

ANTEBELLUM MONEY CASES FROM STATE COURTS

(and some Civil War legal tender cases)

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The U.S. Constitution established a monetary system of gold and silver coin, “freeman’s money.” At the time of ratification of the Constitution, the power to declare a legal tender was possessed by the States, and by the Constitution, the States were prevented from making anything other than such coin a legal tender. See Art. 1, § 10, Cl. 1. Via the Constitution, Congress was granted the power to coin that money, and such power did not include that of establishing a paper legal tender because the power to emit “bills of credit” had been denied to Congress by the 1787 Philadelphia Convention.

Until the War of Northern Aggression, State and federal courts recognized and enforced these simple and plain constitutional requirements. For example, it is perfectly clear that via the congressional coining power set forth in Art. 1, § 8, Cl. 5, a duty is imposed on Congress to provide this country with specie coin as its money. In the counterfeiting case of *United States v. Marigold*, 50 U.S. 560, 567-68 (1850), the Supreme Court confirmed that such duty did in fact exist:

“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 standard of value * * *.

“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 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.”

Yet today, Congress honors this constitutional obligation by its flagrant breach. In carefully orchestrated steps implemented over 50 years (1863 to 1913), it created a private banking system that subjects this country to a monetary system comprised of instantly created bank credit that is only “redeemable” for irredeemable bank notes. A comparable monetary system, Confederate currency, was the subject of *Thorington v. Smith*, 75 U.S. 1 (1869), where the Court used the following language to condemn a monetary system better than what Congress has created and forced the American people to use today:

“As contracts in themselves, except in the contingency of successful revolution, these notes were nullities; for, except in that event, there could be no payer. They bore, indeed, this character upon their face, for they were made payable only ‘after the ratification of a treaty of peace between the Confederate States and the United States of America.’ While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency imposed on the community by irresistible force,” 75 U.S., at 11.

“Considered in themselves, and in the light of subsequent events, these notes had no real value, but they were made current as dollars by irresistible force. They were the only measure of value which the people had, and their use was a matter of almost absolute necessity. And this use gave them a sort of value, insignificant and precarious enough it is true, but always having a sufficiently definite relation to gold and silver, the universal measure of value, so that it was always easy to ascertain how much gold and silver was the real equivalent of a sum expressed in this currency,” 75 U.S., at 13.

How is the Federal Reserve Note, an irredeemable debt obligation of a particular Federal Reserve Bank, substantially different from a Confederate note?

The legal history of the monetary powers embodied in the U.S. Constitution is extremely important and an introduction to that history is posted here:

<http://home.hiwaay.net/~becraft/MONEYbrief.html>

Of course, the exhaustive treatment of this issue appears in Dr. Edwin Vieira’s monumental work, *Pieces of Eight*, and serious students should obtain and be conversant with that work.

An important part of the legal history of the monetary powers embodied in the U.S. Constitution includes the old, pre-Civil War cases decided by state courts, but for most students, these cases are not readily available. The purpose of this compilation is to provide these cases to interested parties. The cases provided here are cited in the memorandum linked above, which is really a brief written more than 25 years ago in the mid-‘80s. While there are a number of other relevant money issue cases decided by state courts before the War of Northern Aggression, those included here are representatives of the judicial construction of the monetary provisions of the U.S. Constitution of that period.

Also provided are state cases that dealt with the constitutionality of the federal legal tender laws enacted by Congress during that war. As to these cases, ignore the title of this compilation.

These old cases have been scanned and converted to text. Such scans are highly accurate, although a student may infrequently find a typographical error. If accuracy is needed, please visit a well-stocked law library and compare these conversions to the original text.

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***Shelby v. Boyd*, 3 Yeates 321 (Pa. 1801).**

Supreme Court of Pennsylvania.

THOMAS SHELBY

v.

JOHN BOYD and WILLIAM RICHARDSON.

1801.

In a suit for lawful money of North Carolina, court will not permit paper money to be brought into court, unless it be a legal tender.

DEBT was brought on an obligation for 1000 £ lawful money of North Carolina, dated 30th November 1786, conditioned for the payment of 500 £ like lawful money on the 1st November 1787. The defendants pleaded payment with leave, &c., and gave notice of the special matters intended to be insisted on at the trial, which went to prove a want of consideration.

The cause was ordered for trial in April last, at the last Circuit Court for Lancaster county, where it was agreed, that judgment should be entered for the plaintiff, and that the execution thereon should stay, until the next Supreme Court, when the defendant should be at liberty to move to pay into court lawful money of the state of North Carolina in satisfaction of the bond, as if the same judgment had not been entered; and if the said motion should not be made effectual by the judgment of the said court, then the judgment entered to stand for the principal and interest of the balance of the obligation in specie.

In a suit for lawful money of North Carolina, the defendant cannot bring paper money into court without showing it to be a legal tender.

Mr. Dallas for the defendants now moved for leave to pay into court certain paper bills of credit, said on the face of them to have been emitted, in pursuance of an act of the state of North Carolina, passed on the 19th December 1785, and produced the deposition of Joseph Tagert, proving that these bills were and now are in circulation in that state, and that they sell from 12 s. to 15 s. for a silver dollar. The *lex loci* must govern in a case of this kind, when it appears on the bond, that it was executed in North Carolina. These bills were a legal tender at that time, and were the objects of the bond. If the court on the trial would have allowed an offer of this money, they will do so now. It merely fulfils the contract of

the parties. The court will give leave to withdraw the general issue, in order to bring money into court; and replead it, when it does not delay the plaintiff. 2 Stra. 1271. 5 Com. Dig. 22. Pleader C. 10. Where the defendant is entitled to pay money into court, it is a matter of course before plea pleaded; and now even after plea, it is perpetually done by a judge's order made for that purpose. 1 Term Rep. 711.

The motion was opposed by Mr. M'Kean for the plaintiff. The law of North Carolina is not shewn, under which these bills of credit were emitted, nor is it ascertained whether they are a legal tender. The deposition of Tagert does not go to this point; and if these bills were ever tenderable, that quality is now probably taken from them. By the 10th section of the 1st article of the constitution of the United States, no state shall emit bills of credit, or make any thing but gold and silver coin a tender in payment of debts. If the contract really contemplated such bills of credit, they might at the time have been equal in value to gold and silver; but if they had depreciated, and had not been tendered in the manner prescribed by the laws of North Carolina, they could not now be brought into court, but their specie value at the time of the contract. This suit is brought for the penalty of the bond, lawful money of North Carolina equal in value to so much Pennsylvania currency; and for this latter currency, judgment must be rendered. If the contract be for foreign coin, it may either be demanded as such, or its sterling value. 1 Leon. 41. If the agreement had respected the continental bills of credit, and no tender had been pleaded, the court would not suffer the paper emitted by congress to be paid into court, but only its specie value when the agreement was entered into. Here the court are wholly in the dark respecting the money offered to be paid in; and in 1 Dall. 175, the court refused parol evidence of the value of lawful current money.

There has been great delay in the present case. A judge under all the circumstances would not have given an order to pay the money into court. Formerly money could not be brought into court, after plea pleaded. 5 Bac. Abr. 22. If it was taken out of court, and any part of the bills of credit turned out to be counterfeit, such part could not be returned. Ib. 6. 5 Co. 115. The defendants here relied on the want of consideration as to the bond, and gave notice accordingly. The plaintiff came prepared on that issue, and not to examine into the value of the bills offered, or whether they were genuine or not.

Per curiam.

It does not appear to us, that the bills of credit offered to be paid into court, are a legal tender, and therefore we cannot admit them to be brought into court. We cannot say, on the face of the obligation, that the contract refers to such money.

Judgment absolute.

***McClarín v. Nesbit*, 2 Nott & McC. (11 S.C.L.) 519 (1820).**

Constitutional Court of Appeals of South Carolina.

DANIEL M'CLARIN

v.

WILSON NESBIT.

November Term, 1820.

Nothing but gold or silver is a legal tender, under the constitution of the United States.

RULE on the sheriff of Spartanburgh district.

In this case an execution for \$___ had issued, with special directions to the sheriff to receive in satisfaction thereof, only silver or gold. He proceeded to make the money, and received from the defendant the full amount of the execution in cents the coin of the United States, which he tendered to the plaintiff, who refused to receive the same, on the ground, that they were not a legal tender.

The circuit court decided, that they were a legal tender, and discharged the rule.

A motion was now made to reverse that decision, on the following grounds, viz.

1st.— That nothing but gold or silver is a legal tender, under the constitution of the United States: And

2d.— That if congress have the power under the constitution to make any other coin a legal tender, they have not done so, and therefore cents are not a legal tender.

Before I proceed to the consideration of the first and principal ground, in this case, I will briefly observe on the second that if congress can create a legal tender, it must be by virtue of the “power to coin money,” for no where 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. If however the power to coin money include the power to make a legal tender, the money coined, if not restrained by congress, must be a legal tender; for, if this were not so, some further act than coining money would be necessary to making a legal tender; and for that further act there is no authority in the constitution. I shall conclude then, that cents coined by the United States,

are a legal tender, as they have not been restrained by act, if it shall appear, that the power to coin money includes the power to make a legal tender.

I shall now proceed to the consideration of the first ground, which is in substance a negation of the power to make a legal tender as incidental to the power of coining money.

The constitution of the United States is so elementary in its provisions; it is so unlike those instruments for which the common law has provided rules of construction, that a court must always feel itself embarrassed whenever called upon to expound any part in the smallest degree doubtful. Subject it to the rules which govern penal statutes, and its active energy, if not its vital principle, must be destroyed. Apply to it the latitudinarian rules by which remedial statutes are construed, and it will be difficult if not impossible to avoid the exercise of legislative discretion. There are indeed a few rules furnished by the constitution itself, and by contemporaneous expositions sanctioned by subsequent judicial decisions or long acquiescence that affords something like a limit to judicial discretion; but still there is left a field sufficiently extensive to awaken the apprehensions of those who are habitually governed by precedent. I have however the consolation to reflect, that the opinion I am now about to pronounce, is not only sanctioned by a majority of this court, but that there is a higher tribunal before which it may be reviewed, and by which it must be sanctioned before it can become the law of the land; a tribunal so well composed as to promise the most satisfactory decision, and of jurisdiction so enlarged as to insure universal attention. Should it err, it would be soon known to those with whom the ultimate power of correction is lodged, and who best know how and when to apply it.

At common law only gold and silver were a legal tender. (2 Inst. 577.) In England copper farthings and half pence were made a legal tender under the value of six pence by proclamation of Charles II, and by the 14 George III, c. 42, Silver coin was limited as a legal tender to sums under 25 £ and Gold became the legal tender for all sums of and above 25 £.

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 tenders. On the 6th February, 1752, the legislature passed the following act: “Whereas bills of credit or paper money issued either by the legislature during the former government under the king of Great Britain, or by the provincial congress, or by the legislature of this state, or by the continental congress, were made and established by law, to be a good and legal tender in payment of all debts and demands throughout this state; and whereas, at present, the said laws are found inconvenient, Be it enacted, that from and after the passing of this act, no bill or bills of credit, or paper currency whatever, are deemed and received as a legal tender.” (P. Laws 306.) 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 the “legal tender.” In this state, anterior to the act of 1782, the legislature at different periods adopted different legal tenders; and it is to be observed, that so completely was this power regarded as in the states, that when congress wished their bills to be a legal tender, they were obliged to apply to the different states, to have them so made, which was done in this state by act. This power though much abused was never denied to be in the states, until the adoption of the constitution.

By the articles of confederation, agreed to in 1778, many years before the adoption of the constitution, the power of coining money and regulating the value, not only of their own coin, but the coin struck by the different states, (see 4th Sec. of the 9th Article) was expressly given to Congress, and yet, during the existence of the confederation, the states exercised jurisdiction over the legal tender.

It has been contended, that under the articles of confederation, Congress did possess, by virtue of the power to coin, the power of making a legal tender, although the states also possessed the power to make a legal tender. In other words, the states possessed the power of declaring what should be a legal tender; and yet Congress possessed the power of declaring that something else should be the legal tender. Would not the existence of such powers involve as great an inconsistency, as that Congress should have the power to establish a Bank, and the states of preventing or defeating its establishment? If Congress did not possess the power of creating a legal tender under the confederation, they do not possess the power under the constitution, for the grant in both instruments is the same; “to coin money.” The states have been limited in their exercise of power over the legal tender to gold and silver, but it does not follow, because power has been taken from the states, it has been given to Congress. The states are prohibited from passing *ex post facto* laws, impairing the obligation of contracts. Congress, however, does not therefore possess the power of doing so. Congress possesses no power that is not expressly given, or which is not necessary and proper to the carrying into execution of some power expressly given. The people then have thought proper, and I think wisely, to retain in their own hands, or at least to withhold from Congress and the state governments certain powers which appertain to sovereignty. They have said neither shall grant a title of nobility, nor pass any Bill of Attainder or *ex post facto* law, impairing the obligations of contracts; and if my construction of the constitution be not incorrect, they have further said, that nothing but gold and silver coin shall be a legal tender for the payment of debts. The language of the 10th Sec. of the 1st Article, is, “no state shall make any thing but gold and silver coin a legal tender in the payment of debts.” The language of the 5th clause of the 8th Sec. of the 1st Article, is, “Congress shall have power to coin money and regulate the value thereof.”

Construe the two sections together, and the constitution appears to intend to limit the power of the states over the legal tender to gold and silver, and to give to Congress, the power of coining gold and silver. This construction is further supported by the two following considerations: 1st. One of the great objects which led to the adoption of the constitution was the annihilation of a spurious currency, which had for years afflicted the people of this country. Give to Congress the power of making a legal tender, and you but change the hand from which the affliction is to proceed; so construe the constitution as to restrict the legal tender to gold and silver, and one of the great objects for which it was ordained, is accomplished. 2d. The constitution, no where gives to Congress any control over contracts. It is indeed scrupulously avoided. If, however, they derive the power of making a legal tender from the power of coining money, they indirectly obtain that which was intended to be withheld.

From every view I have been able to take of this subject, I am satisfied that it was not the intention of the framers of the constitution to give to Congress the power of making money; they have only been intrusted with the power of coining that which was money, gold and silver.

The decision of the Circuit Court, must, therefore be reversed.

Justices Colcock and Richardson, concurred.

Mr. Justice Johnson dissented.

Mr. Justice Nott.

I concur in the conclusion of this opinion; but I am not prepared to say, that Congress may not make copper a tender.

Stark, for the motion.

Davis, contra.

***Townsend v. Townsend*, 7 Tenn. 1 (1821).**

Supreme Court of Errors and Appeals of Tennessee.

TOWNSEND

v.

TOWNSEND AND OTHERS.

May Term, 1821.

Haywood, J., delivered the opinion of himself and Emmerson, J.

The Act of 1819, ch. 19, directs that, upon any judgment thereafter to be obtained, execution shall not issue until two years after the rendition of such judgment, unless the plaintiff shall indorse upon the execution that the sheriff or other officer shall and may receive, in satisfaction of said execution, notes on the State bank of Tennessee and its branches, and the Nashville bank and its branches, or any of them, and such other notes as pass at par with them, &c.

The same or a similar provision is made by a law of 1820 for forming a new bank and for loaning out the moneys that it may issue. These acts of the Legislature are urged to be unconstitutional and void. And various clauses of the State Constitution and of the Constitution of the United States are said to be in direct repugnance to these Acts; and, if so, it is well to admit in the outset that the Acts, like every other act whose basis is authority, are void if the authority be not given. We will take up these several clauses one after another, and examine each in its turn, to discover whether the Acts in question are really unconstitutional, as they are alleged to be.

First, then, let us take into consideration Art. 1, section 10, of the Constitution of the United States: "No State shall, &c., emit bills of credit or make anything but gold and silver coin a tender in payment of debts, pass any, &c., ex post facto law, or law impairing the obligation of contracts," &c. The first two sentences respect tender laws and paper money; the construction to be put on them should repress and prevent the evils they were intended to obviate; and what these are, must be understood by the actual evils which paper money and tender laws produced in the time of the colonial governments; in time of the war of the revolution and after that war, before the adoption of the Constitution of the United States; and also by the effects which these clauses produced after the adoption of the Constitution; and then by considering what will be the effect of the act of Assembly

now under contemplation should the same be deemed valid, we shall be able to discover whether these effects are the ones intended to be prevented by the clauses of the Constitution in question.

What, then, is the history of paper money and tender laws under the colonial governments. North Carolina issued paper money in 1713, £ 8,000, and the money depreciated. The lord's proprietors would not receive it for quit rents, though issued to defray the expenses of the Tuscarora war. It could not be remitted to England, they said, at the same time peltry was received by them. The next North Carolina emission was in 1722, £1,200; the next in 1729, £40,000; the next in 1734, £1,000; treasury notes in 1756, 1757, 1758 and 1759; one emission in 1760, of £12,000; one in 1761, of £20,000; one in 1771, of £60,000, to defray the expenses of suppressing the regulators. At this time there was already afloat £75,000. In 1729 the money depreciated and could never be raised to its original value. In 1730 the depreciation was three and a half for one; in 1735 it was five for one; in 1739 it was seven and a half for one; in 1740 it was received in payment for taxes at the rate of seven and a half for one, and thus the Government redeemed and got clear of it. The Treasury notes depreciated. There is no instance of paper money which did not depreciate, let the plan for sustaining its credit be of whatever description it might. Paper money, in the time of the colonial governments, was issued in most of the provinces, and in some of them depreciated more than it did in North Carolina.

The attempt was made in Massachusetts to issue bank bills, loaning them out on interest and on real and personal security, to be redeemed gradually by the payment from the borrowers of one twelfth, making the bills a tender, and the refusal of them to incur the loss of the debt. These provisions did not delay the depreciation for one instant. The rate of exchange in the first year was 150 and in the second 200 per cent. In 1729 Massachusetts, Rhode Island and Connecticut had issued paper money. It depreciated. There was an immense quantity afloat, but the people still clamored for more. Massachusetts and New Hampshire were restrained from further emissions by royal instructions to the Governors. Rhode Island could not be restrained because she chose her own Governor, and she issued £100,000. It instantly depreciated from 19 to 27 shillings per ounce silver, the former being the settled value before the emission. In 1741, in Massachusetts, the paper money being about to be redeemed by gold and silver remitted from England to reimburse the colonies for the exertions made in the late war above her quota, an apprehension of the scarcity of money and consequent distress of individuals excited a great uneasiness in the colony; a bank was forthwith proposed to supply the place of the paper money thus to be redeemed. Every borrower was to mortgage a real estate in proportion to the sums he should take from the bank, or, at his option, give personal security when the sum should exceed £100, to pay annually three per cent. on the sum borrowed, and four per cent. of the principal. To prevent the general confusion which was anticipated from this institution the Parliament

interfered and suppressed the company. The Massachusetts currency was redeemed at the rate of 50 shillings per ounce of silver, instead of 19 shillings per ounce, the rate at which it was issued. At this time the popular leaders were using their best endeavors to make further emissions. In 1722 Pennsylvania issued paper money accompanied with penalties enacted against those who made any difference in the price of their goods when sold for paper and when sold for gold and silver. Notwithstanding this regulation, £130 of the paper was only equal in the course of exchange with Great Britain to £100 sterling, and in some of the colonies £100 sterling was equal in value to £1,100 currency. Such was the state of the currency before the revolution. During the revolutionary war emissions were made from time to time. Depreciation began in March, 1777, at one and a quarter for one, and progressed to January, 1782, when it was 800 for one; and, as if ashamed of their own loss of credit, the notes silently withdrew from circulation.

