Service, not being a party to the action, are not officers of the United States, not filing the required oath (See: Constitution of the United States of America, Article VI), and having entered into agreement with the same said International Corporations. (See: Treasury Department Delegation Order No. 91)

Respondent District Court, Grace S. Merlo, stated in open court that "I can give you an injunction saying everybody else except the IRS, if you could prove there was anyone else seeking your records". (See: Transcript, Page 33, lines 12, 13, 14)

Respondent First National Bank, further stipulated that if Petitioner could prove any other person was seeking to obtain his records, they might agree to said injunctive relief, but if it related to matters solely within the purview of the Internal Revenue Code, they would not agree to such stipulation. (See: Transcript page 5, line 6 through page 6, line 17)

The said Respondent Corporations, are all inter-agency Corporations within the same said Organizations and Principal,

and had the capacity to remove the same said cause, under 22 U.S.C. 286g, and have failed to timely move the same said cause to the court of the United States.

Numerous questions as to admissability, relevancy and weight of said proffered evidence were and are in question, and remain unresolved at this time, being entered upon the record by and through an unknown procedure, constituting surprise to Petitioner and adversely affecting the substantial rights of the Petitioner to timely and properly rebut the same said evidence. (See: C.R.E. Rule 103 (a)).

III.

It is clearly evident from the express and conditional terms of both the ordained Constitution of the United States of America, and the ordained Constitution of the State of Colorado, that the formation, ordinance and establishment, of the several states, and the Union of States, was only achieved by and through the consent of "We The People." (See: Preamble to said Constitutions, Enabling Act, Section 5, Constitution of the State of Colorado, Article II, section 1)

The Citizens Rights, Privileges and Immunities, are not a grant from the legislative body nor do they require the permission of any governmental body, Officer, Employee, or Agent to become operative or to be freely exercised. (See: Medina vs. People, 154 Colo. 4, 387, P.2d 733) It is further held that the Rights, secured and guaranteed are not subject to any rule making or legislation which would abrogate them. (See: Miranda vs. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694)

Petitioner's claim for injunctive relief, clearly evolved around his Constitutionally secured and guaranteed Right to "Due Process" and "Equal Protection Of The Law".

Pursuant to Article V, Section 2, of the Colorado State Constitution, Respondent District Court, Grace S. Merlo, is under Oath and legal duty to secure, support and uphold Petitioner's Rights, Privileges and Immunities, as a matter of Law. (See: Constitution of the United States, Article VI, Clause 2 and 3)

Respondent, District Court, Grace S. Merlo, has exceeded the vested powers, authority and jurisdiction of said Court, by failing, neglecting and refusing to secure the said Petitioner's Rights as secured and guaranteed by the Constitution of the United States of America, and the Constitution of the State of Colorado.

Petitioner has an inalienable Right to be secure in his person, papers and effects (See: Constitution of the United States, Amendment IV), (Constitution of the State of Colorado, Article II, Sections 3, 7, and 25), and retains his right to seek redress of grievance in the lawful courts established and empowered under said Constitutions. (See: Constitution of the United States of America, Article IV, Section 2, Article VI, Section 2, Amendments IX and X), (Constitution of the State of Colorado, Article II, Sections 6 and 24)

Petitioner can find no power or authority vested in or delegated to the several States, nor to the general Government of the Union of states, nor by and through arbitrary and

capricious acts of any department or agency to alter, amend or abolish his secured rights without Due Process of Law; and Equal Protection of the Law. Nor were said states or general Government ever granted the power or authority to grant, convey and or delegate such authority, privilege, immunity or franchise to any other corporation, association, or individual whatever.

CONCLUSION

It would be un-constitutional for the Legislative Branch of the government of the State of Colorado, to pass a special law concerning privileges, immunities and franchises to Corporations, Associations or Individuals. It therefore stands to reason that the said Respondent District Court, Grace S. Merlo, cannot convey nor grant any special or local privilege, immunity or franchise whatever to the same, whether domestic or foreign.