After the war of the revolution was ended in 1783, the Assembly emitted in North Carolina £100,000, and in 1785 they made another emission to the same amount. The uniform fate of these emissions was depreciation. The emission of 1783 in North Carolina depreciated from 8 to 10 s. and then 12 s. per dollar. The new emission of 1785 still further depreciated to 14, 15 and 16 shillings per dollar, instead of continuing at 8 s. per dollar, but returned and settled at 10 on the adoption of the Constitution of the United States in 1789, and so it has ever since remained. In the debates in the Convention of North Carolina upon the paper money and tender laws, it was stated that paper in Rhode Island had depreciated eight for one, and one hundred per cent., or 16 s. per dollar in North Carolina. It was also stated that Pennsylvania had issued paper money but had not made it a tender; that in South Carolina their bills were a tender, as was also the paper money in Rhode Island, New York, New Jersey and North Carolina. It was further stated, that in South Carolina laws had been passed to pay debts with land, and from calling them pine barrens it is implied with such land as the debtor might choose to offer. And further, it was stated that they had ordered debts to be paid by installments.

One cause of depreciation is that the paper could not be remitted to foreign countries. No matter how small the emission may be, it is not equal to gold and silver. He who exchanges it for gold and silver must give a greater quantity of paper. The expense of searching for and finding the silver, of procuring the exchange and of getting it to the place of exportation, together with the risk of conveyance and the greater danger of having the paper money counterfeited, are all considered and involved in fixing the difference of value, and contribute to the increase of depreciation. If the paper money can not be redeemed till some years hence, that becomes another cause of depreciation. It may be alleviated by an accrual of interest for the delay, but it will nevertheless depreciate from this cause in conjunction with others. £100 in gold and silver is better than £ 100 bearing interest payable at the end of ten years, although it will then be certainly paid; because, a

present and pressing demand, which can not be extinguished but by gold and silver, makes it eligible sometimes to give a greater premium than the interest rather than abide the consequence of non-payment. And it will take the notes, and a premium besides, to procure the £100 which, perhaps, a merchant wants to pay a foreign creditor who has called for payment.

Another cause of depreciation is the power in the Legislature to repeat emissions at pleasure. For hence arises the just apprehension that repeated emissions will be resorted to. Experience proves that paper money will be issued whenever the cry can be raised of general and public distress, and can cause an application to be made for relief.

With respect to the disorders produced by paper money and tender laws, both theory and experience present them to view. Who will be so imprudent as to give credit to the citizens of a State that makes paper money a tender, and where he can be told, take for a gold and silver debt depreciated paper, depreciating still more in the moment it is paid? Who would trust the value of his property to the citizens of another State or of his own State, who can be protected by law against the just demands of creditors by forcing them to receive depreciated paper, or to be delayed of payment from year to year until the Legislature will no longer interfere? Had he not better go to other markets beyond the limits of the State to dispose of his surplus productions? Or had he not better refrain from making any such surplus productions rather than be compelled to receive from the purchasers of them less than one-half the value agreed to be paid for them? Had he not better remove to another country, where good faith is preserved, with all his property there accumulate the rewards of his industry, rather than be continually deprived of a great part of them here to suit the convenience of the purchaser? Would it not be better for a foreign State, whose citizens are thus injured, to use violence and make reprisals rather than suffer such injustice?

If such are the evils which theory would lead us to anticipate, they are not less formidable under the test of experience. Depreciated paper prevented equal contributions from the States to the general expenses of the nation. New York, for instance, had emitted bills of credit. In them her quota was payable, and by depreciation, of inferior value to the quota of other States where money was not depreciated, though the quotas of the latter were of much smaller denomination. Impressions had been made on the public morals by depreciated paper. Purchasers on credit had derived great gains from depreciation, extensive purchases had been made, and at length the hopes of the purchasers were disappointed, and great numbers of the people were found to owe debts which they were unable to pay; a general discontent ensued with the course of trade; petitions were made for relief; embarrassments daily became more extensive, and two parties were formed. One struggling for the observance of public and private engagements, and for the relief of individual distress; they urged recourse to frugality and industry, and that the idle should

not be protected by the Legislature from the consequence of their indiscretion, and should be restrained from involving themselves in difficulties by the conviction that a rigid compliance with contracts would be enforced. This party was for enlarging the powers of Congress to effectuate these ends.

The other party pressed for indulgence to debtors and for less rigor in the exact execution of contracts; for relaxing the administration of justice; for affording facilities for the payment of debts; for suspending the collection of them, and was opposed to any concession of power to Congress which might prove hostile to these views. Wherever this party prevailed paper money was emitted, the delay of legal proceedings was tolerated, suspensions of collecting took place. Where this party had not yet prevailed, the dread of getting the superiority greatly affected the fortunes of a very considerable portion of the community. This uncertainty aided in promoting pecuniary embarrassments, which, at the time, influenced almost all the Legislatures of the Union. Public and private confidence was lost; the public debts due to individuals everywhere depreciated. In private transactions an astonishing degree of distrust prevailed. The bonds of solvent men could not be negotiated but at a discount of 30, 40 or 50 per cent. Real property was scarcely vendible. Sales of any article for ready money could not be made but at a ruinous loss. The debtor class of society might prove successful at elections, and instead of paying by the fruits of industry and economy, might be relieved by legislative interference. National wealth and national labor dwindled. Everywhere it was found that the people could not pay their debts. In some instances threats were used of suspending the administration of justice by private violence. 5th vol. of the Life of Washington, pp. 85, 89.

Amongst the various measures proposed for the removal of this gloomy state of things, a general convention to revise the circumstances of the Union was one, and it succeeded. In Massachusetts, a short time before, the utmost distraction reigned. The mob required an abatement of the compensation promised to the officers of the army, a cessation of taxes and of the administration of justice; they required the circulation of depreciated paper, and a relief from public and private burdens. They threatened lawyers and courts, arrested the course of law, and restrained the judges from doing their duty.

Rhode Island, a paper moneyed State, would not send deputies to the Convention, and North Carolina long hesitated in acceding to the Federal Constitution. Such were the unpromising circumstances which America had to deplore, and such the alarming disorders, which were to be remedied by the Convention. One of the most powerful remedies was the tenth clause of the first article, and particularly the two sentences which we are now considering. They operated most efficaciously. The new course of thinking, which had been inspired by the adoption of a constitution that was understood to prohibit all laws for the emission of paper money, and for the making anything a tender but gold

and silver, restored the confidence which was so essential to the internal prosperity of nations.

There was a great and visible improvement in the circumstances of the people. Conviction was impressed upon debtors that personal exertion alone could save them from embarrassment. An increased degree of industry and economy was the natural consequence of such an opinion. These clauses, as they were not only necessary for the regulation of intercourse between State and State, and the citizens of each, to prevent the misunderstandings which were likely to arise from the prohibited causes, are equally so for regulating the intercourse of citizens of the same State with each other, were therefore considered as a fundamental law of the Union and also a part of the Constitution of each State. What was it to the State of Vermont if Georgia should pass an ex post facto law or bill of attainder which could operate only upon those within her own territory? The restriction was imposed upon Georgia, not for the sake of the people of Vermont, but for the benefit of Georgia and for fear of the tyranny which her own Legislature, at some future time, might be tempted to exercise. A law, impairing the obligation of contracts, as it was equally injurious to citizens of the same State as to foreigners and citizens of other States is equally prohibited as to all, and is not restrictive of State legislation only so far as regards citizens of other States. The constitutions of the several States had left the power unlimited in their State Legislatures. The framers of the Federal Constitution believed it to be of indispensable importance not to leave this power any longer in the hands of the State Legislatures. Experience had demonstrated the baneful effects of its exercise. The known disposition of man excluded the hope that it would not be used for the same pernicious purposes in future. Under the smart of this experience, such were the feelings of the American people at the time, still suffering under repeated emissions of depreciated paper, that not a dissenting voice was raised against the clause before us. No State required it to be expunged, nor did any State propose an amendment. It was universally received without an exception, and the effects of the clauses themselves were miraculous. Public and private confidence took deep root. The people of America were reinstated in the admiration of the world. The precious metals flowed in upon them. Paper money suddenly stopped in its career of depreciation and took a stand from which it never departed; industry revived universally; and to us in America was given a notable proof, that whenever a nation is virtuous and honest it will prosper both in wealth and character; and that whenever a contrary course is pursued, such is the wise decree of providence, that prosperity of either kind will not long follow in her train.

Do these acts of our Legislature revive any of the recited mischiefs? If they are valid, what is there to distinguish our present situation from that which preceded the federal Constitution? Can our legislature emit paper money and give credit to it by promising redemption by taxes and public property? Will not such money depreciate? Can not the

Legislature to every real purpose make it a tender? And will not all the consequences ensue which followed the like causes heretofore, – payment of debts with depreciated paper, the dismissal of self-condemnation for unfaithfulness in contracts, a dereliction of industrious efforts, facility in the assumption of debts, a thirst for more paper, public inquietude under the ravages of speculation, indifference if not dislike to the Government, loss of public and private credit, the transportation of our commodities to countries where the money is not degraded, the removal of our capital thither, the cessation of active labor, the decrease of national wealth, poverty, embarrassment, open resistance to the laws, and a general cry as from a sinking ship of Save us! save us!

Part of the loss by depreciation falls upon every man through whose hand the money passes, and to avoid the loss as much as possible, every holder makes haste to get rid of it and makes some sacrifice to do so. Those to whom debts are due become debtors to an equal amount, to the end that what is lost by depreciation for debts due to them, may be saved by the depreciation of debts due from them. Many who are not debtors immediately become such by the purchase of property to as great an amount as possible, that they may gain as much in value as the sum to be paid to them loses in value by depreciation. Debts, instead of being extinguished, are multiplied, and the way is prepared for further emissions. Those who become creditors, knowing the risks they run, will have such advanced prices as will be a probable indemnification against them. A small number of credits amount to immense sums, and the thirst for paper money increasing with the means taken to allay it, new debtors clamor for more paper. Wanting means, and laboring under the disadvantages inseparably incident to the paper money system, no State, however blessed by nature, can attain prosperity. Embarrassments incessantly multiply; and for discharging debts without paying them, the country must be visited with misfortunes which no country can bear.

The injuries inflicted upon sister States will not be endured. The creditors there, when the attempt is made to pay gold and silver debts with depreciated paper, will seek redress; should the Constitution and laws of the Union be found inadequate to afford it, the Legislature of their own State will look to its strength and to the dissolution of a compact which, instead of procuring justice to the citizens, excludes them from it. Should the disappointed creditor be a foreigner, after remonstrance to the head of the Union and the development of its incompetency, he will appeal to his own government and force will be resorted to. The whole Union becomes exposed for the injustice of one State, and will be disposed to leave it to suffer for its own misconduct rather than be responsible themselves for that which they can not prevent. In either alternative, disunion is the end. On the contrary, if the Constitution and laws of the Union make void such act of the Legislature, and we deem them valid, the debtor in this State will be bound to pay gold and silver to his creditor who lives out of the State; when, at the same time, his debtor within the State, who

owes an equal amount, will pay in depreciated paper, perhaps of not half the value; and thus, one debtor residing within the State will be ruined by the legalized unfaithfulness of another. And in our State Courts, the same words in the same clause mean one thing, but in the federal court another. When part of the citizens are thus sacrificed to suit the convenience of another part, and when such sacrifices become habitual by the frequent exercise of a power which never lies dormant, after the acknowledgment of its existence, it will not be long before the persecuted portion will seek exemption from the wrongs it endures. Such are the tendencies which the Convention mean to eradicate. Acts generative of such tendencies are adverse to the spirit of this clause, and there is a repugnance between them and the Constitution.

We come now to a more minute examination of the Acts in question. The creditor is denied execution for two years, unless he agrees to take paper. What the debtor can not tender, the creditor is not bound to receive. Whatever he is not bound to receive, he can not be punished for refusing. The assessor is prohibited as well as the principal. Here the tender is not directly sanctioned. It is only said to the creditor, If you will not take paper, give up the means of getting anything at all for two years, with the prospect of still longer delay by repeated acts of the Legislature. Take this paper which I have no right to impose upon you, or give up a right which I have no authority to take from you. Suspension of execution is a penalty, if, but for the Act, the creditor would be entitled to it as a right attached to his antecedent contract; and it is a penalty prohibited by the 10th section now under consideration. If the Legislature has power at this day to enact a suspension of execution for refusing to take paper, that section is abrogated. Two years may be extended to a hundred, and where is the difference between a direct injunction to take paper and the injunction to wait one hundred years, if he will not take it? Grant, for argument sake, that the right to execution is not an antecedent right attached to the contract, but a newly created one, given by the Legislature only upon condition; shall it be permitted so to frame the condition as to make it involve the relinquishment of a right secured by the Constitution? By the latter, the creditor is secured against paper money. Can he be required to relinquish that security in order that he may become entitled to the benefit of this new created right, to have execution? By such inventions every constitutional right may in succession be bartered away. Constitutional rights are vested, unexchangeable, and unalienable. They belong to posterity as well as to the present generation. We may use and enjoy, but not transfer them; and every such condition is utterly void. If execution can be suspended on any condition, then the Legislature has an absolute power to suspend it forever. How easy it is to invent a thousand conditions, with which no man in his senses would comply! If the right is newly created and the condition void, it must vest without the performance of the condition; and the result is, that if the right be antecedent, suspension is an unconstitutional penalty; if it be newly created, the condition is unconstitutional, and the right vests absolutely. In either alternative, the indorsement need not be made.

This conclusion follows upon a correct interpretation of the clause prohibiting tender laws. It equally follows a just interpretation of the sentence prohibiting laws to impair the obligation of contracts, contained in Art. 1st, section 10, of the Constitution of the United States, and in Art. 11, section 20, of our Bill of Rights. A grant made by the State, being an executed contract, can not be revoked by the Legislature if pursuant to a law made by themselves; this point is so decided in *Fletcher v. Peck*. With respect to executory contracts, it will be admitted without controversy that the terms and conditions of them can not be in any respect altered or interfered with by the Legislature.

The time, place, person, or thing to be done, can not be changed by act of Assembly. Covenants sometimes, by *ex post facto* circumstances, become unreasonably burdensome. He that covenants to pay rent for premises he never enjoys by the accidental burning of them, must nevertheless pay the rent. A man agrees to perform a voyage by sea under a penalty by way of stated damages for non-compliance, and he is hindered from an exact compliance by adverse winds, still he must pay the penalty. In these and all other cases of contract the Legislature can not interfere to make them more just or reasonable than the parties have made them. For thus no contract could be made that the parties could depend on for fear of the new modelling interposition of the Legislature. Thus far is plain; but still the question remains, is the suspension of execution within the prohibition? Does an Act to suspend execution impair the obligation of contracts made before it? What the obligation of a contract is may be discerned by considering what it is that makes the obligation. The contract alone has not any legal obligation, and why? Because there is no law to enforce it. The contract is made by the parties, and, if sanctioned by law, it promises to enforce performance should the party decline performance himself. The law is the source of the obligation, and the extent of the obligation is defined by the law in use at the time the contract is made. If this law directs a specific execution and a subsequent Act declares that there shall not be a specific execution, the obligation of the contract is lessened and impaired. If the law in being at the date of the contract give an equivalent in money, and a subsequent law say the equivalent should not be in money, such Act would impair the obligation of the contract. If the law in being at the date of the contract give immediate execution on the rendition of the judgment, a subsequent Act, declaring that the execution should not issue for two years, would lessen or impair the contract equally as much in principle as if it suspended execution forever; in which latter case the legal obligation of the contract would be wholly extinguished. The Legislature may alter remedies; but they must not, so far as regards antecedent contracts, be rendered less efficacious or more dilatory than those ordained by the law in being when the contract was made, if such alteration be the direct and special object of the Legislature, apparent in an Act made for the purpose. Though, possibly, if such alteration were the consequence of a general law and merely incidental to it, which law had not the alteration for its object, it might not be subject to the imputation of constitutional repugnance. The Legislature may

regulate contracts of all sorts, but the regulation must be before, not after, the time when the contracts are made.

Our State Constitution, Art. 11, section 7, ordains “that all courts shall be open, and every man for an injury done him in his lands, goods, person, or reputation, shall have remedy by course of law, and right and justice administered without sale, denial, or delay.” This clause relates to every possible injury which a man may sustain and which affects him in respect to his real or personal property, or in respect to his person or reputation, and includes the right which is vested in him to demand the execution of a contract; which being a personal right to a chattel is, when performance is denied or withheld, an injury to him in his goods or chattels. And with respect to it right and justice is to be done, without sale, denial, or delay. In Magna Charta this restriction is upon royal power; in our country it is upon legislative and all other power. We must understand the meaning to be that, notwithstanding any act of the Legislature to the contrary, every man shall have “right and justice” in all cases, “without sale, denial, or delay.”

In 1796, when the Constitution was formed, it could not have been apprehended that any other department of government, except that of the Legislature, would ever have weight enough to offer any obstruction. Experience from 1777 had fully demonstrated the imbecility of every executive office in the United States. From the executive no such offer could be anticipated. In 2d Institute, 55 my Lord Coke says the king is the speaker, and, in contemplation of law, is constantly present in all his courts, pronouncing the words of Magna Charta, *Nulli vendemus, nulli negabimus, aut differemus justitiam vel rectum.*” In Tennessee every Legislature is in contemplation of law during the whole session, and the judge of every court during the whole term, in the constant repetition of the words “right and justice” must be “administered without sale, denial, or delay.” In 2d Institute, 56, justice is said to be the end, and right the mean whereby we may attain the end, and that is the law. What that mean consists in is more specially explained in Sullivan, 523, where it is stated to be original and judicial process. Original process, he says, must issue without price except that which the law fixes, and without denial, though the defendant be a favorite of the king or government who interferes in his behalf, and must be proceeded on by the judges, after suit instituted upon it, without delay, themselves or by order of the king, or, as we say, act of the Legislature. And the judges where the causes depend must issue the proper judicial process, without fee or reward, except that fixed by law. In other words, where judgment is rendered the judges shall cause execution to issue, notwithstanding any order or act of Assembly or other pretended authority whatsoever.

This is the long-fixed, well-known meaning and legal construction of the words right and justice without sale, denial or delay. They clearly comprehend the case of executions suspended by act of the Legislature in every instance where justice requires that it should

immediately issue; as it manifestly does where the law, operating upon the contract when first made, held out to the creditor the promise of immediate execution after judgment.

There is yet another part of our Constitution which some suppose takes from the Legislature the power to suspend execution. By our Bill of Rights, section 20, “no retrospective law or law impairing the obligation of contracts shall be made.” This clause, taken in its common and unrestrained sense, extends to all prior times, persons and transactions, whether civil or criminal, yet, certainly, there are some cases coming within its general scope to which it does not extend. It does not extend to ex post facto laws, for they are prohibited by the Bill of Rights, section 11. It does not extend to a law for extenuation or mitigation of offences, the remission of penalties or forfeitures. A present law may repeal a former one, or may enforce a contract heretofore made, or may make evidence a paper authenticated according to its directions which was not evidence before, or may suspend computation under the Act of Limitations for a certain time past, during which a war existed, or no courts were in being; nor are laws void which give further time for the registration of deeds, nor for the disallowance of land warrants unfairly issued; nor divorce laws; nor laws making allowances to members of Assembly, their clerks and door-keepers, after the service is performed. That the term retrospective has a very restrained meaning, is abundantly testified by the conduct of subsequent Legislatures and of the judicial tribunals of the country. In February, 1796, the Constitution was made; in March, 1796, the Legislature gave further time for the registration of deeds and made registrations under it as good and valid to all intents and purposes as if such deeds had been registered in proper time. Similar laws have been made in 1801, 1803, 1805, and almost at the expiration of every two years. These Acts have been frequently held valid by judicial determinations. The Acts of 1796, ch. 20, 1797, ch. 14 and 43, section 4, ch. 45, 1799, ch. 35, section 2, ch. 47, 1801, ch. 19, 1807, ch. 85, are all of them retrospective in the most general sense of that term; but they are of unquestionable validity. And what are the laws of 1801, ch. 24, 1803, ch. 25, 1805, ch. 4, for confirming administrations granted and marriages solemnized under the Franklin government, and for giving old verdicts the force and effect of judgments entered upon them? In short, so many are the past transactions upon which the public good requires posterior legislation, that no government can preserve order, suppress wrong and promote the public welfare, without the power to do so. It is not withheld from any of the State Governments, unless the present clause be an exception. Nor does the genius of free government demand that it should not be exercised, as it does, that the Legislature should not have power to pass an ex post facto law; because, with that engine, a dominant faction might spread destruction through the ranks of its political adversaries.