The People of the said sovereign State of Colorado, restricted and restrained those acting in Corporate capacities, and retained the jurisdiction of the Courts over the person of the same, and further, retained the power and authority to abolish or annul the charters privileges, immunities and franchises of the same, should they become injurious to the citizens of the State. (See: Constitution of the State of Colorado, Article XV, Section 3)

The inferior Respondent District Court clearly exceeded the vested powers, authority and jurisdiction of the said Office, by granting certain special privileges to Respondent

Corporations, their subsidiary Corporations, Associations and the Individuals thereof, and their Foreign Principals.

The inferior District Court, Grace s. Merlo, prejudiced Petitioners claim, by and through an unknown court procedure, and through surprise, and taking notice of hearsay, and questionable documentary evidence. Petitioner has a secured Constitutional Right to "Due Process" and "Equal Protection Of The Law", in the courts of the said State, and has not waived those rights.

The Constitutionally Secured and Guaranteed Rights, Privileges and Immunities of Citizens are inalienable. The privileges, and immunities of Corporations are regulated and granted by and through the ordained Legislative, Executive and Judicial Branches of the said state. The Rights reserved by and to "We The People", and not expressly surrendered to the government, are not surrendered to Corporations, Associations or Individuals, in any capacity under any color. Nor can special or local legislation, or arbitrary acts of a judicial magistrate, grant superseding privileges, powers and authorities to Corporations, Associations, or Individuals, foreign or domestic, above and over the Rights, Privileges and Immunities of Citizens as secured by the ordained Constitution.

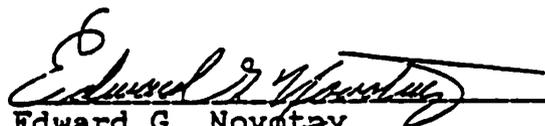
The said inferior Respondent District Court, Grace S. Merlo exceeded the vested powers, authority, and jurisdiction of the said Office, by granting certain Corporations, Associations, and or Individuals, special privileges, immunities and franchises, above and over the Constitutionally secured and

guaranteed Rights of this Petitioner, and is un-Constitutional and void ab initio.

It is a matter of law that the Rights not enumerated by the Constitution are not to be disparaged, the reason being the soul of justice, and the establishment of justice a declared matter of Public Policy, it is not within the vested powers, authority or jurisdiction of the said inferior Respondent District Court, Grace S. Merlo, to disparage those Rights enumerated.

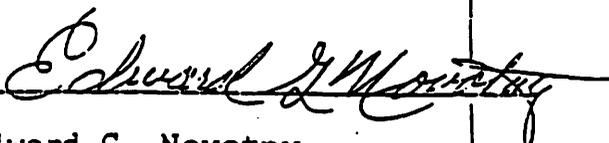
WHEREFORE, Petitioner, Edward G. Novotny, does hereby petition that this Supreme Court issue Writ of Certiorari commanding the district Court of the 22nd Judicial district, in and for Montezuma County Colorado, to certify the record of Case No. 89-CV-168, to this Court, that it might review the papers, records and proceeding had in the said inferior District Court.

and Further, that the Supreme Court vacate said orders, and for such further relief as to this court deems necessary and proper. dated this 28th day of Febuary, 1990.


Edward G. Novotny
917 Brookside
Cortez, Colorado 81321
(303) 565-9394

CERTIFICATE OF SERVICE

I, Edward G. Novotny, do hereby CERTIFY that I hand delivered a true and correct copy of this PETITION FOR COMMON LAW WRIT OF CERTIORARI, and related documents, to the following named persons, and sent 10 copies plus one original to the Colorado Supreme Court in Denver Colorado, on this date, February 28, 1990.


Edward G. Novotny

District Court, 22nd Judicial District, Grace S. Merlo
Cortez, Colo. 81321

Guy B Dyer, Jr.
140 West First Street
Cortez, Colo. 81321

Clifford C. Fossum
208 West North Street
Cortez, Colo. 81321

Dated the 28th day of Febuary, 1990


Edward G. Novotny

cc:

Edward G. Novotny (911)
917 Brookside
Cortez, CO 81321

Honorable Grace S. Merlo
Montezuma County Courthouse
109 West Main
Cortez, CO 81321

Clerk of Montezuma District Court
Montezuma County Courthouse
109 West Main
Cortez, CO 81321

Guy D. Dyer, Jr.
140 West First Street
Cortez, CO 81321

Clifford C. Fossum
208 West North Street
Cortez, CO 81321

SUPREME COURT, STATE OF COLORADO
CASE NO. 90SC132
CERTIORARI TO THE DISTRICT COURT, MONTEZUMA COUNTY, #89CV168

ORDER OF COURT

EDWARD G. NOVOTNY,

Petitioner,

vs.

FIRST NATIONAL BANK, CITIZENS STATE BANK and VALLEY NATIONAL BANK,

Respondents,

and

DISTRICT COURT, 22nd JUDICIAL DISTRICT, and HONORABLE GRACE S. MERLO,

Respondents.

Upon consideration of the Motion to Exceed the 12 Page Limit for Writ of Certiorari and the Notice of Appeal in the Nature of Certiorari and the Petition for Common Law Writ of Certiorari filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that this Matter be treated as an Original Proceeding.

IT IS FURTHER ORDERED that said Petition for Common Law Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MARCH 15, 1990.

Supreme Court
State of Colorado
Certified to be a full, true and correct copy

MAR 16 1990

Court Seal By *Carolyn Scott*
MAC V. DANFORD
Clerk of the Supreme Court
Deputy Clerk



No. 3-093626

STATE OF COLORADO

3-093626

DIVISION OF ACCOUNTS AND CONTROL



PAYABLE THROUGH ANY BANK OR BANKER

VOID AFTER 6 MONTHS FROM ISSUE DATE

FUND 1001 GENERAL FUND

AGENCY NO	VOUCHER NO.	ACCOUNT
390000	M971026	11019

WARRANT

ON THE TREASURER OF THE STATE OF COLORADO

MONTH	DAY	YEAR
02	22	89

CHANGE TO ACCOUNT OF DEPARTMENT OF STATE

PAY TO THE ORDER OF

JOHN B NELSON
 01 30 89 892008629
 14675 CO ROAD 35.0
 MANitou CO 81323

DOLLARS	CENTS
\$ *****8	00

OUT OF ANY MONIES NOT OTHERWISE APPROPRIATED

⑆01093626⑆ ⑆107005872⑆ 70 005 89⑆

CHARGE TO AGENCY

NAME DEPARTMENT OF STATE
NUMBER 390000 PAYEE NAME JOHN B NELSON

WARRANT NO. 3-093626

VOUCHER NUMBER M97102600131

MONTH	DAY	YEAR
02	22	89

STATE OF COLORADO



DESCRIPTION	AMOUNT
02 21 REFUND OF UNIFORM COMMERCIAL CODE FILINGS REFER TO NUMBER BELOW PAYEE NAME FOR VALIDATION NUMBER AND DATE OF FILING DOCUMENTS WERE RETURNED PREVIOUSLY REJECTED OR REFUND WAS REQUESTED IN WRITING	
TOTAL	

DETACH THIS STUB AND RETAIN FOR YOUR RECORDS

NOT NEGOTIABLE

KNOW YOUR ENDORSER . REQUIRE IDENTIFICATION

NOTICE

Endorsements must be both legally and technically correct. Authority of one person to endorse for another (except officers of corporations) must accompany the warrant.

CHARGE TO AGENCY

NAME DEPARTMENT OF STATE
NUMBER 39000 PAYEE NAME JOHN B NELSON
WARRANT NO. 3-093626

VOUCHER NUMBER
M97102600131

MONTH	DAY	YEAR
02	22	89

STATE OF COLORADO



DESCRIPTION	AMOUNT
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TOTAL	

DETACH THIS SLIP AND RETURN
FOR YOUR RECORDS

NOT NEGOTIABLE

STATE OF COLORADO
DEPARTMENT OF THE TREASURY

GAIL S. SCHOETTLER
STATE TREASURER



NANCY COLEMAN
DEPUTY TREASURER

July 25, 1990

Mr. John Nelson
14675 County Road 35.6
Mancos, CO 81328

Dear Mr. Nelson:

Thank you for contacting my office regarding bonds held by the State of Colorado. Although Treasury security measures prohibit distribution of copies of bonds, we are happy to provide you with the following information.