The laws of 1783, ch. 7, second 1794, ch. 13, 1803, ch. 1, section 5, were all of them retrospective in whole or in part but were never deemed unconstitutional. All these and

many other acts of the Legislature establish the truth of the position that there are some, and indeed many cases in which retrospective laws may be made. We have viewed with earnest attention the Bill of Rights, section 20, and have considered the inconveniences which any one interpretation will produce, and have finally settled down in this opinion that the word “retrospective,” as in the North Carolina and Maryland Constitutions it is followed by explanatory words, so here it is explained by the words which immediately follow, “or law impairing the obligation of contracts,” and that the whole clause and both sentences taken together mean that no retrospective law which impairs the obligation of contracts, or any other law which impairs their obligation, shall be made, the latter words relating equally to both the preceding substantives; and, therefore, that the term retrospective alone, without the explanatory words, can have no influence in this discussion.

There is yet another clause of our Constitution which is said to militate against this act of the Legislature. Our Bill of Rights, section 8, declares: “That no man shall be deprived of his property, &c., but by the judgment of his peers or the law of the land.” Property is a thing in being which is capable of becoming the subject of dominion or ownership, and which actually has a master or proprietor, and is actually reduced into possession. Property in possession by this clause is secured to the owner, so that it can not be taken from him but by due course of law in a court regularly constituted and proceeding by the standing rules of law; not by act of Assembly depriving the owner of it for the benefit of some other individual. The State has the eminent domain or ultimum dominium over all the subjects of property in its territory, and may use it on urgent occasions for the public good, when in the opinion of the sovereign power, it is just and necessary so to use it. In the war of the revolution the Government authorized impressments of all things necessary for promoting the great cause in which it was engaged. This power of the Legislature, by section 21 of our Bill of Rights, is limited in its exercise, though not taken away: “No man’s property shall be taken or appropriated to public use, without the consent of his representatives, or without just compensation being made therefor.”

The act of Assembly now under consideration takes away no property either for public or private uses, and is, therefore, not affected either by section 8 or section 21 of the Bill of Rights.

The result then of the investigation we have made is this, that suspension of execution as directed by these acts of the Legislature now under consideration, is forbidden by the prohibition of tender laws, as a direct consequence of the prohibition; also by the interdiction to pass laws impairing the obligation of contracts, suspension of execution being an impairing of such obligation; and furthermore, by the declaration that justice and right shall be done without delay in all cases, the process of execution being one sense of

the term right, which is not to be delayed.

We are, therefore, bound to say that these Acts are repugnant to the Constitution and void, so far as relates to the suspension of execution; and that execution ought to issue immediately without any such indorsement as the Act requires. The judicial tribunals of the country must refuse sanction to Acts which are to be executed through their agency; such as an act of suspension of execution is, which can not take place without the assent of the Court. There are some violations which need not their instrumentality, and of course can not meet their rejection, and which alone the great body of the people must correct. An occlusion of the Courts of justice would be one of them. The Courts can not sit but on the days appointed by the Legislature: and in that and other instances the Court having no agency, would have no responsibility. Wherever their co-operation is unconstitutionally required, it is the most sacred of all their duties to withhold it, and whenever they are found to want firmness to do so, the Constitution and public freedom die together.

And here it is convenient to obviate an argument of frequent recurrence. The Assembly it is said have a right to suspend execution, because they may place the terms of the Court at such a distance from each other as to make it impossible for a creditor to entitle himself to execution in less than two, three, or more years, at the pleasure of the Legislature. The Assembly has power thus to fix the terms of the Courts, and as suspension of execution would be one of the consequences. The power to fix the terms, however, was not granted with a view to such consequence, but to the more easy and convenient administration of justice, consistently with the spirit of the Constitution, displayed in the section which requires that the Courts shall be always open for the redress of injuries. To fix the terms at a remote distance from each other for the purpose of producing an effect adverse to the spirit of the Constitution, would be to use the power of the Legislature for purposes not intended in the grant of it to them. It would be an abuse of power – as much so as the suspension of the Courts themselves; and certainly the legitimacy of an end produced, can not be established by deducing it from an abuse of power; an abuse so alarming and so odious in its exercise that it never has been resorted to and perhaps never will be by the Legislature, unless when the calamity to be evaded shall in the opinion and by the consent of all mankind, be more disastrous and afflicting than the means adopted for its prevention. The indignant disapprobation of the people is a corrective so powerful that it need not be aided by any auxiliary power in any co-ordinate branch of the Government, but may be safely left, as the people have left it, to its own inherent energies. Whenever the people shall be ready to approve of such a measure, the adoption of it may be safely committed to the uncontrolled discretion of the Legislature. The power of the Legislature will then fairly flow in the channels which the contested argument opens for them, and not as at present, through others which the argument does not pretend is open to them. The contested argument is unsound unless an illegitimate end, produced by a misapplication

of power, can sanctify the like end produced by a direct infraction of the restriction imposed upon that power.

To be more explicit still; if a suspension of execution may be attained through the medium of the legislative authority to fix the times and places of holding courts, it by no means follows that the same end may be attained, through the medium of a prohibited legislation upon contracts already made.

It is proper, however, to remark in conclusion, that the same good faith which protects the creditor against injustice, interposes a powerful veto against the subjection of the debtor to a greater burden than he has undertaken to bear. If he has specially contracted for payment to be made in bank paper, or if such was the meaning of the contract and the understanding of the parties at the time of its formation, it would be highly unconscionable in the creditor to enforce a payment in gold and silver, taking advantage of that extraordinary state of things which at this time pervades the western country, rendering a payment in gold and silver not only far more burdensome, but almost impossible and absolutely ruinous. The debtor ought to be heard to say, *non in haec vincula veni*. There is a salutary rule in equity which ought to be applied under such extraordinary circumstances, and it is this: whatever a man has a right to in conscience, and the law has not fully provided for, equity will. 1 Fonb., 15-20. It is a rule which is the foundation in equity of all the precedents we now follow, and which have been established upon it. The immense and almost incalculable difference that at present exists in this State between specie and paper payments, justifies the application of this rule in its fullest extent, to obviate the injustice of creditors, who would enforce specie payments, instead of the paper ones which they agreed to receive. Such creditors by bill in equity and injunction, should be held to specific execution, and be compelled to receive what they stipulated to take, and not be allowed to ruin the debtor by calling for gold and silver. The precise contract ought to be complied with exactly as it was made, and the most perfect good faith be preserved on both sides. This relief ought to be confined to that species of bank paper which the contract specifies; and when there is no such specification in the contract, should be extended to every species which is generally current in the State, the debtor making a proper allowance in all instances for the difference of value between one species and another that is generally current, and for the depreciation that has intervened since the day appointed for payment in the contract itself. The rule of equity must be applied that he who will have equity must do it. He who seeks relief against injustice must not do injustice, and wherever an injunction issues, security should be given to pay such sum as the Court shall finally decree.

These points to be sure are not before us for judgment, and we mean no more than to intimate what at present are our general impressions, and to state in general terms the

principles which I now think should be resorted to, leaving for future adjudication in each particular case that may occur, the particular relief which that case may require to effect justice according to its circumstances.

This is the opinion which I deem the proper one to be given on this question, and which, if it were entirely concurred in by Judge Emmerson as it formerly was, I would now finally give, although Judge Whyte is not yet prepared to give his.

But as there is some part of this opinion which Judge Emmerson does not concur in, namely, that part which enforces paper money contracts specifically as made, it must therefore not be considered as final till it can be ascertained by the opinion of Judge Whyte whether in this point I am correct or not. For if I am so, then injunctions ought to issue whenever it shall be attempted to extort gold and silver in satisfaction of a paper money contract, which, however, can not be issued with propriety and safety to the applicant before it is known by that opinion, whether such a course be a proper one or not. Under these considerations it seems better to wait for his opinion than to expose debtors to great losses without informing them of the means of redress within their power, if any such there be.

Should injunctions issue before we are definitely informed upon this point, it might happen that five hundred bills might be filed and injunctions be issued upon them, all which would ultimately be found unsustainable, and be dismissed with costs to be paid by the applicants, after an illegal delay of execution for several months. Mischiefs so serious as these it is prudent to avoid, by conforming to the usual practice of courts, not to give judgment till all the members of the Court are ready with their opinions.

ORIGINAL NOTE. – Judge Whyte did not express an opinion when the above was delivered, but like motions having been made in the Supreme Court of Charlotte, that judge said he considered the question as settled, and joined in the orders.

Subsequently, when Judges Brown and Peck came to the bench, they uniformly, on sundry motions to the same effect, concurred in the above opinion; so that the expression of five judges on the bench of the Supreme Court has been in accordance with this opinion.

***Lange v. Kohne*, 1 McCord (12 S.C.L.) 115 (1821).**

Constitutional Court of Appeals of South Carolina.

J. H. LANGE, Assignee,

v.

FREDERICK KOHNE.

January Term, 1821.

At common law, no chose in action is assignable; and the statute of Ann, and our Act, making notes payable in money assignable, do not include notes payable in paper medium. And a verdict obtained by an assignee will be arrested.

Paper medium is not money; for by the 8th and 10th sections of the Constitution of the United States, Congress alone has the right to coin money; and no state can coin money, emit bills of credit, or make any thing but gold and silver coin a tender. FNa

FNa. As to what coin is a tender, see the very able and concise opinion of Judge Huger, in *M'Clarín vs. Nesbit*, 2 Nott & M'Cord's Rep. 519; where accidentally the name of the judge who delivered the opinion of the Court is omitted.

THIS was an action brought on a due bill, of which the following is a copy:

“Due Mr. John Geyer one hundred pounds, paper medium.

28th September, 1793.

“For Frederick Kohne,

“PETER PATTERSON.”

The plaintiff claimed as assignee of John Geyer, who made the assignment for the benefit of his creditors. John Geyer, the insolvent debtor, was the chief witness; and the general tenor of his testimony, was to prove that the money had been borrowed by Patterson, who was a confidential clerk of Kohne's, for the use of Kohne.

To account for the due bill remaining so long unpaid, the defendant produced no evidence, but relied upon the presumption of payment arising from the lapse of time. The presiding Judge charged in favor of the defendant; but the jury found a verdict for the plaintiff for the amount of the due bill, without interest.

A motion in arrest of judgment, and for a new trial, was now made upon several grounds.

Mr. Justice HUGER delivered the opinion of the Court.

It is unnecessary to notice the different grounds for a new trial in this case, as the motion in arrest of judgment must prevail. At common law, a chose in action is not assignable. By the statute of Ann and our act, notes, &c. *payable in money*, are assignable. The note in question, however, is not payable in money, but *in paper medium*.— That *paper medium* is not money, appears from the 8th and 10th sections of the Constitution of the United States, which declare that Congress shall coin money; and that no state shall coin money, emit bills of credit, or make any thing but gold and silver coin a tender in payment of debts. But the act creating a paper medium, does not pretend to give it the character of money, it only makes it a tender at the treasury.

The motion in arrest of judgment must therefore be granted.

Justices Nott, Colcock, Gantt, Richardson and Bay, concurred.

***Foquet v. Hoadley*, 3 Conn. 534 (1821).**

Supreme Court of Errors of Connecticut.

Foquet

v.

Hoadley.

June, 1821.

Treasury notes are not money or cash; nor will evidence of one support an allegation regarding the other.

THIS was an action on a promissory note, dated at Plattsburgh, the 9th of June, 1815, in and by which, the defendant promised the plaintiff, to pay to him, for value received, the sum of 129 dollars, and 14 cents, on demand.

The defendant pleaded, 1st, That on the 1st of July, 1815, he enclosed in a letter, directed to the plaintiff at Plattsburgh, in the state of New-York, and deposited in the post-office at New-London, in this state, three fifty dollar treasury notes, of the value of 150 dollars, which, through the regular course of the mail, the plaintiff, on the 15th of the same month, received and accepted of the defendant, in full satisfaction of the note: 2dly, That at Plattsburgh, on the 15th of July, 1815, it was accorded and agreed, by and between the plaintiff and defendant, that the defendant should transmit to the plaintiff, by letter, through the mail, the sum due on the note; and the defendant did, immediately afterwards, remit to the plaintiff, at Plattsburgh, cash or money, in the ordinary course of the mail, to the amount of the note, which the plaintiff received in full payment thereof: 3dly, That on the 1st day of July, 1815, the defendant, at the instance and request of the plaintiff, deposited in the post-office at New-London, to be forwarded by mail, three fifty dollar treasury notes, of the value of 150 dollars, enclosed in a letter, directed to the plaintiff, at Plattsburgh, the place of his abode; which the plaintiff received and accepted in full satisfaction of the note: 4thly, That the defendant, by direction of the plaintiff, on the 1st of July, 1815, deposited in the mail, cash or money sufficient to pay the note, *viz.* 150 dollars, enclosed in a letter, directed to the plaintiff at Plattsburgh, to be forwarded according to its direction; which the plaintiff received in full payment of the note.

These pleas the plaintiff traversed; on which, issue was joined; and the cause was tried at Litchfield, August term, 1820, before Brainard, J.

On the trial, the defendant, to support the first and third pleas, offered in evidence, the deposition of Everitt Howard, which, among other things, stated, that in the month of June, 1815, being a boarder in the plaintiff's family, at Plattsburgh, he was present at a settlement between the plaintiff and defendant; that the defendant, being deficient in funds, proposed remitting the balance due, by letter, soon, if there was no danger; that the plaintiff answered, there would be no danger, and, as he was in very great want of cash, he wished the plaintiff to convey it immediately, by mail; that the defendant enquired, how he should receive his note, to which the plaintiff replied, that it should be endorsed satisfied, and delivered to a Lieut. Fowler, who was present, for the defendant. To the admission of this evidence, the plaintiff objected, and the judge rejected it.

In support of the second and fourth pleas, the defendant offered Elijah Butts, to prove, that on the 1st of July, 1815, the defendant deposited in the post-office in New-London, three fifty dollar treasury notes, in a letter directed to the plaintiff at Plattsburgh, to be conveyed to him by mail; in which letter the plaintiff was requested to take therefrom, the sum of 129 dollars, 14 cents, and enclose the note satisfied, and to pay over the balance to sundry persons specified. To the admission of this testimony, the plaintiff objected; and the judge decided that it was inadmissible.

The plaintiff having obtained a verdict, the defendant moved for a new trial, on the ground that the evidence offered by him, was improperly rejected; and the judge reserved the motion.

Bacon and J. W. Huntington, contra.

Hosmer, Ch. J.

The defendant, in his first and third pleas, alleged, that he transmitted to the plaintiff, three fifty dollar treasury notes, and that the plaintiff received them, in full satisfaction of the note in suit.

To establish these facts, he offered in evidence the deposition of Everitt Howard, who testified, that the plaintiff requested of him, to send him cash per mail. Treasury notes are not cash; and the testimony offered conducted to prove no averment contained in the aforesaid pleas. The deposition, therefore, was rightly rejected.

In the second and fourth pleas, the defendant averred, that he sent to the plaintiff cash or money, by the ordinary course of the mail; and, to evince this allegation, he offered the testimony of one Betts, shewing that treasury notes were transmitted. This testimony was repelled most justly, for this very plain reason, that treasury notes are not cash.

A promissory note, payable in money, cannot be discharged, by the act of the debtor, without the co-operation of the creditor, unless in gold and silver coin. Const. U. S. art. 1. sect. 10. Bank notes are not a legal tender, if the creditor objects to receive them. *Wright v. Reed*, 3 Term Rep. 554. *Grigby v. Oakes & al.* 2 Bos. & Pull. 526. The reason of this is conclusive; they do not fulfil the contract; and it is the province of courts, to enforce contracts, as the parties have made them. I am aware of the decision made in a sister state, (*Keith v. Jones*, 9 Johns. Rep. 120.) in which it is said, that bank-paper, in conformity with common usage and understanding, is regarded as cash; and that the same observation has been made in other cases. *Miller v. Race*, 1 Burr. 452. *Grant v. Vaughan*, 3 Burr. 1516. Notwithstanding the truth of the remark, evinced by constant experience, that bank bills are voluntarily received as cash, I cannot admit, that he who assumes to pay gold and silver coin, can compel his creditor to receive in satisfaction bank bills of any, or either, of the numerous banks in our country. The creditor may always say, and this should be an impenetrable shield, “*Non hæc in fœdera veni.*”

Let the law be as it may, with respect to bank bills, which, by usage, are treated as cash, and are the common currency of our country, there is no analogy between them and treasury notes. The latter are neither cash nor currency; and there is no usage to sanction, or even give plausibility to, their being considered as such.

The other Judges were of the same opinion.

New trial not to be granted.

***Baily v. Gentry*, 1 Mo. 164 (1822).**

Supreme Court of Missouri.

BAILY

v.

GENTRY AND WIFE.

April Term, 1822.

COOK, J.

This is an application for a supersedeas, in the following case: Gentry and wife obtained judgment against Baily in the Circuit Court of Cooper county, in an action of debt, founded on his bill obligatory; and on the 9th day of September, 1821, caused an execution to issue thereon, on which the sheriff returned, that on the 1st day of October, 1821, he levied said execution on a negro man, the property of the defendant, and there being no endorsement thereon, by the plaintiff, the defendant, on the 13th day of February, 1822, offered his bond, with security, agreeably to law, to stay all further proceedings on said execution, which bond he had taken as sufficient, and returned it with the execution. The plaintiff moved the Court to quash the proceedings of the sheriff, in taking said bond, and award to them an alias execution, on the ground, that the law, under which the sheriff acted, was unconstitutional and void; whereupon, the Court adjudged, that the proceedings had on said execution be quashed and set aside, and the plaintiff have an alias execution. In support of the application, it is insisted, first, that the Circuit Court erred in setting aside the proceedings of the Sheriff on the execution, and secondly, in awarding an alias execution. In support of the first error assigned, the act of the last session of the General Assembly of this State, pointing out the manner in which execution may be stayed, &c., is relied on. The application is opposed, on the ground, that so much of the act referred to, as provides for staying executions, is repugnant to the Constitution of the United States, and to the Constitution of this State, and, therefore, void: first, because it impairs the obligation of contracts; secondly, because, in effect, it makes something else, besides gold and silver coin, a tender payment of debts; thirdly, because it is retrospective in its operation; and fourthly, because it would effect an unconstitutional delay of justice. It is contended, in support of the application, first, that the act under consideration is not repugnant to the Constitution of the United States, nor to the Constitution of this State; and secondly, that the Court is bound to observe the provisions of the act of the General Assembly, without regard to the Constitution.

The last point is first in order, inasmuch as it tends to preclude any investigation of the validity of the act. It will, therefore, be first considered. A course of adjudication, almost entirely uniform and uninterrupted since the adoption of the Federal and State Constitutions, as well in the Supreme Court of the United States as in most of the State Courts, would (but for the zealous manner in which this point was urged in argument), have been deemed satisfactory and conclusive. It is contended that the judiciary, in deciding on the validity of the acts of the Legislature, usurps a supremacy in government destructive of the powers and independence of its co-ordinate branches, and that the decision of the Court, pronouncing such act unconstitutional, is a virtual repeal thereof. If the declared will of the Legislature, whether consonant or repugnant to the Constitution, has the force and effect of law, and the co-ordinate branches of the government bound to conform to it, until the Legislature itself shall declare a different will, then is the Constitution, as to that body, a mere nullity, a dead letter, and the acts of one branch of the government, created by, and deriving all its powers under the Constitution, are paramount to it. That the Legislature are not under the control of any other branch of the government, as to what they shall do or omit to do, is clear; as in the case put in argument, that if they should neglect to assemble for the purpose of enacting laws necessary for the government of the State, or being assembled, should (in cases where legislative aid is necessary to give effect to constitutional provisions, in relation to other branches of the government), exercise their powers so improvidently as to embarrass the administration of justice, the judiciary would neither be competent to command them to meet and enact laws, nor to modify what they had done, but must decide and construe their express enactments. To the objection that the Court, in deciding an act of the Legislature to be unconstitutional, virtually repeals the law, it is but necessary to answer, that it is not the judgment of the Court which destroys the effect of the act; the Legislature being prohibited, by the Constitution, from passing such law, the act itself is void, and therefore requires no act of the Court, or any other authority, to repeal it. Since the case of *Marbury v. Madison*, decided in the Supreme Court of the United States (1 Cranch's Rep. 137), this question has been generally looked upon as settled.

M'GIRK, C. J.

In the second section of the sixth article of the constitution of the United States, it is provided, that "this constitution, and the laws of the United States, made in pursuance thereof, &c., shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." It is conceived that this provision not only gives the power to the State Judges, but expressly makes it their duty, to decide on the constitutionality of the laws of the State, whenever they are supposed to conflict with the constitution of the United States. But on the question, whose province is it to decide whether acts of the State Legislature

contravene the State constitution? our constitution is silent. The powers of the government are divided into three distinct departments, each of which is to be confided to a separate magistracy (art. 2, of constitution of this State). The third article creates the legislative power, and vests it in a General Assembly. The fourth article creates and vests the supreme executive power in a Governor. The fifth article creates and vests the judicial power, in matters of law and equity, in a Supreme Court, and other Courts, therein provided for. The constitution of the United States makes a similar distribution of the powers of the general government, and, under this distribution of power, we find the Supreme Court of the United States deciding on the constitutionality of the acts of Congress, although there is nothing in that constitution expressly authorizing that Court to do so. The case above referred to, in 1 Cranch, was an application on the part of Marbury (founded on the act of Congress which authorizes the Supreme Court of the United States to issue writs of mandamus, in cases warranted by the principles and usages of law, to any Courts appointed, or persons holding office under the authority of the United States), for a mandamus to compel Mr. Madison, Secretary of State, to deliver a commission. The Court refused to award the mandamus, on the ground, that the act of Congress relied on, was unconstitutional, and in support of that opinion, says: "It is emphatically the duty of the Court to say what the law is; and, if two laws conflict with each other, the Court must decide on the operation of each." And in another part of the opinion, page 178: "So, if a law be in opposition to the Constitution, if the law and Constitution both apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of the conflicting rules govern the case. This is of the very essence of judicial duty." If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle, that the Constitution is to be considered in Court, a paramount law, are reduced to the necessity of maintaining, that Courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. And again, page 180: "Why, otherwise, does the Constitution direct the Judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the known instruments, to violate what they swear to support." In the case of *M'Culloch v. The State of Maryland et al.*, reported 4 Wheaton, 316, the constitutionality of the act of Congress incorporating the President, Directors and Company of the Bank of the United States, was the direct question; yet the competency of the Court to decide on the constitutionality of the act, was not questioned.

The next question for consideration is, did the Circuit Court err in setting aside the return of the sheriff on the execution? And this necessarily leads us to consider the act of the

General Assembly of this State, upon the validity of which this question depends. It authorizes the sheriff, in terms, to make the return he did; and if the act is constitutional, the proceedings and return of the sheriff were right, and the Circuit Court erred in quashing said return. But if the act be unconstitutional, then there is no error on that point. In deciding this question we shall consider the objections to the act, in the order in which they are arranged in the preceding part of this opinion. First, does this act impair the obligation of contracts? The act substantially provides, in the first section, that valuers shall be appointed, whose duty it shall be, to appraise all property, real or personal, taken under executions issued by Courts of Record or Justices of the Peace. The second section provides, that when any execution shall issue or any judgment heretofore obtained, or hereafter to be obtained, &c., it shall and may be lawful for the creditor, his agent or attorney, to endorse on said execution or order of sale, that the plaintiff will take property at two-thirds of its appraised value, in discharge of the whole or part of the execution, or order of sale; that the sheriff shall make a levy on property, have it appraised or valued, and that if the money is not paid at a given time, then the sheriff shall proceed to sell the property at two-thirds of its appraised value, if it will sell for so much; if not, he is required to deliver it over to the plaintiff, at two-thirds of such appraised value, in discharge of the execution.

The third section provides that in all cases where an execution, &c., is issued, and no endorsement is made in pursuance of the second section, there shall be a stay of any further proceedings on such execution, &c., for the period of two and a half years thereafter, provided the defendant will give a bond to the amount of the execution, and interest, with security, to be approved of by the sheriff. It also provides that real estate may be substituted, in lieu of personal security, under certain restrictions. The tenth section extends the provisions of the second section to executions issued, or to be issued before the taking effect of the act. The act also provides that no execution shall issue after one has been previously stayed, unless under particular circumstances. The first inquiry is, do the provisions of this act, in staying executions, impair the obligation of contracts? First, what is a contract? Secondly, what is its obligation? A contract is an engagement to do, or not to do, a particular thing. Next, what is its obligation? In the case of *Sturges v. Crowningshield* (4 Wheat. 122), the Supreme Court of the United States give the definition both of a contract and its obligation. The Legislature of New York had passed an insolvent law, by which the debtor as well as the debt might be discharged. The question arose, in that case, whether the law was constitutional. The Court declared the law unconstitutional and void, so far as it released the debt, because it impaired the obligation of contracts. Chief Justice Marshall, in delivering the opinion of the Court, page 197, says: "A contract is an agreement to do, or not to do, a particular thing; the law binds him to perform his undertaking, and this is, of course, the obligation of his contract." In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money, on or before

a certain day. The contract binds him to pay that sum at that day, and this is the obligation. In this definition of the obligation of a contract, we most heartily acquiesce.

The obligation of the contract extends further than to pay on a particular day; it continues until the debt is paid, or the act performed. The Constitution of the United States. art. 1, sec. 10, is as follows: “No State shall enter into any treaty of 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.” And the 17th sec. of the 13th art. of the Constitution of this State, says that no ex post facto law, or law impairing the obligation of contracts, can be passed. Here are two express prohibitions against the Legislature impairing the obligation of contracts. We have seen what a contract is, and what is its obligation; and now the question naturally and necessarily arises, does the law under consideration impair the obligation of contracts? We approach this question with a full sense of the responsibility we are under. When the legislative department of government enact a law, the question of its validity should be approached by all persons, and particularly by Courts of Justice, with great caution and circumspection. To impair, in the sense in which it was used in both the Constitutions, means to alter so as to make the contract more beneficial to one party, and less so to the other, than by its terms it purported to be; and the Supreme Court of the United States, in *Sturgis v. Crowningshield* (4 Wheat. 197), declare that any law that releases a part of the obligation, in the literal sense of the word, impairs it. The means afforded to enforce satisfaction for a breach of contract, are, perhaps, of themselves, no part of the contract. But yet they may form a part of the binding force of the contract; for without legal means to enforce the performance of a contract, it can have no legal effect. It is, in law, as if no contract existed. In the case before the court, the right has been ascertained, the contract proved to exist. The plaintiffs have a right to enjoy the sum of money now, and the act in question says the party shall not enjoy this right for two and a half years hereafter.

This violates the legal obligation of the contract, and the law is repugnant to the Constitution of the United States and of this State. It is true, there is a distinction between the remedy and the thing to be remedied. The Legislature may modify the remedy, but they cannot constitutionally take away all remedy; for the 7th section of the 13th article of our Constitution says: “Courts of justice ought to be open to every person,” and “certain remedy afforded, without sale, denial or delay;” so that by this section, there must always be a remedy, and this remedy is to be applied without any postponement or hinder. It is a fixed principle of the English government, whose concern for private rights is by no means equal to that of ours, that want of right and want of remedy are precisely the same thing, 1 Bac. Abr. If this is a sound principle, it will follow, that whatever impairs remedy, impairs right. When the remedy is destroyed, the right is, also. It surely cannot be

contended, that a postponement of the plaintiff's means of obtaining possession of his right, is any remedy for him, or that it enters into the composition of remedy. Remedy, in law, is the means afforded by law to obtain a right. This statute affords means to postpone and defer the obtaining of right, and is, therefore, not remedial with respect to the great ends of government and justice, nor in a constitutional sense. The court will pass by the objection, that the law is retrospective in its operation. considering the merits of the application embraced in the other points.

COOK, J.

It is next objected that the act under consideration, in effect, makes property a tender in payment of debts. The 1st clause of the 30th section of the 1st article of the Constitution of the United States, provides that "No State shall make any thing but gold and silver coin a tender in payment of debts." In adopting this provision, the framers of that instrument used terms of certain and established import. Let us inquire what a tender is, and what its consequences, in cases within the meaning of the Constitution. If one person owes to another a certain sum of money, this is a debt; it is the duty of the debtor to produce to the creditor that sum of money, and offer to pay it to him: this is a tender; and if the debt so tendered, is not received by the creditor, the debtor is thereby discharged from the duty of tendering it again, until it shall have been legally demanded by the creditor: and this is its consequences.

The act under consideration does not, in terms, authorize the debtor to tender property in discharge of his debt, but requires the creditor to endorse his consent, so to receive it, on his execution, under the penalty of being delayed in the enjoyment of his right, for the period of two years and a half. If, then, we define a tender in general terms to be an act on the part of the debtor, which affords some exemption to him, and works a correspondent inconvenience to the creditor, we shall find that the exemption afforded the defendant, by the operation of this law, is more beneficial to him, and the inconvenience imposed on the creditor is much greater than would result from an actual tender made by the debtor himself. Construing the Constitution, then, to prohibit the States from passing laws, the effect of which would be to induce the creditor to receive something else than gold and silver coin in payment of the debt due him, in order to avoid an inconvenience that would result on his failure to do so, we are led to the conclusion that the act under consideration is repugnant to the provision of the Constitution of the United States, last referred to.

It is also contended that this provision is void, because it would effect an unconstitutional delay of justice. The seventh section of our declaration of rights, article thirteenth of our Constitution, requires that "Courts of Justice be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice be

administered without sale, denial or delay.” In this provision is included every injury to which a man is subject, either in his person, property or reputation, and every question of right that can become a subject of judicial investigation. It operates alike on every branch of the government concerned in the administration of justice. Of the Legislature, it requires the enactment of such laws as may be convenient and necessary for the speedy administration of justice; that “Courts of Justice be open to every person;” and when the jurisdiction of a Court has attached to any question of right, we must understand this provision as requiring such Court, notwithstanding any law, usage or custom to the contrary, to administer right and justice in such case, without sale, denial or delay. The next inquiry, then, is, what is a delay of justice within the meaning of this clause of our Constitution? It does not, it cannot mean, that whenever in fact an injury has been done or suffered, no time shall intervene before such injury shall be redressed; nor can it mean that no time shall be afforded the person complained of, to controvert the charge brought against him. This would take away the means of doing justice. We must, then, give to the terms of the provision a reasonable and operative construction, which appears to be this: that reasonable means shall be employed to ascertain right, and when that is legally done, justice shall be administered as speedily as may be, according to the usual operation of legal process. Any legislative provision, then, the effects of which tend not to the legal ascertainment of right, but alone to the delay of justice, is repugnant to the provision of our Constitution last mentioned. If the word “delay” is to be understood in its common and received acceptation (the only proper mode of interpreting words in common use), which is, to hinder, defer or frustrate, we are unavoidably led to the conclusion that the act under consideration does ““delay” justice, in the literal sense of the word, and in the sense in which our convention used it.

In the case before the Court, the right of the plaintiffs to have of the defendant a certain sum of money, is legally ascertained. Justice requires, that that sum of money should be paid by him to them, and by the provision of the act under consideration, that payment is deferred or delayed for the period of two years and a half. It is true the act presents to the creditor the alternative of communicating his demand for something else, or of submitting to the delay; but whether he makes the one choice or the other, it is under the influence of a legislative provision, repugnant to the Constitution; for, if he elects to submit to delay, the administration of justice is deferred; and, if he consents to take property in payment of his debt, as he is driven to this choice by the hinderance of justice, then justice is denied to him, his right to receive money, instead of property, being ascertained. The Circuit Court, therefore, did not err in setting aside the bond and sheriff’s return.

M’GIRK, C. J.

But yet, there is some further difficulty in this case. It being the opinion of this Court, that

a supersedeas ought not to be granted, because the Court set aside the return of the sheriff, on the ground of its being authorized, then there has, as the return shows, been a levy, and the law on this subject appears settled, that an alias execution cannot regularly be issued, by all the cases put by the books. The defendant appears to have been deprived of his property, and, therefore, until the levy is exhausted, it is unjust his property should be subjected again; and we are inclined to the opinion, that if it appeared by the sheriff's return, that the defendant had received his property again, and more especially, if he had received it at his own instance, that then the relation between him and his creditor would not be altered. But, however the fact may be in this case, it does not appear whether the property has been restored or not; at all events, if it has been restored, the sheriff may re-take and sell; if it has not been restored, the sheriff may still sell, without a new execution.FN(a) Therefore, the *alias* ought not to have been awarded. Let the supersedeas go.

FN(a). See *Brown v. Ward*, *post* 209; *Bumgardner v. The Circuit Court of Howard County*, 4 Mo. R. 50; *Little v. Seymour & Bool*, 6 Mo. R., 169 and note: *Stevens v. Andrews*, 31 Mo. R. 207.

JONES, J. dissenting.

The record presents the following case: Reuben Gentry and wife obtained judgment against Baily, in the Circuit Court of Cooper county, for \$200 debt and \$22 33 1-2 damages, with costs. A writ of *fieri facias* having issued on this judgment, returnable on the fourth Monday of January last, the sheriff in answer thereto returned, that he had, by virtue thereof, levied on a negro man, the property of the defendant, and there having been no endorsement made on the execution by the plaintiff, the defendant offered his bond, with security, agreeably to law, to stay further proceedings on execution, which bond was taken as sufficient, and was therewith returned. That the levy was made on 1st October, 1821, and the said bond was made and given on the 13th of February, 1822. At the last term of the Circuit Court, the plaintiff's counsel moved to quash the proceedings of the sheriff therein, in taking the replevin bond to stay the issuing of another execution, and the collection of the judgment, in the cause as theretofore rendered; and also moved the court to award them an *alias* execution, on the ground that the law on which the sheriff acted in taking the bond, was unconstitutional and void.

The court decided that the proceedings had under the execution should be quashed and set aside, and that the plaintiff should have another execution against the defendant, and which has accordingly been issued. To reverse this decision of the Circuit Court, a writ of error has been brought, and this court has been applied to for a supersedeas thereon. The counsel of both parties have confined their arguments chiefly as to the constitutionality of the act

of Assembly, pointing out the manner that executions may be stayed, and regulating the sale of property under execution, approved 28th December, 1821.

A preliminary question, however, presents itself for consideration; that is, whether the Circuit Court, under the circumstances of the case as stated, had legal authority to quash the sheriff's return in toto, and award the issuing of a new execution. The first execution is admitted to be good, and so is that part of the sheriff's return which states his having levied on the negro man; but then it is contended that, because all the proceedings of the sheriff, subsequent to the levy, are void, that the whole return is vitiated thereby. I think differently, and am of opinion that the Circuit Court, instead of quashing the whole of the return, ought (in case it conceived the act of Assembly referred to, to be unconstitutional and void), to have only quashed the proceedings of the sheriff subsequent to the levy (which is admitted to have been lawfully made and returned, although the value of the negro is not stated, which, in strictness, ought to have been done, but which has been but little attended to in practice in this State), and to have awarded a writ of *venditioni exponas*, commanding the sheriff to sell the negro levied on (who, from aught that appears to the contrary from the record, and in contemplation of law, was in possession of the sheriff), and have the money, arising from the proceeds of such sale, in court at the return day thereof, to render to the plaintiffs for their debt, damages and costs: Salk., 318, p. 1; Bac. Abr. 719, and numerous other authorities there cited. That the award of an *alias* execution, after a levy made on the first, and before the remedy on that levy had been exhausted, is erroneous on the following authorities. If a sheriff takes goods in execution by virtue of a *fiери facias*, whether he sells them or not, yet being taken from the defendant, against whom the execution was issued, he may plead that taking in discharge of himself, and shall not be liable to a second execution: 2 Mod. 214; 2 Bac. Abr. 720. If a sheriff takes bond, (as was done in this case), this is a good execution, and the sheriff shall answer for the money: 2 Bac. Abr. 720. As, therefore, the defendant is, in these cases, discharged as to the plaintiffs, it is clearly agreed that the plaintiff may maintain an action against the sheriff: 2 Bac. Abr. 720, and several other authorities there cited. If the sheriff, in return to a writ of *fiери facias*, states that he had levied on property of a defendant, and that they were rescued out of his hands, he makes himself liable to an action of debt; or a *scire facias* may be brought against him by the plaintiff, who otherwise would be without remedy: 3 Williams' Saunders, p. 344. The same doctrine is recognized by Lord Holt (as reported in 2 Lord Raymond, 1075, in the case of Clark v. Withers), who said that the sheriff was answerable for the value of the goods, after he has seized them, and is bound to sell them at all events, to the value of the goods he has returned them of; and, although the goods are lost or rescued from him, he is bound to the value he returned them to be of, and an action of debt lies against him for that value. By a law of the State, the goods of the defendant are bound from the delivery of a writ of *fiери facias* to the sheriff; so that he can neither sell nor dispose of them, even to a bona fide purchaser. The record does not state

when the writ, in this case, was delivered to the sheriff, but it must have been before the 1st October, 1821, when the levy was actually made; from which time the negro was, in contemplation of law, in the actual, not implied, possession of the sheriff, and continued in such, his possession, until at least the return day of the writ, viz: the fourth Monday in January, a period of nearly four months, during which the defendant was not only deprived of the services of the negro, but is also chargeable with the legal interest on the amount of the judgment. It is, however, contended by the plaintiff's counsel, that it is to be presumed the negro continued in possession of the defendant until the 13th February, when the bond is said to have been executed. This position is, in my opinion, not sustainable, because it would create a presumption clearly contrary to law. A sheriff cannot deliver goods levied on under an execution by *fieri facias*, either to the plaintiff or the defendant, but he ought to sell them: 2 Vent. 95; 2 Bac. Abr. 716. It has been contended that the sheriff ought not to be held responsible, if it should appear he was mistaken as to the constitutionality of the law under which he is said to have taken the bond.