Of the bonds mentioned in your inquiry, the Department of Treasury currently holds only International Bank for Reconstruction and Development bonds. Eight 6 3/8% International Bank for Reconstruction and Development bonds, were purchased December 27, 1973 and October 14, 1975 with a maturity date of October 1, 1994.

Please do not hesitate to contact Sharon Elliott of my office at (303)866-2059 should you have any questions or require further information.

Sincerely,

Gail Schoettler
Gail Schoettler

U. S. AGENCY OBLIGATIONS

ARTICLE 60

U. S. Agency Obligations

11-60-101. Definitions.

11-60-102. Debentures -- legal investments

11-60-101

Financial Institutions

646

-- federal intermediate credit banks -- bank for cooperatives.

11-60-103. Lawful investments -- international banks.

11-60-104. Article controlling.

11-60-101. Definitions. As used in this article, unless the context otherwise requires:

(1) "Bank for cooperatives" means the corporation known as the central bank for cooperatives and any bank for cooperatives organized and chartered by the governor of the farm credit administration pursuant to the "Farm Credit Act of 1933", as amended

(2) "Debenture" means an instrument evidencing an obligation issued by a federal intermediate credit bank pursuant to the "Federal Farm Loan Act", as amended, or by a bank for cooperatives pursuant to the "Farm Credit Act of 1933", as amended, and includes consolidated debentures issued by federal intermediate credit banks acting together or banks for cooperatives acting together.

(3) "Federal intermediate credit bank" means any federal intermediate credit bank chartered by the farm credit administration pursuant to the "Federal Farm Loan Act", as amended.

(4) "Funds" includes but is not limited to any moneys or deposits, or any fiduciary, sinking, insurance, investment, retirement, compensation, pension, estate, trust, or other funds, public or private.

(5) "Public bodies or officers" includes but is not limited to the state of Colorado and any of its institutions, agencies, counties, municipalities, districts, and any political subdivision, department, agency, or instrumentality thereof, and any political or public corporation, board, commission, or officer.

Source: L. 57, p. 520, § 1; CRS 53, § 83-3-1; C.R.S. 1963, § 83-3-1.

11-60-102. Debentures - legal investments - federal intermediate credit banks - bank for cooperatives. It is lawful, notwithstanding any restrictions on investments contained in any of the laws of this state, for any bank, trust company, savings bank, savings and loan association, insurance company, credit union, public body or officer, or any person, including but not limited to those doing business under any banking, insurance, deposit, fiduciary, or investment laws of the United States, or any of the states thereof, to invest any funds in its, his, or their custody, control, or possession, in any debentures or other similar obligations issued by a federal intermediate credit bank or by a bank for cooperatives and to use any such debentures as security for public deposits or any other fund in their custody, control, or possession.

Source: L. 57, p. 521, § 2; CRS 53, § 83-3-2; C.R.S. 1963, § 83-3-2.

11-60-103. Lawful investments - international banks. It is lawful, notwithstanding any restrictions on investments contained in any of the laws of this state, for any bank, trust company, savings bank, savings and loan association, insurance company, credit union, public body or officer, or person, including but not limited to those doing business under any banking, insurance, deposit, fiduciary, or investment laws of the United States, or of any of the states thereof, to invest any funds in its, his, or their custody, control, or possession, in the obligations of the international bank for reconstruction

State Constitution prohibits this

and development, the inter-American development bank, or the Asian development bank.

Source: L. 57, p. 521, § 3; CRS 53, § 83-3-3; C.R.S. 1963, § 83-3-3; L. 67, p. 564, § 1; L. 69, p. 690, § 1.

11-60-104. Article controlling. Insofar as the provisions of this article are inconsistent with the provisions of any other law, the provisions of this article are controlling; but nothing in this article shall be construed as modifying part 3 of article 1 of title 15, C.R.S. 1973.

Source: L. 57, p. 521, § 5; CRS 53, § 83-3-4; C.R.S. 1963, § 83-3-4.

Cross reference. As to fiduciary investment, see § 15-1-301 et seq.

ARTICLE 61

Legal Tender

11-61-101. Gold and silver coin a legal tender.

11-61-101. Gold and silver coin a legal tender. The gold and silver coin issued by the government of the United States shall be a legal tender for the payment of all debts contracted April 5, 1893, between the citizens of this state. The same shall be received in payment of all debts due to the citizens of this state and in satisfaction of all taxes levied by the authority of the laws of this state.

Source: L. 1893, p. 306, § 1; R. S. 08, § 3941; C. L. § 3817; CSA, C. 98, § 1; CRS 53, § 83-2-1; C.R.S. 1963, § 83-2-1.

STATE OF COLORADO
DEPARTMENT OF THE TREASURY

GAIL S. SCHOETTLER
STATE TREASURER



NANCY COLEMAN
DEPUTY TREASURER

April 10, 1989

Ms. Grace Hayes
P.O. Box 292
Wiley, CO 81092

Dear Ms. Hayes:

As State Treasurer, it is out of my jurisdiction to change cash into gold or silver coin. Your letters are being forwarded to The Federal Reserve Bank to the attention of Carolyn Davis in the Securities Department at 1020 15th Street, Denver, CO 80202. She should be getting in touch with you soon.

Sincerely,

Gail Schoettler
Gail Schoettler

cc: Carolyn Davis
Federal Reserve Bank

Susan Schmitt
Citizens Advocate Office.



Denver Branch
Federal Reserve Bank of Kansas City

P.O. Box 5228, T.A.
Denver, Colorado 80217
(303) 572-2300

A Tradition of Service
1914-1989

April 19, 1989

Ms. Grace Hayes
P.O. Box 292
Wiley, Colorado 81092

Dear Ms. Hayes:

The Colorado State Treasurer has referred your letter of February 10, 1989 to the Denver Branch of the Federal Reserve Bank of Kansas City. In your letter you have requested that you receive gold or silver coins in exchange for \$5,000 of Federal Reserve Notes.

Although the dollar as a standard unit of value has been previously defined in terms of a gold or silver content, there is no constitutional requirement that the currency of the United States consist of gold and silver coins or of currency backed by gold or silver. Even though statutes of the United States, in the past, have specified a formal gold or silver content of the dollar, these statutes were rendered obsolete when the United States officially abandoned the domestic gold standard with the passage of the Gold Reserve Act of 1934. This Act effectively withdrew all gold from monetary circulation by requiring that it be tendered to the Federal Government. All persons who tendered their gold received compensation in dollars. The Act also amended the Federal Reserve Act to provide that Federal Reserve notes would be redeemable only in lawful money. Prior to that amendment, the Federal Reserve Act provided that Federal Reserve notes were also redeemable in gold. For all practical purposes the dollar was completely removed from the gold standard in 1970 when the requirement that the Treasury maintain a 25% gold backing for all Federal Reserve notes was dropped. Similarly in view of the demonetization of silver by Congress in the 1960's under several public laws, there is no longer any requirement that currency be redeemable in silver.

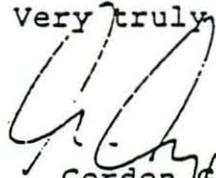
Consequently, a holder of Federal Reserve notes who presents them for redemption in lawful money at a Federal Reserve Bank is most likely to receive in exchange lawful money in the form of other Federal Reserve notes. A holder of Federal Reserve notes presenting them for redemption in lawful money at a Federal Reserve Bank may request a particular type of money, such as silver dollars, and, if it is available, the request may be

Ms. Grace Hayes
April 19, 1989
Page 2

granted. But the holder has no legal right in this respect and the Reserve Bank need only give other Federal Reserve notes in redemption of such notes.