A sheriff, in my opinion, acts on his own responsibility; not only as to the force and construction of statutes, but also as to matter of fact, of which, in many cases, he could have no means to inform himself of. He is, at his peril, to levy on the property of the defendant; for if he takes and sells the property of any other person, even through mistake, he is liable to an action, although great doubts may exist, whether the goods belong to the defendant, or such other person. If, on the other hand, he should not make the levy, and return *nulla bona* to the writ, he is liable to the action of the plaintiff in the execution, if it should appear that the goods really belonged to the defendant. Numerous are the cases reported in the English books, where actions have been sustained against sheriffs, by persons alleged to have become bankrupt by their assignees, or by other persons, for the purpose of ascertaining whether an act of bankruptcy had been committed, and if so, at what time; and if the sheriff has been mistaken, either in point of law, or in matter of fact, as found by the jury, he is held to be responsible. No doubt has been suggested as to the sufficiency of the return, if the law in question is constitutional and valid, nor that the bond therein referred to, was given and executed conformably to its provisions. Admitting, however, that law to be unconstitutional and void, the decision of the Circuit Court is, in my opinion, erroneous; because, by the levy on the negro, the defendant was, from that moment, no longer liable to the plaintiff (unless, indeed, in case of a deficiency on the sale of him to pay the amount of the execution), whose only remedy is against the sheriff. I much regret that such a question as that of deciding on the constitutionality of an act of the Legislature, should be brought before this court by way of motion, and an immediate decision pressed. It would have been much more satisfactory, that a question of such importance had been brought before the court by appeal or writ of error from the judgment of a Circuit Court, in an action wherein the whole matter would have been spread upon the record. And it is the more to be regretted, because more than one member of this court have

been credibly informed, that the same question will, in a few weeks, be brought before them on an appeal, or writ of error, to reverse the judgment of a Circuit Court in the third judicial district.

Being of opinion, that the Circuit Court of Cooper county erred, in quashing the sheriff's return *in toto*, and awarding an alias, or new execution, against the defendant, and that a decision on the constitutionality of the act of the Legislature is not necessary on the question now before the court (being an incidental one), I shall forbear giving my opinion thereon at this time. Should, however, the same question come before the court, either in the case alluded to, now depending in the third judicial district, or in any one properly brought, it will then be my duty to give such opinion, and it shall be done. I am for granting the *supersedeas* prayed for.

***McChord v. Ford*, 19 Ky. 166 (1826).**

Court of Appeals of Kentucky.

M'Chord

v.

Ford, &c.

Apr. 15, 1826.

ERROR TO THE FAYETTE CIRCUIT; JESSE BLEDSOE, JUDGE.

OPINION OF THE COURT, BY JUDGE MILLS.

This is a petition and summons on a note promising to pay seven hundred dollars, “current money of Kentucky.” The defendant demurred, and the court sustained the demurrer, and gave judgment against the plaintiff, on the ground that a summons and petition could not be sustained on the note. To reverse this judgment, this writ of error is prosecuted.

Promissory note for current money of Kentucky.

This court decided, in the case of *Chambers v. George*, 5 Litt. 385, that a summons and petition could not be sustained on a note promising to pay a number of dollars in the “currency of Kentucky.” In that opinion, as printed, the following expressions, in reciting the note, are used, which might have led the court below into this conclusion; “payable in the money of this State.”

In the expressions in *Chambers v. George*, 5 “Littell, 335, payable in the money of the State,” there is a typographical error; it should read “currency of this State.”

But in this there is a typographical error, and the expression ought to be, “payable in the currency of this State.”

This court has also said, in the same case and in others, that bank notes, so lately the only currency of this State, are not money.

Currency, when bank notes is the only currency, does not mean money.

And, of course, as the remedy by summons and petition, embraced notes or bonds stipulating the payment of money only, it could not embrace such notes.

But as bank notes are not money, it also follows that this note can not intend bank notes, but gold or silver. The word “current” preceding the word “money,” can not change its meaning, because it is equally applicable to that kind of money made current by act of Congress, which in truth, is the only current money of Kentucky. Current money does not mean the same thing as “currency.”

But “current money of Kentucky,” does mean money.

It follows, therefore, that the judgment in this case is erroneous, and must be reversed with costs, and the cause be remanded for further proceedings not inconsistent with this opinion.

Wickliffe for plaintiffs; Chinn for defendants.

***Sinclair v. Piercy*, 28 Ky. 63 (1830).**

Court of Appeals of Kentucky.

Sinclair

v.

Piercy.

Oct. 27, 1830.

ERROR TO THE NICHOLAS CIRCUIT; HENRY O. BROWN, JUDGE

JUDGE UNDERWOOD, delivered the opinion of the court.

Piercy brought an action of covenant on an obligation for the payment of “\$100, on or before the 1st of November, 1823, to be paid in money, receivable in the United States land office.” Sinclair filed a plea to the jurisdiction of the circuit court, alleging that he had reduced the amount of the demand, by a payment which had been endorsed as a credit on the obligation, to \$50. Piercy demurred to the plea, and the court gave judgment in his favor. The correctness of this decision is the only question. If the obligation be one on which an action of debt could be maintained then as the sum was reduced to \$50, a justice of the peace would, under the act of 1813, have exclusive original jurisdiction of the amount. Will anything but gold and silver coin discharge the obligation? In other words, is there any kind of property but money in the strict legal meaning, which would be a good tender on the day the obligation became due?

If an obligation, on which debt will lie, be reduced by partial payments to \$50, a justice of the peace has exclusive original jurisdiction of the demand.

In *McCord v. Ford, &c.*, III Mon., 167, this court decided, that an obligation for the payment of “current money of Kentucky,” was a covenant to pay gold or silver, although “currency of Kentucky,” would mean the circulating medium of the state, at the date of the instrument, in which the expression is used; no matter whether such medium be bank notes or the lawful coin of the United States. In *Chambers v. George*, V Litt., 335, the court said, that “bank paper is not money.” In *Jones, &c. v. Overstreet*, IV Mon., 547, bank notes collected by a sheriff, were so far regarded as money as to permit and sustain a motion against him for their recovery upon his failure to pay over. This case contains a citation of authorities, showing that bank notes are often treated as money in courts of justice. The

result from an examination of all the cases is, that money in its strict legal sense, means gold or silver coin, and that an obligation for money alone can not be satisfied with any thing else. But, that bank notes are treated as money for many purposes, and are often so regarded in law, is very clear. They pass by delivery as money. If stolen and paid away by the thief, the person losing can not recover them from the *bona fide* holder.

An obligation for the payment of “current money of Kentucky” is a covenant to pay gold or silver; yet “currency of Kentucky” means the circulating medium of the state at the date of the instrument in which the expression is used. An obligation for money alone, can not be satisfied by anything, but gold or silver coin. Bank notes pass by delivery.

If bank notes be stolen and paid away by the thief, they can not be recovered by the loser from a *bona fide* holder of them.

Is there enough apparent upon the face of the obligation, to show that the term money was not used in its strict legal sense? We think there is, when the charter of the bank of the United States is considered. The 14th section of the act incorporating the subscribers to the bank of the United States declares, “that the bills or notes of the said corporation originally made payable, or which shall have become payable, on demand, shall be receivable in all payments to the United States unless otherwise directed by act of Congress.” The notes of this corporation, circulate as money, and by the charter are receivable as money in payments to the United States, and consequently are receivable in the land offices. The expression, therefore, used in the obligation, means, and includes that description of medium, circulating as money, which the law makes receivable in the land office. A covenant to pay such money as is receivable in payment of taxes in Kentucky would, for the same reason, embrace notes on the bank of the Commonwealth.

The conclusion from this reasoning is, that the obligation sued on, was payable in such bank notes as were receivable by law as money in the United States land offices. Wherefore, the action of covenant was the proper remedy, and the court did not err in its decision. It is not necessary, now to decide, whether the obligation declared on would embrace any thing but gold or silver coin, if the act of Congress cited, had not been passed. How far such a contract might be influenced by the private regulations of the receivers at the land offices, in regard to the reception of bank notes, we shall leave until a case occurs.

On an obligation for the payment of “one hundred dollars to be paid in money receivable in the United States’ Land Office,” debt will not lie.

The judgment is affirmed with costs.

***Pryor v. Commonwealth*, 32 Ky. 298 (1834).**

Court of Appeals of Kentucky.

Pryor

v.

The Commonwealth.

Oct. 24, 1834.

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

JUDGE NICHOLAS delivered the opinion of the Court – in which the Chief Justice, being absent at the hearing, took no part.

The indictment charged Pryor with setting up and keeping a gaming table, at which the game of chance called Faro was played for money, and at which money was won and lost. The proof was, that bank notes were played for, won and lost.

The term money in the technical sense of judicial proceedings, means nothing but gold and silver coin.

Every penal offense must be provided as laid in the indictment. – A charge, that the defendant set up and kept a faro bank, at which money was bet, lost and won, is not sustained by proof that bank notes were bet, lost and won.

This court has heretofore repeatedly determined, that the term money, though it may have a popular import which, in ordinary parlance, means, or at least includes bank notes: yet, that its true technical import is lawful money of the United States, in other words, gold or silver coin, and when used in judicial proceedings it is always to be taken in this technical sense. This has been so repeatedly decided, that the question ought long ago to have been considered as at rest. Though the betting of bank notes is equally illegal, and would render the defendant liable to the same penalty as the betting of money, yet as the proof must fit the charge as laid, the charge was not made out in this case, and the court ought to have so instructed the jury, at the instance of the defendant. If the charge had been for a betting, winning and losing of bank notes, it would have been no better sustained by proof of a betting, with gold and silver coin.

The court, also erred, in refusing the defendant the right of peremptory challenge to the extent of three jurors. It was held in the case of *Montee v. the Commonwealth*, 3 J. J. Marshall, that the statute was susceptible of a construction, which would allow to the accused such right of peremptory challenge. We still think so. That case has probably most generally regulated the practice on this subject ever since. That would be a strong reason against retracting the opinion then intimated, even though we felt more doubt than we do of its correctness. The statute is, no doubt, susceptible of a different construction, which would confine its provisions to civil cases. But as no reason of justice or policy can be surmised for allowing such a right in a merely civil case, that does not equally require it in these penal proceedings, we can not presume a legislative intention to make any such discrimination, and if there be an allowable construction, which will prevent it, such construction should be adopted by the court.

The right of peremptory challenge in penal cases (not felonies) extends to three jurors, as in cases strictly civil. 3 J. J. M., 149.

Judgment reversed, and the cause remanded for a new trial consistent herewith.

***Lowry v. McGhee & McDermott*, 16 Tenn. 242 (1835).**

Supreme Court of Tennessee.

LOWRY

v.

MCGHEE AND MCDERMOTT.

July Term, 1835.

GREEN, J., delivered the opinion of the court.

1st. The first question for consideration is whether this was a good tender.

By the Constitution of the United States nothing can be a tender in payment of debt but gold and silver coin. It is insisted, however, that by the act of 1820, ch. 11, sec. 2, a redemption is authorized on the payment or tender of the money bid at the sale, and ten per cent. interest thereon, in such bank-notes as were receivable on executions, and that, as by the act of 1819, ch. 19, sec. 1, notes on the Bank of the State of Tennessee and its branches, and notes on the Nashville Bank and its branches, and such other notes as passed at par with them, were made receivable on executions, consequently, the notes tendered in the case under consideration passing at par with those enumerated above, the tender of them was lawful.

The answer to this argument is that the Constitution of the United States is the supreme law, and that no law can be valid which, in violation of that instrument, shall attempt to make anything but gold and silver coin a tender.

The constitutionality of the act of 1819, ch. 19, in an elaborate and able opinion delivered by Judge Haywood, in *Townsend v. Townsend and others*, Peck's Rep. 1, was fully discussed, and after mature deliberation it was decided by this court to be unconstitutional and void. That decision was satisfactory to the bar and to the country, when made, and so far as we know has been universally approved of ever since.

It is easy to perceive the effect of that decision upon the present question. That act made certain bank-notes receivable on executions and the act of 1820 made such bank-notes as were receivable on executions a good tender to authorize the redemption of land. Does it not follow that, if the act of 1819 was void, so that no bank-notes were receivable on

executions, the act of 1820 does not make them a good tender, for it only makes that a good tender which was receivable on executions? In this construction there is consistency in the two acts but to suppose that nothing but specie should be receivable on executions, and yet the bank-notes mentioned in the act of 1819 should be receivable in redemption of the land purchased at execution sale, would present the most absurd and incongruous state of things. According to the argument, a creditor would not be bound to receive on the execution anything but gold and silver coin; but, if he became the purchaser of the debtor's land, he could be paid off in bank-notes fifty per cent. below par. If this be so, no man would advance his money at execution sale for land, to have it taken away by the tender of that nominal amount he had bid, with ten per cent. in Nashville Bank notes. Such a doctrine would make the operation of the execution on land wholly ineffectual. It is no answer to say that in this case the notes were at par with gold and silver. The argument, if good, must rest on the two statutes before referred to; and, by the act of 1819, Nashville Bank notes are made receivable as well as United States Bank notes, consequently all the absurdity above suggested inevitably follows as consequence of the assumption that the tender in this case was a good one.

The truth is, the act of 1820 requires the purchaser at execution sale to receive such money only as he was bound to pay when he purchased the land. This, in terms, it expresses; and, as bank-notes are not receivable on execution, so neither is a purchaser at execution sale bound receive them. But if the act of 1820 had said in express terms, without reference to the act of 1819, that bank-notes should be a good tender in payment of the amount bid at an execution sale, it would have been unconstitutional. The Constitution of the United States (art. 1, sec. 10) prohibits any state making "anything but gold and silver coin a tender in payment of debts."

The force of the argument that a party may become a purchaser or not at execution sale, as he may choose, and that if he does become a purchaser he does it upon the condition that he is to give up the land upon receiving the amount of his bid in bank-notes, and that therefore the law is constitutional, is not perceived. If a law were passed making bank-notes a good tender in payment of all debts, the same argument might be urged with equal force in its favor. In that case it might be said that all contracts which were entered into after its passage were made with a knowledge of the law, and an implied agreement to receive bank-notes in payment. Is it not perceived that by this sophistry the whole force of this salutary provision of the Constitution of the United States might be destroyed and rendered inoperative?

This provision was inserted to prevent the existence of a spurious and worthless currency, and is of positive and paramount obligation. It is true that United States notes were as valuable as the gold and silver at the time this tender was made; still they were no more

gold and silver than if they had been fifty per cent. under par, and, consequently, no better tender, when objected to, than Nashville notes would have been.

2d. In the second place it is insisted that, although the bank-notes were not a good tender, yet that this court, in view of the attempt which has been made to redeem this land, can disregard the time fixed by the statute, and permit the complainant now to redeem by paying the amount required in gold and silver. This is asking the court to go beyond its power. The act says that the land may be redeemed within two years from the day of sale. Until the two years expire the purchaser's title is dependent upon a condition; but after the expiration of that time his title becomes absolute – as much so as if the act of 1820 had never existed. A party has no more right to redeem after the expiration of the two years than, before the act of 1820, he could have done after a sale and the execution of a deed by the sheriff.

In the case of *Hawkins v. Jamison* (Mart. & Yer. 85) this court decided that the property purchased at execution sale, under the redemption law, is not held, like mortgage property, as a security for the money; that, if it should be destroyed before the day fixed for redemption and before it should be redeemed, it would be the loss of the purchaser, because by the purchase he becomes owner of the property. The court, therefore, held that it is like a defeasible sale, where the offer to repurchase must be made by the day limited or the right is gone forever. Judge Crabb, in delivering the opinion of the court, says: "The purchaser is the legal owner of the property sold under execution, by virtue of the deed or bill of sale from the sheriff, as heretofore; subject to the equitable right of the debtor, etc., to reclaim or repurchase it upon the terms specified in the act."

In cases of sales with liberty to repurchase it is well settled that the condition must be strictly performed by the day.

In *Scott v. Brittain*, 2 Yerg. Rep. 223, Judge CATRON, in delivering the opinion of the court, says: "But, if it is a defeasible purchase, the condition must be strictly performed at the day or no relief will be granted, because it does not admit of compensation for the risk. If the thing perish the next moment, it must be the loss of the purchaser, he having no covenant, or even implied promise, for the return of the money in that event; and we are taught by a maxim in equity that in these casual cases eventual loss or gain must accrue to, or fall on, him who runs the risk." 1 Call's Rep. 255; 7 Cranch, 227. It must be apparent from what has been said that this court cannot, upon any principle known to a court of equity, as applicable to this case, compel the defendant McGhee now to take the money and interest he paid for the land. No tender was made before the day fixed by the act, and the title has vested absolutely in the purchaser. Decree affirmed.

***Gray v. Donahue*, 4 Watts 400 (Pa. 1835).**

Supreme Court of Pennsylvania.

Gray

v.

Donahoe.

September, 1835.

A note payable in current bank notes is not negotiable; and a transfer of it by blank endorsement creates no liability in the endorser.

ERROR to the District Court of Allegheny county.

This was an action of assumpsit by the administratrix of John Donahoe v. James Gray. Upon the plea of set-off, the defendant gave in evidence a note in the following words: "Pittsburgh, April 1st 1816. On the 1st of May 1819, I promise to pay John Donahoe, or order, \$50, in current bank notes, without defalcation, for value received." Signed "T. Connor." Endorsed "John Donahoe"—together with a regular protest for non-payment, and notice. In answer to a point put by defendant's counsel, the court below (Grier, president), instructed the jury that the note given in evidence by the defendant was not negotiable, and the blank endorsement of it by the plaintiff's intestate created no liability. This opinion was assigned for error.

The opinion of the court was delivered by SERGEANT, J.

One essential quality of a negotiable note is, that it be for the payment of money. If it be for the payment or delivery of any other kind of property, however valuable, it stands on the footing of an ordinary contract, not possessing the characteristics of a negotiable instrument, and therefore incapable of transfer by blank endorsement, so as to render the maker or endorser liable to the holder. The question therefore is, whether a promissory note payable "in current bank notes," is to be considered as a note for the payment of money. On this point there have been contradictory decisions in the courts of different states, but we are of opinion that it is not so to be considered.

No principle is better established, nor more necessary to be maintained, than that bank notes are not money, in the legal sense of the word. They are not a legal tender as money,

either in the ordinary transactions of business, or in the collection of debts by legal process. Coins struck at the mint, or authorized by Act of Congress, are alone lawful money. They possess a fixed and permanent value, or at least as nearly so as human affairs admit of. Bank notes are merely promissory notes for the payment of money; ordinarily, it is true, convertible into coin on demand at the bank where they are issued. But their value is fluctuating and precarious; different at different distances from their place of issue, and even there, at particular periods, depreciated below the par of gold and silver, though they may continue to pass current from hand to hand, and constitute a part of the circulating medium of the country. Of the truth of this we have had abundant experience. A note for payment in current money is then an engagement to pay in a kind of property, consisting of promissory notes or choses in action which the parties have chosen specifically to contract for, but which may or may not be equivalent to money, and cannot be therefore be considered a promise to pay money in its legal or commercial sense. The creditor has no right to exact specie in payment of such notes: he is bound to accept current bank notes, however inferior in value.