I note that as Exhibit A to your letter, you have included a copy of Title 31, United States Code, Section 449 which defines a particular relationship between dollars and gold. As noted on your exhibit immediately below the text to Section 449, Section 449 was repealed by Public Law 94-564 on October 19, 1976.

Very truly yours,



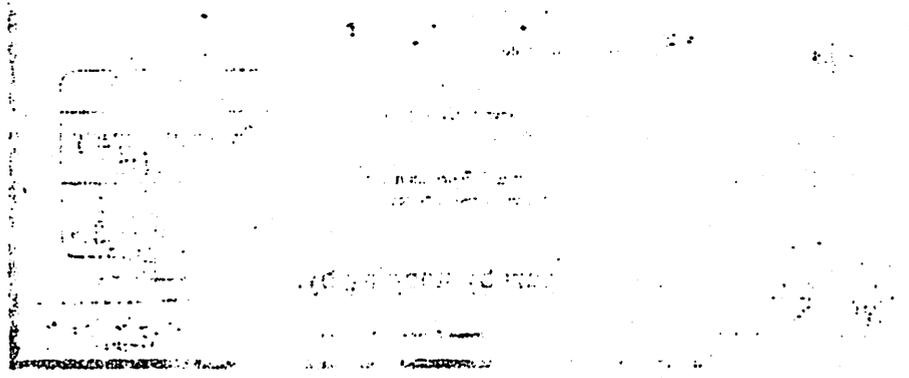
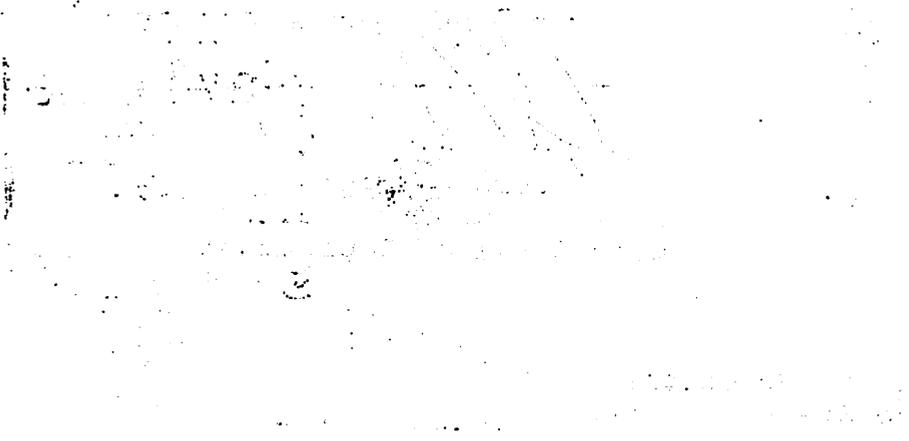
Gordon Gregg
Manager

Cash Services Department

cc: Ms. Gail S. Schoettler,
Colorado State Treasurer

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You can't
play house
when you
haven't
got a home

The real tragedy of homelessness is its devastating effect on children. More than 7,000,000 children across America are homeless today... and the numbers are increasing every day.

You can help. Bring the whole family in.

The Great American Yard Sale

Saturday, August 11

9:00 AM - 5:00 PM

Sponsored by Preferred Property Center, Inc.
Better Homes and Gardens®

Proceeds will go to The Better Homes® Foundation
to benefit homeless families and children across America.



Do your part by stopping by.



Preferred Property Center, Inc. is an Equal Opportunity Employer. All rights reserved.

taining an irrational monopoly," as he put it. Garcia claimed that the two private-sector plants, in Cajamarca and in Arequipa, were competing unfairly with the state-owned Enci milk-processing plant and that their operations were against his policy of lowering the costs of basic foodstuffs as well as damaging to the cattle industry and the sale of fresh milk.

Observers believe that Garcia would not move to nationalize the two Nestle subsidiaries. However, the restrictions on production that he may impose could set a precedent affecting other foreign-owned companies doing business in Peru.

Messages to Qaddafi

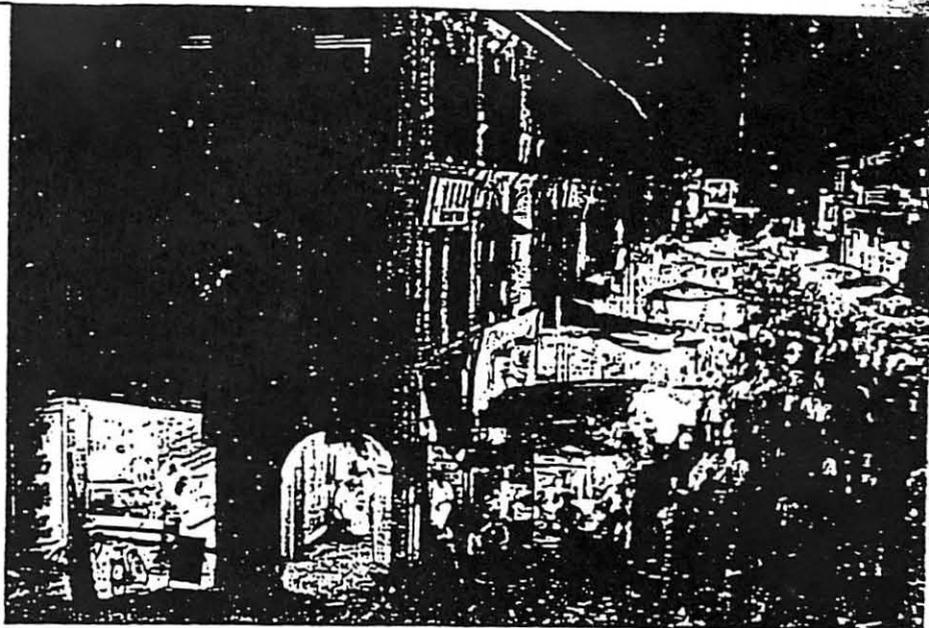
Maltese government leader Karmenu Mifsud Bonnici has been serving as a go-between for Libya, whose relations with Italy were seriously damaged by the Rome airport attack in December. He recently carried a message from Libya's Col. Muammar Qaddafi to Italian Prime Minister Bettino Craxi urging a meeting between the leaders. But Craxi insisted that there be clear premises and precise assurances before any meeting could be set up between himself and the Libyan leader. Craxi pointed to reports from Tripoli of continued Libyan support for terrorism, which would "appear to be in complete contradiction with the avowed desire of the Libyan leadership to openly work for an end to violence and terrorism."

Thus Craxi made it clear that denials of support for terrorism from Libya were not enough; he stressed that they must be followed "by concrete gestures to show restraint from any form of support and protection from groups known for pursuing terrorist methods." Craxi also insisted that Qaddafi "pledge to work for mutually respectful relations in the region" and "refrain from interference or other actions which could heighten tension or create destabilizing effects."

Qaddafi has rarely allowed respect for truth to stand in his way. Such pledges from him could be forthcoming, especially since some 5,000 workers about to be laid off at a Fiat automobile plant in Turin have "appealed" to Qaddafi for their jobs. A Libyan-owned bank, the Libyan Arab Foreign Bank, owns 14 percent of Fiat's shares.

Cashless Society

The first cashless society may soon be Singapore, which formally launched its latest move in that direction recently. No cash transactions are permitted in major department stores, supermarkets, gas sta-



Singapore is turning itself into a cashless society with shopping by bankcards.

tions, hospitals and government offices. The scheme, under which shoppers use their plastic automated teller machine cards to pay for goods and services, began weeks ago. It has left some customers wary of this government-dictated temptation to spend, spend, spend.

Cashless shopping is just the beginning of the program. Singaporeans will also be paying utility bills, taxes, traffic fines and hospital bills by direct deduction from their bank accounts. To promote the new system, the government has closed all cash payment offices, leaving citizens little choice but to join Singapore's cashless drive toward a high-tech — but cashless — society.