This point has been already decided by this court in the case of *McCormick v. Trotter*, 10 S. & R. 94, where it was held that the endorsee of a promissory note for \$500, payable to L. or order, in bank notes of the chartered banks of Pennsylvania, could not maintain an action on it in his own name against the maker. On the other hand, in *Keith v. Jones*, 9 Johns. Rep. 120, a note payable to B. or bearer in York state bills or specie, was held to be a negotiable note under the statute, and might be declared on as such. So in *Judah v. Harris*, 19 Johns. Rep. 144, the same decision was made in a suit on a promissory note payable in bank notes current in the city of New York. In *Morris v. Edwards*, 1 Ohio Rep. 194, a promise to pay in current bank notes of the city of Cincinnati was considered as a contract to pay money. Chancellor Kent, however, in his *Commentaries*, vol. 3, p. 75, says, “in England negotiable paper must be for the payment of money in specie, and not in bank notes. Bayley on Bills, ed. Boston, p. 6. In this country it has been held that a note payable in bank bills was a good negotiable note within the statute, if confined to a species of paper universally current as cash. *Keith v. Jones*, 9 Johns. Rep. 120; *Judah v. Harris*, 19 Id. 144. But the doctrine of these cases have been met and denied (*McCormick v. Trotter*, 10 S. & R. 94); and I think the weight of argument is against them, and in favor of the English rule.” And in *Robinson v. Noble’s Executors*, 8 Peters’s Rep. 181, where the engagement was to pay in the bank paper of the Miami Exporting Company, or its equivalent, the Supreme Court of the United States held, that the defendant was only bound to pay the specie value of the notes at the time they should have been paid, not their nominal amount in specie. On the whole, we are of opinion the charge of the court below on this point was proper.

In the other point objected to, we also think there was no error. The defendant’s intestate

was not liable on his blank endorsement, If so, the defendant could not avail himself of it, whether he held the note himself, or was beneficially interested in it.

Judgment affirmed.

***Carter & Carter v. Penn*, 4 Ala. 140 (1842).**

Supreme Court of Alabama.

CARTER AND CARTER

v.

PENN.

June Term, 1842.

WRIT of Error to the Circuit Court of Talladega.

The defendant in error declared against the plaintiffs in assumpsit on a promissory note made by them on the 26th March, 1840, for the payment of the sum of eight hundred and fifty-three 47-100, current money of the State of Alabama, to him, one day after date. It is averred that the money in which the note is payable is of the value of the sum expressed in the note.

The defendant pleaded several pleas, and on the trial he demurred to the evidence. From the demurrer it appears that the plaintiffs adduced a note in these words, viz:

“One day after date, we or either of us oblige ourselves, our heirs, &c. to pay, or cause to be paid, unto Thomas Penn, his heirs or assigns, the just and full sum of eight hundred and fifty-three dollars and forty-seven cents, current money of the State of Alabama, it being for value received, this 26th day of March, 1840.
JOHN W. CARTER, [seal.]
HENRY CARTER, [seal.]”

It was also proved that payment of the note was demanded of the makers before suit brought. On this evidence the Circuit Court rendered a judgment in favor of the plaintiff for the amount of the note and interest.

CHILTON, for the plaintiff in error.

MOODY, for the defendant.

COLLIER, C. J.

The questions raised by the demurrer to the evidence are – 1. Was not the writing produced at the trial a sealed instrument? 2. Was the plaintiff entitled to recover the full amount of the sum expressed on its face, without reference to the value of Alabama currency?

1. By the act of the 2d February, 1839, it is enacted, “That all covenants, conveyances, and all contracts in writing, which import on their face to be made under seal, shall be taken, deemed and held to be sealed instruments, and shall have the same effect as if the seal of the party or parties were affixed thereto, whether there be a scroll to the name of such party or parties or not.”

Previous to the passage of this act, it was necessary, in order to constitute a sealed instrument, not only that it should appear from the body of the writing that the parties intended thus to characterize it, but it was also necessary to accompany its execution with a scroll, or some other indicium of a seal. [Lee v. Adkins, Minor’s Rep. 187.] The only change in the law proposed to be effected by the statute, was to dispense with a scroll or its equivalent, and to make the recognition of the parties in the body of the paper that it was sealed, impart to it the dignity of a deed.

2. The note does not stipulate for the payment of a debt in Bank bills, but is an undertaking to pay “current money of the State of Alabama.” It is true that an infinite variety of commodities have been used as money in different periods and countries, [2 McC. Com. Dic. 193,] and in common parlance all these different representations of the common standard of value, have been designated as money. But the notes of the Banks which are not redeemable in coin, on demand, cannot, with any propriety be regarded as such; in fact the best Bank paper passes as money by consent only, and it cannot be otherwise so long as the inhibition of the Federal Constitution upon the rights of the States to dispense with gold and silver as the only lawful tender continues in force.

It results from this view, that the judgment of the Circuit Court is affirmed.

***Dillard v. Evans*, 4 Ark. 175 (1842).**

Supreme Court of Arkansas.

DILLARD

v.

EVANS.

January Term, 1842.

Words and terms used in agreement between individuals, must be taken in a general sense, and not in a technical signification.

In March, 1840, bank paper continued the common medium of exchange, or ordinary circulation, in Arkansas; and of this fact, the Court is bound judicially to take notice.

Therefore, a note of that date, payable in “common currency of Arkansas,” is a note payable in Arkansas bank paper, and not in specie.

This was an action of debt, tried in Washington Circuit Court, in November, A. D. 1841, before the Hon. Joseph M. Hoge, one of the Circuit Judges. John Dillard sued Lewis Evans, in debt, on a note, executed March 17, 1840, and payable in “common currency of Arkansas.” The defendant demurred, on the ground that the plaintiff had mistaken his remedy, and the demurrer was sustained, and judgment entered against the plaintiff, who appealed to this Court.

Paschal & Evans, for the appellant.

Walker, contra.

By the Court-Lacy, J.

The instrument bears date on the 11th day of March, A. D. 1840, and, at that period of time, bank paper constituted the common medium of exchange or ordinary circulation for money. Bank issues are not, in the constitutional sense of the term, lawful money or legal coin. Gold and silver alone are a legal tender in payment of debts; and the only true constitutional currency known to the laws. And, had specie or current coin been the common circulating medium at the date of the note sued on, then the terms of the contract

would have been restricted exclusively to that circulation. Such was not the fact; and this court is bound judicially to take notice of the kind of circulating medium that was then in general use in the State. And the bond sued on should be construed in reference to the existing state of things at the date of its execution. The parties contracting must be supposed to use the terms in their agreement, in their ordinary and popular acceptance, and not in their strict constitutional sense. Words and terms, when used in agreements between individuals, must be taken in a general sense, and not in a technical signification. This is a rule of sound legal construction, founded alike in justice and in public policy; and its application to the case now before the court will readily test and determine the case before us. The terms “common currency in in Arkansas,” at the date of the bond sued on, unquestionably meant bank notes or paper issues, which were then the general and universal currency of the State. Gold and silver, or lawful coin, had, at that time, ceased to circulate as money, and their place was supplied by bank issues or paper money; and, consequently, the parties to the suit are presumed to have contracted, with a full knowledge and understanding of this state of things; and, therefore, it is both right and just that their contract should be governed by the true import and meaning of the terms that they themselves have thought proper to attach to them. FN1 This point has been expressly decided, in a number of cases, by the Court of Appeals in Kentucky. *McCord v. Ford*, 3 Mon., 166 ; *Stricker, as adm’r, v. Miller*, 5 Lit., 235. In the case of *Chambers v. George*, 5 Lit., 335, which was an action of petition and summons on a note, “payable in the currency,” Chief Justice Boyle held the terms of the agreement to mean bank notes or paper issues at the date of the contract; paper money then constituting the ordinary circulation in that State. In this opinion we fully concur; and, consequently, the court below decided correctly in sustaining the demurrer. The note sued on not being an obligation for the direct payment of money, of course an action of debt will not lie upon it.

FN1. – A note or bond payable in “good current money of the State,” is payable in gold or silver. It is otherwise if merely payable “in the currency of this State,” or “current bank paper of this State,” or “current notes of the State,” while the State has a paper currency. *Graham v. Adams*, 5-261; payable in “Arkansas money,” is payable in United States coin. *Wilburn v. Greer*, 6-255. In “greenback currency,” is payable in United States currency. *Burton v. Brooks*, 25-215.

Judgment affirmed.

***Gasquet v. Warren*, 10 Miss. 514 (1844).**

High Court of Errors and Appeals of Mississippi.

GASQUET, PARISH & CO.

v.

ROBERT H. WARREN & PETER M. WARREN.

January Term, 1844.

A receipt may be explained, or even contradicted by parol proof.

A sheriff has no right to receive, in satisfaction of an execution, without the plaintiff's consent, anything but gold or silver.

If the defendant in execution voluntarily pay the sheriff bank notes, even though he get a receipt in full, unless the plaintiff chooses to ratify it, will not thereby be discharged of the debt.

Neither a sheriff nor an attorney at law has a right, under their general powers, to receive bank notes in payment of an execution.

ERROR from the circuit court of Tippah county.

The plaintiffs in error obtained a judgment against the defendants, in the circuit court of Tippah county, on the 29th May, 1839; and the execution which issued thereon was bonded on the 2d of December, 1839.

All of the judgment was satisfied, except the sum of \$800, anterior to the 3d June, 1841, when a writ of *venditioni exponas* was issued for the collection of that amount, which was superseded by the defendants.

Upon this supersedeas a motion was made by the defendants to have the execution credited with the sum of \$800, and have the judgment entered satisfied on the execution docket. The plaintiffs replied that the execution was already credited with the full amount to which it was entitled, and on the 28th March, 1842, the issue thus made up was submitted to a jury, who found that the execution was entitled to an additional credit of \$800, which the court ordered to be entered, and rendered a judgment for the costs of the supersedeas

against the plaintiffs.

The plaintiffs moved for a new trial, which was refused by the court, and they excepted; all the evidence is contained in the bill of exceptions, that was submitted to the jury on the trial of the issue, but the only part that is material to the question involved, is the following:

The defendants read to the jury the receipt of William Henderson, sheriff, dated 25th February, 1840, to R. H. Warren, of eight hundred dollars, on an execution in favor of the plaintiffs against Ferguson & Warren. The plaintiffs then proved that the above receipt was given by Henderson for the notes of the Mississippi Union Bank, and that one of the defendants told the sheriff at the time he paid the said bank notes, that the attorneys for the plaintiff said they would take the said bank notes. It was also proved that some bank bills of the Union Bank had, at a former term, been tendered in court, on a motion against the sheriff, and that those bank bills were the same that had been paid to the sheriff by one of the defendants, and for which said receipt had been taken. It was proved, by the depositions of the plaintiffs' attorneys, that no instructions had been given by either of them to receive any kind of money in payment of said execution, and that they had not told the defendant that they would take the kind of money represented.

Gholson, for plaintiffs in error.

It is submitted that, in this case, the court below erred in overruling the motion of the plaintiffs for a new trial.

The receipt given by the sheriff was subject to explanation, and when explained it appeared that in truth no payment at all had been made. Even if the execution had been returned satisfied, the payment having been made in uncurrent money, the plaintiffs would have had the right to set aside the return, and issue a new execution. *Planters Bank v. Scott*, 5 How. 246. See *Morton v. Walker*, Opinion Book, 332.

In this case the receipt would have been void, not only as against the plaintiffs, but even as to the sheriff, he having been induced to take the uncurrent money by a representation on the part of one of the defendants that the plaintiffs' attorneys had agreed to receive such money, which representation appeared by the testimony to be wholly unfounded.

Mr. Chief Justice SHARKEY delivered the opinion of the court.

It will be sufficient, in this case, to mention the prominent facts, to show the question presented for determination, without a minute examination of all the facts and

circumstances disclosed by the record.

It seems that the plaintiffs in error had recovered a judgment against R. H. Warren, one of the defendants in error, for \$904 debt, and \$165 damages. A *fi. fa.* issued on this judgment, which was levied on personal property. The defendant gave a forthcoming bond, with P. M. Warren as surety, which was forfeited, and thereupon another *fi. fa.* issued, which was levied on land. The defendants made some partial payments, which reduced the sum due to \$800. He afterwards applied to the circuit judge to supersede the execution, on the ground of an entire payment, and moved in court to have satisfaction entered, which was directed by the court on the finding of a jury, that the amount had been paid, and this is the judgment which the plaintiffs now seek to reverse. To prove the payment, the defendants in execution introduced the receipt of the sheriff in the following words; "Received of R. H. Warren eight hundred dollars, on an execution in favor of Gasquet, Parish & Co, against Ferguson and Warren, this 25th February, 1840. W. Henderson, sheriff." It was in proof that there was no other judgment against Warren, except the one in this record, so that the particular judgment to which the receipt referred could not be mistaken. Witnesses were then introduced, who proved beyond doubt, that the payment acknowledged by the receipt, was made in Union Bank notes, which, although current in discharge of debts in that part of the state, were considerably below par. The defendant, when he paid the money, represented to the sheriff that the plaintiffs' attorney would receive it in satisfaction, but it was also in proof, that neither the plaintiff nor his attorney, had ever consented to receive such money, either by direction to the sheriff or otherwise. Thus it will be seen that the main question is, whether a payment by the defendant to the sheriff, made in depreciated bank notes, is a satisfaction of the execution.

The receipt, although it was *prima facie* evidence of payment, yet it was not conclusive. It was, therefore, entirely competent for the plaintiff to introduce proof to explain it, or even to contradict it, by showing that in fact no money was received, or in what particular kind of money the payment was made.

The decision of the main point depends upon the application of a few plain and undeniable principles of law. By the execution the sheriff was commanded to levy the money. His duty was plain, and his power limited. By the judgment of the court the plaintiff was entitled to receive from the defendant so much money, and to coerce its payment by execution, for which purpose the execution commanded the sheriff to levy the amount by a seizure of the defendants' property. The command being to levy the money, the sheriff had no authority to depart from it, and being commanded to raise the money, he could not legally receive from the defendant by voluntary payment anything but money. Bank notes, by common consent, may circulate as money; they may be adopted as a general currency, but this does not make them money, although for some purposes they are treated in law as such. A

tender made in bank notes is good, if not objected to on that account; but when the law requires the sheriff to levy so much money, it means that which in fact and in law is money, which is gold or silver coin. This in law is money, and nothing else is. By receiving anything else, the officer departs from his authority and from his duty, and his act therefore is not binding on the plaintiff. And as the obligation, the judgment, calls for money, the defendant does not discharge himself by paying anything else. The law having condemned him to pay money, will not allow the duty to be discharged by the payment of specific articles. Such payment is no answer to the legal liability. Before the judgment, the plaintiff was not bound to receive anything in discharge of the debt but gold or silver; nothing else would have discharged the defendants' obligation; would it not be singular that, after judgment, after the obligation had been raised in dignity, the defendant should be allowed to discharge it by depreciated paper money? And yet this is the necessary result of the judgment in this case. That this payment was received by the sheriff makes no difference; in receiving it he went beyond the scope of his power, and the plaintiff is not bound by his acts. The plaintiff is only bound by the acts of the sheriff when he confines himself strictly within the line of duty. It was not his duty to receive in discharge of the plaintiffs' execution, depreciated bank notes, without express authority from the plaintiff himself. Even the authority of the attorney for doing so would not be sufficient under his general power. This question has already been virtually settled in several cases decided by this court. *Planters Bank v. Scott*, 5 Howard, 246. *Morton v. Walker*, (January, 1843.)

This, it must be remembered, was a voluntary payment made by the defendant. We need not determine how the question would stand if the sheriff had sold property of the defendant, and taken Union Bank notes in payment. We can say, however, that even in such case the plaintiff would not be bound to receive the bank notes; but whether the defendant would be discharged, and the sheriff alone become responsible, is a question which does not arise in this case. We think the court clearly erred in refusing a new trial, and the judgment must be reversed, and the cause remanded for a new trial.

Mr. Justice CLAYTON, having been of counsel, gave no opinion.

***State v. Beackmo*, 8 Blackf. 246 (Ind. 1846).**

Supreme Court of Indiana.

THE STATE

v.

BEACKMO.

November Term, 1846.

ERROR to the Tippecanoe Circuit Court.

PERKINS, J.

This was a proceeding originally instituted under the 17th section of the act providing for a general system of internal improvement, approved January 27, 1836, before the board of commissioners having the superintendence of the public works of Indiana, to recover damages for injury done to real estate by the construction through it of the Wabash and Erie canal. An appeal was taken from the award of damages by the arbitrators to the Circuit Court. The claimant there obtained a verdict for a fraction over \$700, and a judgment, payable in canal-scrip, upon the verdict.

Several errors are alleged to have intervened in the proceedings, of which the first that we shall notice is the leave given to amend the claim for damages.

The record states that leave to amend was given, but it does not show the character of the amendment made. The section of the internal improvement act above cited, provides that appeals to the Circuit Court from assessments of damages before the commissioners, shall be governed in all things by the law relative to appeal cases from justices of the peace. In those cases, amendments within certain and liberal limits are allowed in the Circuit Court. We presume the amendment in this case was properly permitted.

The plaintiff in error asked the Circuit Court to instruct the jury, “that if they believed Beackmo, the claimant, to have been an alien at the time of filing his claim for damages, they must find for the defendant.” The refusal to give this instruction constitutes the second error complained of. The refused instruction must have been asked in the broad terms in which it was stated, upon the assumption that no alien could, as against the State, be the owner of land in Indiana. The assumption was not true. Aliens having declared their

intention, pursuant to law, to become citizens of the United States, have, since 1818, been capable of fee simple ownership of land in this State. R. S., 1838, p. 67. If, therefore, it was proved on the trial, that Beackmo had, prior to the purchase of the land damaged, taken that step towards citizenship, the instruction would have been unquestionably wrong. The evidence is not before us, and the presumption is in favour of the correctness of the decision of the Court in refusing the instruction.

The Court gave the jury the following instruction, viz.: “That in estimating the claimant’s damages, they should find them not in cash but in canal-scrip, and should increase them as much above their cash value as the scrip, the currency in which they were payable, was depreciated below par.” To this instruction the defendant below excepted, and it raises the important question in the cause. Scrip being at the time at a depreciation of near fifty per cent., the effect of the instruction was to nearly double the verdict of damages for the claimant. In considering this point, we will first look at the acts of the Legislature regulating the assessment and payment of damages in this class of cases. The extension of the Wabash and Erie canal, in the prosecution of which the alleged injury in the present case was committed, was embraced in the general internal improvement act of 1836; and the only provision, in regard to the mode and principle of assessing damages, is found in that act. It contemplates their assessment in cash – their measurement by the constitutional standard of value, and by it alone; and their payment in the same. The act of 1842 (Laws of 1842, p. 24), providing the means for prosecuting this extension of the canal, and under which the decision of the Court below was made, makes no change in the mode or principle of determining damages, but enacts that all the expenses of constructing the work shall be paid in canal-scrip. It is true that the act of 1836 does not say, in express terms, that the damages shall be assessed and paid in cash, but it authorizes those acts to be performed in no other manner, and no other was contemplated. We find, then, nothing in the letter of these laws justifying the instruction under consideration; nor do we think it better corresponded with the intention of the Legislature in enacting them. We suppose that one object, at least, which the Legislature had in view in requiring scrip-payment by the act of 1842, was to defray the largest possible amount of expenses, to construct the longest possible line of canal, with the limited means appropriated to that purpose. It can require no argument to show that that object would be better promoted by adhering to the plain import of the language of the laws upon the subject, than by the construction of those laws adopted by the Court below. It will hardly be contended, we think, that the superintendent of the canal could claim a quantity of scrip, that would bring in market the amount of his salary in cash. If he could not, neither can the claimant of damages, for the law of 1842 specifies no distinction between them. Indeed, to give the act of 1842 the construction adopted by the Circuit Court would render useless the provision for payment in scrip, for the State might as well pay the cash at once as to pay scrip enough to bring the cash at the nearest broker’s office. Perhaps, were it in her power, it would be better for her to do it,

and reserve to herself the chance of a rise in the value of the scrip. The instruction was erroneous.