The system, titled the Electronic Fund Transfer Point of Sale, began as a \$569,000 project awarded to the Britain-based CAP Information Systems Group. When it was put into effect, there were frequent complaints about terminal breakdowns and slow transaction times. Informed sources said that about 65 British-made terminals were replaced with Japanese Omron machines. Nonetheless, about 1 million people of a total population of approximately 2.5 million are expected to benefit from the scheme, with 200 terminals installed across the island.

Coed Crews

Rear Adm. Jorgen F. Bork, commander of Denmark's Navy Operational Command, has stated that an experiment with women on Danish naval vessels has gone well — with the single exception of ships on North Atlantic cruises. He stated that "it is not appropriate to have mixed crews on long cruises with long absences, for example on Greenland and the Faeroes" because of hanky-panky between the sexes, com-

plicated by shipboard jealousies. Denmark's navy has just concluded an experimental period of a few years in which women, as an exception to a men-only rule, could do service aboard ships. Some caustic NATO commentators wonder at the amount of hot Viking blood that still must run in Danish veins. It is only a two-day sail from Denmark to the Faeroes.

Ambassadors Ousted

Soviet Communist Party General Secretary Mikhail Gorbachev appears to have expanded his shake-up "purges" to the Soviet foreign service. Yuri V. Dubinin, Moscow's ambassador to Spain for eight years, was dismissed from his position without warning and had only one week to pack his bags. In keeping with the Kremlin's usual practice, nothing has been said in Moscow. The name of the new ambassador will not be disclosed until he arrives in Madrid.

Another embassy switch may be unrelated. Igor Andropov, son of former Soviet Communist Party General Secretary and longtime KGB chief Yuri Andropov, was replaced as ambassador to Greece several months ago. The Soviet Embassy in Athens was rocked by the defections of three Soviet KGB and GRU (military intelligence) officers in the past year. Yuri Andropov was spending long periods home in Moscow. Kremlin-watchers believe that Gorbachev will begin his foreign service restructuring in earnest. Earlier, the only person he had replaced since coming to power was the veteran Minister of Foreign Affairs Andrei Gromyko, whom he made the Soviet president.

Prepared for Insight by M. Atlantic Research Associates Inc., publishers of *El Warning*.

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July 7, 1989

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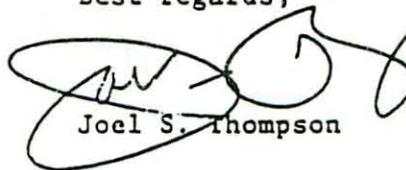
RE: Federal Land Bank v. Rose
Case No. 87CV05

Dear Russ:

On July 6, 1989, I received a roll of quarters from you. All of the quarters were minted after 1964, the last year in which quarters with predominantly silver content were minted by the United States government. Under the Court's Order of April 20, 1989 in the above-referenced civil action, you were required to send ten silver dollars to Sharp and Casson, P.C. each month. You complied with the Court's Order on May 1, 1989. On June 1, 1989, you sent a combination of half dollars, quarters and dimes, but I overlooked the fact that they were not silver dollars because they all had predominantly silver content. Mailing us ten dollars in quarters which have little or no silver content is contrary to the Court's Order. I have retained the roll of quarters and will apply \$10.00 against the attorney's fees and expenses awarded to The Federal Land Bank, so that the remaining balance of attorney's fees and expenses is \$507.32. However, as I stated in my letter of July 5, 1989, if I have not received ten silver dollars in accordance with the Court's Order on or before July 14, 1989, I intend to file a motion to hold you in contempt for violation of the Court's Order of April 20, 1989.

If you have any questions, please call me.

Best regards,



Joel S. Thompson

JST:jss
cc: Mr. Alan Heath

—John M. Mason, 1893

and I get real busy.

—George S. Patton, Jr.

minimum amount of time.

action on the enemy. In the
unit's wounds, death and

to inflict the maximum

is. It is to use the means at

the which is not subject to

there is only one tactical

EQUALITY

EQUALITY

There is only one tactical principle which is not subject to change. It is to use the means at hand to inflict the maximum amount of wounds, death and destruction on the enemy in the minimum amount of time.

--George S. Patton, Jr.

...then I get real fussy.

--John Nelson, 1993