We have thus far viewed the act of 1842 as extending to cases like the one under consideration. If this view be correct, as was held by the Circuit Court, there is another question in the cause of graver importance, an opinion upon which we might now withhold, but which we think it proper to express. That question involves the constitutionality itself of the act of 1842, in requiring damages to real estate to be paid in canal scrip.

Of its validity so far as it relates to the salaries of officers, the wages of workmen, the purchase of materials, &c., we have no doubt. The State, as well as an individual, may make a valid contract to pay in specific articles; but the appropriation of private property to public use is accomplished, not by contract, but by force. The will of the owner is not consulted; his opposition is unavailing. He is compelled to yield up his most cherished possession to the right of eminent domain which the State possesses. But the Constitution here interposes, and declares that a “just compensation” shall be made for the property so appropriated – that the injured party may have his damages assessed by a jury of the country; and it will not be disputed that when they are so assessed, they become a “debt” in the constitutional sense of the word, and being so, the Constitution of the United States restrains the State from enforcing their payment in any thing but gold and silver.

That a State law requiring such damages to be paid in canal scrip, is repugnant to the aforementioned provision of the Federal Constitution, is so clear that argument would but tend to obscure the proposition. A word or two upon the subject of “just compensation” may not be misplaced. It seems to us that the clause in our own Constitution requiring it, should be carefully guarded and most scrupulously observed. In all enlightened nations, even where there is no constitutional requirement on the subject, we are told by writers on public law, that to maintain secure to the citizen the enjoyment of his private property is one of the chief ends of government and a most sacred obligation. Vattel’s Law of Nations, 5, 113; Rutherford’s Inst., 372; 2 Burlamaqui, 150; 1 Am. Law Mag., 318. In this age of improvement, there is, perhaps, no point at which the rights of the citizen are more likely to be overlooked and invaded by the government, and consequently none where they should be more vigilantly watched, than at this.

What, then, constitutes a “just compensation” for private real property appropriated to public use, considered both as to the amount to be paid, and the manner of payment? A precise and definite answer to this question is not very easily given. It is a difficult matter to estimate the amount of compensation to which a man is entitled for the loss of such property, chosen by himself. A piece of ground may possess a value in the eye of its owner,

not appreciated by others. These considerations form the principal ground of chancery jurisdiction in decreeing the specific performance of contracts in relation to realty. The nearest approach to a just compensation would seem to be to replace to the loser other lands equally valuable and desirable to him with those taken; but this can not, at least often, be done; and the next best alternative appears to us to be to pay him the fairly adjudged damage he sustains on account of the lands appropriated, in that medium of exchange which has a determined value and universal availability in the procurement of property. And we think we hazard nothing in saying, that a law authorizing compulsory payment for real estate or damage thereto, when appropriated by the State or its authority, in any thing but gold and silver, would not make adequate provision for a just compensation. Admit that it authorized the giving in quantity what should be estimated of the value in cash of the damages, and that in particular instances the compensation might be satisfactory, still we should regard the law objectionable. The thing given might not always be available at the time its worth might be needed by the injured individual; it might depreciate after assessment and before payment. Such a law, in short, would take from the owner a certainty, permanent property of his own choice, and subject him to the reception, in compensation, of what he might not want, and to the risk of the sudden fluctuations to which it might be exposed. Nothing short of gold and silver, the value of which is comparatively certain and changeless, and with which, better than with any thing else, can at any time be commanded what the possessor may desire, can adequately compensate a proprietor for what he is compelled to surrender to the public use.

To prevent misconstruction, we may remark that in what we have said we refer only to the real damage actually sustained by the proprietor, and take it for granted the jury are to be governed, in determining the amount of that damage, by the principles laid down in *McIntire v. The State*, and *The State v. Digby*, 5 Blackf., 384, 543.

Were the act of 1842, then, rightly regarded as extended to the compensation to be made for damage to real estate taken for the canal, it is clear we should be compelled to declare it, that far, void. But we do not think it does so extend. Its language does not necessarily require so broad a construction, and we are to presume the Legislature did not intend to pass its constitutional limits. As to these damages, the law stands as it did before the passage of the act in question.

Per Curiam.

The judgment is reversed with costs. Cause remanded, &c.

***Ogden v. Slade*, 1 Tex. 13 (1846).**

Supreme Court of Texas.

F. W. OGDEN

v.

W. SLADE

December Term, 1846.

Appeal from Jefferson County.

A note payable “in the lawful funds of the United States” is payable in gold or silver.

Where a note contains an alternative provision, which allows the maker to discharge it in money “or its equivalent;” such provisions may restrain its negotiability according to the rules of the common law, and prevent the transferee from maintaining a suit upon it in his own name; but the rule in equity is otherwise.

Under our blended system of law and equity, the assignee of a note, not negotiable, is entitled to the benefit of the equitable rule, and may sue upon it in his own name. The facts of this case are fully stated in the opinion of the court.

No counsel appeared for the appellant.

Buckley, for appellee.

The court did not err in ruling out the note pleaded as a setoff, because not being payable in *money*, it was not negotiable; and not being negotiable, the appellant could not maintain a suit thereon, either as plaintiff or defendant, in his own name. 2 Bl. Com. 442.

The note was executed previous to the passage of the statute, allowing an assignee to maintain a suit in his own name, to wit: on the 13th January, 1840, and is not embraced within the provisions of the statute, because said act operates only prospectively upon future contracts. Texas Laws, vol. 4, 145, 146. The note sued on by the appellee was for a specific debt or sum certain; and the instrument pleaded in the setoff, being for uncertain damages – not being for money – could not be set up by appellant against the appellee’s demand under the statute. Laws of Texas, vol. 4, 62, 63.

LIPSCOMB, J.

This is an appeal from the district court for the county of Jefferson.

The suit was brought by the appellee against the appellant, on a promissory note for the sum of three hundred and thirty-one dollars. The defendant in the court below pleaded in setoff against the plaintiff a note in the following words:

“On or before the first day of December next, we, or either of us, promise to pay John D. Swain or bearer, the sum of four hundred dollars in lawful funds of the United States or its equivalent, for value received, the same being secured by mortgage on one section of land situated on the east bank of the Neches river, witness our hands this 13th day of January, 1840.

(Signed.)

WILLIAM S. WILSON.

WILLIAM SLADE.”

The defendant alleged that he was the owner of the note so offered by him in setoff for a valuable consideration, and that it had been transferred to him by delivery before the commencement of the suit. The presiding judge on the trial rejected the note, and would not allow it to be given in evidence as a setoff; from which decision the defendant appealed. The cause has not been argued, but submitted on the brief of the appellee’s counsel only. It is to be regretted that a question of so much importance in relation to the practice had not been fully argued. The appellee objects to the setoff because it is said to be for an uncertain sum. The note calls for four hundred dollars, lawful funds of the United States. What is the plain meaning of “lawful funds?” Gold and silver is the only lawful tender in the United States. It must therefore mean payment in gold or silver. By equivalent, the parties must have meant such paper currency as passed at par with gold and silver. This alternative of an equivalent would perhaps restrain the negotiability, and destroy the mercantile character of the paper, so that it could not pass by delivery, and the holder might not maintain a suit in his own name on it at common law. This test would perhaps be decisive of the right to plead it as an offset, if we were to apply to it the rules of the common law courts; but we believe that under our very peculiarly blended system of law and equity, if the appellant’s right to the note and interest in it are found to be such as would be protected and enforced by the rules of equity, he ought to have the benefit of those rules.

By an act of the congress of Texas, of the 5th February, 1840, to regulate judicial proceedings, section 12, it is enacted “that in every civil suit in which sufficient matter of

substance may appear upon the petition to enable the court to proceed upon the merits of the cause, the suit shall not abate for want of form. The court shall, in the first instance, endeavor to try each cause by the rules and principles of law; should the cause more properly belong to equity jurisdiction, the court shall without delay proceed to try the same according to the principles of equity.” Under the provisions of this law, it seems to us, that when the note offered in setoff by the defendant was presented by the plea, the court below should have inquired first, if it was well pleaded at law? if it was not, the next inquiry should have been, could it be supported on the principles of equity jurisprudence? We have before intimated that by the strict rules of the common law, the defense was bad. Can it then be sustained as an equitable setoff, the defendant in the court below having averred that he was the owner of the note for a valuable consideration, before the commencement of the suit?

Judge Story, in his commentaries on equity jurisprudence says, that “an assignment of a debt may be by parol as well as by deed, and as the assignee is generally entitled to all the remedies of the assignor, so he is generally subjected to all the equities between the assignor and his debtor.” Story Com. 344.

Again, in speaking of courts of law protecting to some extent such parol assignments of choses in action, he remarks “that there is this difference between the courts. In the courts of law, the suit must be brought in the name of the assignor, although the right of the assignee will be to some extent recognized. On the other hand in equity the assignee may sue on such assignment in his own name, and enforce payment of the debt directly.” Id. 317, 318. This, we have no doubt, is the well settled doctrine on assignments of this description in the courts of equity, and it would be superfluous to enlarge upon other authorities. The conclusion is that the offset ought to have been received in the court below. We are aware that it may appear awkward and novel to those who have been accustomed to look upon the two jurisdictions as rivals, to have them brought in such close and harmonious connection; but if it be a furtherance of justice to simplify the remedy, and render it shorter and less expensive to the parties, the beneficial results of the law will be acknowledged. Nor is this combination an anomaly. In the jurisprudence of the state of Pennsylvania, the principles of equity have always been administered under the rules of the courts of law. The judgment of the district court for the county of Jefferson is reversed, and the cause remanded for further proceedings in accordance with this decision.

***Cockrill v. Kirkpatrick*, 9 Mo. 697 (1846).**

Supreme Court of Missouri.

COCKRILL

v.

KIRKPATRICK.

January Term, 1846.

ERROR TO RANDOLPH CIRCUIT COURT.

DAVID TODD, for Plaintiff. The plaintiff insists upon these points to reverse the judgment: 1. That evidence to prove witness' understanding of the legal effects of a contract, to be different from the substantial contents of an absent contract, is illegal and incompetent. 7 Mo. R. 515. 2. If the defendant has collected money for plaintiff, and a demand is made, and no payment, a recovery can be had, and for interest from refusal. 3. A demand may be inferred, and is not to be proven in express terms. 4. When money is tendered and not received, upon suit the plaintiff can recover the principal, and unless the money is in court upon the plea of tender, and there paid over, judgment must go for the plaintiff. 13 Wend. 390. 5. That if a note is payable in currency at a particular day, and is not paid on that day by the pay or, and it is his duty to seek the creditor for that purpose, he is not permitted subsequently to pay it in such currency without the consent of payee. 6. A plea of tender made of such currency after such day of payment, is not good.

JOHN B. CLARK, for Defendant. The defendant in error relies upon the following points and authorities to sustain the decision of the Circuit Court: 1. The defendant in this case was but the agent of the plaintiff in the collection of the money in the note, and had a right to collect the same in the kind of currency contracted to be taken by the plaintiff, although nothing was said in the note about the kind of money agreed to be paid and received in discharge; yet if there was an agreement to take currency, and the agent received the same kind of money agreed to be taken by the principal, he is bound to receive the same from the agent. Theobald on Agency, 356. 2. In this case the plaintiff has no right of action until he makes a demand of the agent to account. This principle has been decided by this court in the cases of Benton v. Craig, 2 Mo. R. 189; Burton v. Collin, 3 Mo. R. 315. 3. There being no special instructions to the agent in this case, and he having transacted the business of his principal in the usual manner observed in the country at that time, the principal was bound, and the agent absolved from any liability, although a loss ensued. Theobald on

Agency, 356.

MCBRIDE, J.

Cockrill brought his action before a justice of the peace in Randolph county, against Kirkpatrick, for money collected by the defendant for the plaintiff, where the defendant obtained judgment; from which the plaintiff appealed to the Circuit Court, where the defendant again having judgment, the plaintiff sued out his writ of error and has brought his case to this court.

The following is the evidence as preserved by the bill of exceptions, to-wit: R. Denson testified that he was indebted to Noble on a note: that said note was assigned by Noble to the plaintiff: that above two years ago he paid the amount, \$30.12 1/2, to the defendant, who had said note for collection; that he paid said note in Illinois bank paper, except 12 1/2 cents which he paid in specie: that it was paid in notes on the Springfield or Shawneetown Bank. His note to Noble was payable in the currency of this State: that it was his understanding that the note was to be paid in the common currency of the country, and that Springfield, Shawneetown, Indiana, &c., bank paper, was at that time the common currency of the country, but that there was more Illinois paper than any other kind.

N. Coates testified, that about January, 1842, he was doing business in Cockrill's store in Huntsville, when defendant came there and said to plaintiff, I have collected or have got your money from Denson; plaintiff said very well, or I am glad of it; that witness then went into another room, and in a few minutes after, on his return, heard plaintiff say to defendant, I will not pay any such price, or any such charges; that he understood this to be in relation to a charge which defendant made for collecting the money; that the parties separated; he did not see or hear defendant offer plaintiff any money, nor did he see defendant have any.

J. R. Abernathy testified, that Springfield bank paper sunk greatly below par, and ceased to circulate generally, in the month of February, 1842; that previous to that time the money in circulation was principally Illinois, Kentucky, &c.

Thereupon the plaintiff asked the court to instruct the jury as follows: 1. That if they believe from the evidence that the defendant collected \$30.12 1/2 of the plaintiff's money, and that the plaintiff informed the defendant that he was ready to receive it, or demanded it, or done any act equivalent to a demand, they will find for the plaintiff, unless they also find that the defendant has since that time, and before the bringing of this suit, paid or tendered to the plaintiff the said money. 2. That it is not necessary that a demand should be proven positively, but the jury may infer a demand from the circumstances in the case.

3. That circumstances are sufficient to make out a demand. 4. That although the defendant is entitled to a reasonable compensation for collecting the plaintiff's money, yet it was his duty to pay all the money, over and above what would pay him such compensation, for his trouble, and labor, and time. 5. That "currency of Missouri" only means such money as is issued or received by authority of the laws of Missouri or of the United States. 6. That it is not competent for a party to a written contract, or others, to prove that the contract was different from the terms thereof, unless fraud or mistake is proven. 7. That currency, or current bank paper, may mean such bank paper as is in general circulation, but currency of the United States, or of the State of Missouri, should be construed such currency as is authorized by the laws of the United States or of the State of Missouri. 8. That if the jury find for the plaintiff, they may find interest on the money from the time the same ought to have been paid. 9. That a tender of money is the actual production, and offer to pay the money, or a declaration made by the party to whom the money is to be paid, that he will not receive it. 10. That the offer of money in gross, or in a bag, does not make a tender; but it must be counted out, or the proper amount offered without demanding change, unless the party to whom the money was to be paid, declared that he would not receive it. 11. If a tender in bank bill is refused, and the bills are uncurrent, or under par at the time, the jury may infer from that fact that their uncurrency, or deficiency in value, was the cause of objection. 12. That a tender only bars the plaintiff from recovering costs, but he is entitled to recover the amount due. The 2nd, 4th, 6th, 9th, 10th, 11th, and 12th were given; the 1st, 5th, and 7th refused; whilst the 3rd and 8th appear not to have been acted upon by the court.

The defendant then asked the following instructions to the jury: 1. If the jury believe the contract was made for such money as was current at the time when the same was due, the defendant had a right to collect the same in currency. 2. If the jury believe there was a tender of the money due, before the institution of the suit, and that the plaintiff refused to receive it, they will find for the defendant. 3. That the plaintiff in this case cannot recover, unless he or his agent made a demand of the defendant for the money before the suit was brought. 4. That if the jury believe a demand was made, yet if they believe the money was collected in the kind of money agreed to be paid, and that the defendant offered the same, and that the plaintiff refused to receive it when demanded, and after the defendant had offered to pay, deducting a reasonable compensation for collecting the same, they will find for the defendant. 5. A tender in bank bills or notes, is a good tender, unless specially objected to on that account at the time. 6. A tender and refusal to receive may be inferred from circumstances. All of which were given by the court except the sixth, which appears not to have been acted upon.

The record the proceeds, "Denson was then again called before the jury, and in the main said, that he thought said note read 'current money of Missouri,' but he was not certain."

The jury having found a verdict for the defendant, the plaintiff filed his motion to set aside the verdict and for a new trial, &c., which having been overruled, he excepted to the opinion of the court. Without undertaking to examine the instructions in detail, we shall investigate two or three points arising out of the case, as we believe a decision of those will decide the whole of the instructions.

If it be admitted that the note from Denson to Noble was payable “in the currency of this State,” then we shall not have much difficulty in ascertaining what are the legal rights of the parties. These terms import either, first, gold or silver coin, which is the constitutional currency of the United States, the “tender money” of the several States of the Union; or, second, the notes of the Bank of the State of Missouri, the issuing of which is authorized by the laws of this State, and cannot by any fair construction be made to mean the notes of the several banks incorporated by the laws of other States, which for the time being may have been in circulation in this State.

But if the note was “payable in the current money of Missouri,” as the obligor subsequently stated, then all necessity for construction is absolutely excluded, for the terms explain themselves, and can only mean “tender money,” gold or silver coin. And this, too, without invoking the aid of the principle, that the language in an obligation is to be taken most strongly against the maker thereof.

The courts of Kentucky have had much difficulty in construing contracts of the description of the one now under consideration. In the case of *Chambers v. George*, 5 Litt. 335, where the obligor undertook to pay a certain sum of money, “payable in the currency of the State,” it was held not to be a direct promise to pay money. Then in the case of *Lampton v. Haggard*, 3 Mon. 149, where the note sued on was for \$350, “Kentucky currency,” the court say, “that although the Bank of Kentucky was in operation, it paid specie for its notes, and continued to do so for some time after the date of the note, hence the term used could only mean gold or silver.” And in referring to the case of *Chambers v. George*, the court say, “that the note in that case was given after the suspension of specie payments by the Bank of Kentucky, and the non-payment of specie by other banks, subsequently established, had caused a paper circulating medium which in popular acceptance, became emphatically the “currency of Kentucky.” Again in the case of *McCord v. Ford*, 3 Mon. 166, an action was brought on a note promising to pay \$700, “current money of Kentucky,” and it was held, that this was a direct promise to pay, and the terms used do not import the same as in the case of *Chambers v. George*, but mean that kind of money made current by an act of Congress, which is the only current money of Kentucky. The court in the case of *Bainbridge v. Owen*, 2 J. J. Marsh. 463, interpret “current money” to mean constitutional coin.

From the foregoing cases we glean the fact, that the meaning of such restrictive or qualifying terms, depend upon the varying circumstances of the country. Whilst the banks in Kentucky redeemed their notes in gold and silver, the expressions amounted to nothing, they were imperative; but so soon as the banks suspended, then the parties were presumed to contract for the irredeemable paper currency of the State. Our bank, however, has not been forced into a position so humiliating, and our courts have not yet been driven to such extremities in endeavoring to satisfy the exigencies of the public on the one hand, and a faithful discharge of their duty on the other.

The only case decided by this court, which has been referred to, is the case in 7 Mo. R. 595, where the obligor promised to pay \$2,000, "in currency," and the court held the writing not to be a bill of exchange within the meaning of our statute concerning Bills of Exchange; and moreover, that the obligee could only recover the value of currency at the falling due of the note.

If the note in question be, as is contended for, payable in the bank paper of Illinois, Kentucky, Indiana, Virginia and Missouri, which constituted the principal paper circulation at the date of the contract, whose right would it be to designate in which of the various descriptions of paper the payment should be made? This would become an inquiry of some moment to the parties, because the relative value of the notes of the enumerated banks, might vary from five to twenty per cent. If Illinois, Indiana, Kentucky and Virginia bank paper constituted the "currency of this State," or "the current money of Missouri," then we concede that the payment in Illinois bank paper was a good payment; but if the paper circulation of the Missouri Bank, and gold and silver, constituted "the currency of this State," or "the current money of Missouri," then the obligor was bound for such paper and coin; and a payment in any other description of bank paper was not in conformity with the terms of the contract. We have no hesitation or difficulty in declaring that the undertaking in this case was to pay Missouri Bank paper, which was by law made the paper "currency of this State," or gold or silver coin, which by the Constitution of the United States, constitutes the "current money of Missouri," as well as of all the other States in the confederacy.

But the defendant's counsel contends that even if the note should be construed to mean what the plaintiff insists it does mean, yet the defendant, as the agent of the plaintiff, had a right to go behind the note, and receive payment in that description of currency, contracted for by the original parties, and refers to Theobald on Agency, 356, for authority. It is there said, "neither is an agent chargeable for a breach of his instructions, if the compliance would have been a fraud upon others." *Burwell v. Christie*, Cowp. 395. The technical answer to this, and the like cases, is, that the court will not permit a plaintiff to allege his own fraud. Thus an agent was employed to sell certain articles, and the condition

of the sale purported that the highest bidder should be the purchaser; but the agent had private instructions not to sell under a certain sum: notwithstanding which, he sold for the highest sum bid, though less than the sum prescribed; and upon an action brought against him by his employer, he had judgment in his favor, since he could not have obeyed instructions without practicing a fraud upon the bidders. But it would have been otherwise if the direction had been to set the article up at the price mentioned, since no fraud could have ensued from that circumstance. *Howard v. Christie*, 6 Term R. 347.

We do not think this principle applicable to the case now before us, for if the point be conceded that the note from its terms was payable in Missouri Bank paper, or gold and silver coin, then there is no principle of law by which the obligor would have a right to go behind the note to show that it was payable in a currency less valuable; and a contrary doctrine, in cases like this, would be most monstrous and mischievous. Here the obligor executes an instrument of writing, by which he binds himself to pay a certain sum of money in a way therein specified, at a day named, which writing is made assignable by law; and after assignment, when it falls into the hands of an individual who looks to the face of the instrument for the extent and character of the obligation, the obligor claims that although he has bound himself to pay the debt in the constitutional currency, yet it was his understanding that it was to be paid in irredeemable and worthless bank paper. And the agent of the assignee goes behind the written contract, and receives from the obligor, a discharge in this worthless paper currency, and when his principal demands payment, he says, I have done what in equity you ought to have done, and the law will hold me faultless. The fraud, if any there be in the transaction, is surely not chargeable against the assignee of the note.

The defendant had no right to prove the contents of the note without first showing its loss, or destruction, or otherwise accounting for its absence. FN(a) From anything that appears in the evidence, the maker of the note may have had it in his pocket, when he was testifying to its contents; and if so, it should have been produced, it being the best evidence; but in this case the non production of the note is not very important, inasmuch as the evidence of the witness does not qualify its legal import.

We are of opinion that before a principal can maintain an action against his agent for money received or collected by him for his principal, that a demand should be made. What constitutes a demand, is a question for the jury to decide, and in making their decision they are to take into consideration all of the attendant circumstances.

Tender is an offer to perform a contract, or to pay money, coupled with a present ability to do the act; and all the instructions about a sum in gross, and money in a bag, are outside of this case, for there is no evidence whatever upon which to predicate such an instruction.

Tender, like a demand, may be proven by circumstances, and need not be established by direct, positive, and unequivocal evidence. When established, it prevents the running of interest, and may save costs when the money is brought into court, and deposited; but the plaintiff is, notwithstanding, entitled to his judgment for his debt, as the tender is not a satisfaction of the debt due. The tender need not be in constitutional coin, but is good in bank paper, unless objected to on that account at the time; if made in depreciated bank notes, the refusal to accept, may be presumed to arise from the fact of such depreciation. FN(b) From the foregoing views, it results that the Circuit Court erred, and the other members of the court concurring herein, the judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

FN(a). See ante, p. 443.

FN(b). *Berthold v. Reyburn*, 37 Mo. R. 586; *Appel v. Woltman*, 38 Mo. R. 194; *Verges v. Giboney*, 38 Mo. R. 458.

Prather v. State Bank, 3 Ind. 356 (1852).

Supreme Court of Indiana.

PRATHER

v.

THE STATE BANK.

May Term, 1852.

APPEAL from the Jennings Circuit Court.

PERKINS, J.

Bill in chancery by Hiram Prather against the State Bank of Indiana, John Walker, Achilles Vawter, and Alanson Andrews, praying an injunction upon the collection of a judgment at law. Answers and replications were filed. No depositions were taken. The cause was submitted upon the bill, answers, and exhibits, and the bill was dismissed. The facts in the cause are, that at the March term, 1841, of the Jennings Circuit Court, the said state bank, for the use of her branch at Madison, obtained a judgment against said Prather, Walker, Vawter, and Andrews, for 548 dollars and 62 cents, and costs; that on the 20th day of January, 1842, a *fi. fa.* was issued on said judgment and placed in the hands of the proper sheriff; that on the 26th [day] of February following, and while said execution was in the hands of the sheriff, said Prather paid the amount of said judgment to said John Walker, a co-defendant therein, and the clerk of said Jennings Circuit Court, in manner specified in the following exhibit, to-wit:

“I, Hiram Prather, have this day paid to John Walker, clerk of the Jennings Circuit Court, five hundred and eighty dollars and six cents, the amount of a judgment and interest against me in favor of the state bank of Indiana – one hundred and twenty-five dollars in state bank paper and the balance in treasury notes. I do bind myself to make the amount bankable and to keep the said Walker harmless. February 26, 1842. Hiram Prather.”

The clerk executed to Prather this receipt, viz.:

“In the Jennings Circuit Court. State Bank of Indiana v. John Walker, Achilles Vawter, Hiram Prather, and Alanson Andrews. Assumpsit. Received of Hiram

Prather five hundred and eighty dollars and six cents, the full amount of the above judgment and interest, costs excepted, this 26th February, 1842. John Walker, clerk.”

Said clerk also made the following entry under the judgment:

“The above judgment is paid off, costs excepted. February 26, 1842. \$580.06.”

Prather subsequently paid the costs. Soon after receiving said paper from Prather, Walker forwarded it, by John Lodge, a conductor on the Madison railroad, to the branch bank at Madison. On its delivery to the bank, the cashier wrote to said Walker as follows:

“Madison, March 1, 1842. Sir: We received yesterday, by Mr. Lodge, the package of scrip and Indiana notes. I think Mr. Prather ought not to expect us to take those notes at par. They are now at a discount of 25 per cent. To get bankable money we will have to lose that. I will be willing to lose a part, but Mr. Prather ought also to lose a part. You know that we lent him bankable money, at six per cent. interest, which he pledged himself to pay to us without renewal; but he failed, and we have had to employ attorneys at a loss of five *per cent.* to us; so that I really think he ought to lose a part. Please write to me on the subject as soon as you can. Very respectfully, J. F. D. Lanier.”

The date and contents of the response to this letter do not appear, but it seems that in the course of a couple of months, Walker wrote requesting a receipt for the paper as a satisfaction of the judgment; in answer to which, Mr. Lanier immediately replied that it would not be so received, and returned the package. Walker, instead of redelivering it to Prather, subsequently appropriated it to his own use.

Nothing further appears to have been done till 1845, when the bank at first brought suit on the official bond of Walker, the clerk, but afterwards dismissed it and procured a new execution on the judgment against Prather and his co-defendants, whereupon this bill for an injunction was filed. Walker is insolvent.

Admitting, (without deciding,) for the purposes of this case, that the clerk possessed the same authority in regard to it as though he had personally no interest in the cause; and that he had the right to receive payment of the judgment while an execution was in the hands of the proper officer for its collection, still he had not, as clerk, the power to receive payment of said judgment in anything but gold and silver, without a previous authority from the plaintiff to do so. No clerk, nor sheriff, nor constable, as such, has a right, under the constitution and law, to receive payment of a judgment in anything but the legal currency of the country. *Griffin v. Thompson*, 2 How. U. S. Rep. 244; *McFarland v.*

Gwinn, 3 id. 717. No previous authority to receive paper is pretended to have been given in this case. The transaction, therefore, between Prather and Walker, by which the former delivered to the latter an amount of bank notes and scrip nominally equal to the amount of the judgment, was not a payment of said judgment. But though there was no payment at the time, still, the bank may have ratified the act of the clerk afterwards and accepted the paper in payment. This ratification may have been express, or it may be implied from circumstances.

We must inquire whether it has taken place. There has been no express acceptance of the paper. On the contrary, there was an express refusal to unconditionally accept it when sent to the bank; and a conditional acceptance, the condition not being afterwards assented to by one party nor waived by the other, amounts to no acceptance. And there was afterwards an absolute refusal to accept when the paper was returned. There is no circumstance from which an acceptance can be implied except the delay of the bank in returning the paper. The record does not fix the period of this delay, but the plaintiff claims it to have been two months. Admit it, and we think no negligence imputable to the bank. Prather had delivered to Walker that which he knew was not a legal tender in payment of the judgment, with the view of having Walker, as his agent, procure the acceptance of it by the plaintiff in payment. Walker sent the thing delivered to the bank, but gave no direction as to the disposition to be made of it in case of a refusal by the bank to accept it. It was his duty to have given such direction. He could not require the bank to send back the paper, which she had never asked to be sent to her, at her own risk; and the bank would not, perhaps have been justified, in the absence of instructions, in sending it back at the risk of Walker. On her refusal to accept the paper, therefore, she would properly suffer it to remain in her custody till it was called for by him. And it was the duty of Prather to look to the conduct of his agent, and see that the business was properly transacted; for, as we have said, Walker had not the power to receive this paper, as clerk, in payment of the judgment, and, hence could only receive it as the agent or depository of Prather. If Prather has been negligent, as is evidently the case, in calling his agent to account, he must suffer the consequence. The bank, immediately on the paper being left with her, notified Walker that it would not be accepted at par, and requested his further direction. She returned the deposit as soon, perhaps sooner, than she was required to. We think the bill was rightly dismissed. The decree is affirmed, with costs.

J. G. Marshall, for appellant.

S. C. Stevens, for appellee.

***Bone v. Torry*, 16 Ark. 83 (1855).**

Supreme Court of Arkansas.

BONE as adm.

v.

TORRY.

January Term, 1855.

A judgment or decree in a suit against a surety, is sufficient *prima facie* evidence of the liability of the security and of the liability of the principal over to him. Snider v. Greathouse, 16 Ark. 72.

And if the proceedings and judgment or decree, in such case, do not show that the plaintiff was the security of the defendant for the debt for which such decree or judgment was rendered, the fact may be proved by the other evidence.

This court cannot take judicial notice of the laws of other states: and, in the absence of proof of the fact, will not presume that a judgment, in favor of a Bank, for a specific sum of money, was payable in depreciated Bank paper.

A security, against whom a decree was rendered, pays the amount in cash and a note with security, which are received by the creditor in full discharge of the decree: and satisfaction entered of record: this is such a payment as will entitle the surety to maintain an action against the principal.

Appeal from the circuit court of Chicot County. Hon. John C. Murray, circuit judge.

Pike & Cummins, and Trapnall for appellant.

Walker, J.

On the 21st of April, 1852, George G. Torrey filed the following claim for allowance, in the Chicot probate court, to-wit:

“Estate of Allen Moore,
TO GEORGE G. TORRY, Dr.

To amount of money paid John Bacon, Alexander Symington, and Thomas Robins, assignees of William T. Irish, Volney Stamps, and James H. Murray, of a note executed by said Allen Moore, dated January the 4th, 1840, payable on the first of January, 1841, for the sum of fourteen hundred dollars, which said note was signed by said George G. Torry, as security for said Allen Moore, and for eight per cent. interest per annum, and on a judgment previously had thereon, and a decree was rendered against said George G. Torry and others, in the vice chancery court, held at Natchez, State of Mississippi, on the 29th of December, 1849, for the sum of twenty-five hundred and sixteen dollars and eighty cents, together with interest, from said date, as aforesaid, and costs amounting to the sum of, for principal and interest to 29th of May, 1851, \$2,802.03.”

This account was sworn to in the usual form, and after several continuances had, the claim was allowed by the probate court of Chicot county, and ordered to be classed for payment, Exceptions were filed to the decision of the probate court, and an appeal prayed and taken to the circuit court of said county.

At the April term, 1853, of the Chicot circuit court, the case came up for hearing, upon the assignment of errors and exceptions taken to the judgment, and decision of the probate court; and it was upon consideration, held by the circuit court, that there was no error, in law, or fact, in the records and proceedings of the probate court; and the judgment of said court was, in all things, affirmed, with costs. From which judgment and decision, the administrator of the estate of Moore, has appealed to this court.

The whole case turns upon the sufficiency of the proof adduced before the probate court to establish the claim against the estate.

In order to entitle Torry to a judgment of allowance of this claim against the estate of Moore, it devolved upon him to prove that he was the security for Moore, and that, as such, he actually paid the sum claimed.

It is objected that the transcript of the record of the judgment from Mississippi, against Torry, and the decree also rendered in the vice chancery court against him were not sufficient evidence to establish this fact, because Moore was not a party to either of these suits, nor does it appear from the record in either suit, that Moore was a party to the note sued upon.

Upon examination of the record, this objection appears to be well taken in fact, and, we apprehend, as this is the case, that the record would, of itself, be insufficient to connect Moore as a party, bound in the original contract, either as principal or as security. But the

claimant did not rely alone upon the record, but introduced evidence to prove, and, we think, did sufficiently prove that this judgment was rendered upon a note executed by Moore, as principal, and Torrey as security. The attorney who brought the suit testifies to this, as well as the agent for the plaintiffs in interest in the suit. The attorney says that he brought the suit against Torrey, the security, alone, because, as is his impression, Moore was beyond the reach of process at the time. Moore himself recognized his liability as principal, and proposed to the agent to compromise the debt by paying 70 or 75 cents on the dollar; he complained that the consideration had failed, and that it was a hard case on him. From the time when this conversation took place, it may be inferred that it was after the judgment at law, and perhaps about the time of the rendition of the decree. It is objected that there is no evidence of the assignment; and, therefore, if the payment was made, it is not shown to have been made to the creditor. The testimony of both the agent and the attorney shows that there was a blank endorsement upon the note, and this we have held to be sufficient. This seems to have been made after the commencement of the suit at law, and before judgment. But, independent of this, Moore himself fully recognized the right of the plaintiffs by proposing to compromise and settle with them.

Torrey defended the suit at law, and judgment went against him. The reason why the money was not collected upon the judgment seems to have been because the charter of the Planter's Bank, in whose name the suit had been commenced, had been declared forfeited, and the assignees filed their bill to have the money collected and paid over to them. It is true that in the chancery suit he withdrew all defense, and this seems to have been done by agreement to give him time to pay. It is not shown what defense he might have made; indeed, after the judgment at law which was defended, it is not very clear that any defense could have been interposed. It is true that Moore complained that the consideration had failed, but there is no evidence that Torrey was aware of this. But whether so or not, and, although we do not question but that, if there had been collusion between the security and the creditor, whereby the judgment was taken for a larger amount than was really due, the principal might, notwithstanding the judgment, show that fact. But we have held, at the present term, in the case of Snider v. Greathouse, that the record was *prima facie* evidence of the liability of the security, and of the liability of the principal over to him to pay the amount recovered and paid by him. This the administrator has not done; and, therefore, the decree must be held sufficient evidence of the true amount due to the creditors.

The administrator contends that this debt might have been discharged with the paper of the Planter's Bank of Natchez, which was only worth about 50 cents on the dollar; that the security should have looked to this, and have bought in the paper at the market price. We are not aware of any statute of Mississippi that would compel the creditors to take depreciated bank paper in discharge of that debt. We are not required to take judicial notice of the statute of a sister State, and there is no evidence upon the subject. The judgment was

for dollars, and the payment, so far as the facts are before us, could only have been made in gold or silver, the constitutional coin. FN1

The next question is, was the money paid, or was the debt so satisfied and discharged, as to the amount to a payment.

From the proof, it appears, that one thousand dollars were paid in a draft, which was cashed, and that on the first day of December, 1851, the time of the final settlement of the decree, Torrey executed his note with security, to the creditors, for \$1,782.80, payable five months after date, in full satisfaction for the decree, but the notes, up to the date of the examination of the witness, had not been paid. The decree was entered of record fully satisfied, and receipts showing the payment thereof given.

As a general rule, a surety cannot support an action against the principal debtor for money paid for the principal, if he has merely given security for payment. 2 Stark. Ev. 1060, *Morris v. Berkey, Sergt. & Rawle*, 238.

But where the creditor, by express agreement, receives a note in payment of a debt, or bank paper, or property, there would certainly be no good reason why such payment, so accepted, would not be a complete satisfaction of judgment debt; because, as between the debtor and creditor, it is for the creditor to say when he has received a full compensation in satisfaction of his debt.

But as between principal and security, where the security pays or satisfies the debt of his principal, by the execution of a new security, or by the payment of property, or depreciated paper currency, there would seem to be more doubt; because, the liability of the principal to pay the security, is founded upon a payment or satisfaction of the debt by the security, and the liability of the principal is limited to the actual loss sustained by the surety by reason of his surety-ship.

If the surety pays the debt, in depreciated paper currency, or in property, the real value of the paper, or property, would be the extent of the loss to the surety; and, consequently, of the liability of the principal over to him, unless by express contract with the creditor, he is subrogated to all the rights of the creditor. *Hickman & Pearson v. McCurdy*, 7 J. J. Marsh. R. 560.

In the case before us, there was no payment, either in depreciated paper or property. The decree was paid by draft for \$1000, which was cashed, and a note with security for the balance. Was that note equivalent to cash, or is it such a satisfaction of the decree as to raise an implied promise to pay, on the part of the principal debtor?

That the decree was fully and completely discharged and satisfied, and that, too, by the security, there can be no doubt, and it is equally clear, that such discharge was as effectual for the principal, as if paid by himself. This payment of an approved note, by which the surety bound himself to pay the amount in cash, must, we think, be held *prima facie* equivalent to a payment in cash. In *Cornwall v. Gould*, 4 Pick. Rep. 444, it was held that a surety, who had extinguished the debt by giving a separate promissory note for it, might maintain *indebitatus assumpsit* against his security. Such was, also, the decision of the Supreme Court of New Hampshire, in *Pearson v. Parker*, 3 N. H. Rep. 366.

In *Stone v. Porter*, 4 Dana, 207, it was held, that a payment in bank notes by surety, would entitle him to maintain an action of *indebitatus assumpsit*; and Judge Robinson, who delivered the opinion, remarked that if individual bills or notes had been received by the creditor in payment of his demand, the surety might maintain *indebitatus assumpsit*. Such, too, was the decision of the Supreme Court of New York, in *Whitelerby v. Mann*, 11 John. R. 518. And the Supreme Court of Kentucky, in *Robinson v. Maxey*, 7 Dana, 105, reviewed its former decisions, and those of several of the sister States; and, in answer to the objection that the money must be, in fact, paid before *assumpsit* can be maintained, said: “The law will not speculate on such remote contingencies. On the contrary, it will not consider the substituted bond as equivalent to the amount of it in money, because it was so considered by the parties to it, and may be, and probably is, a full equivalent.”

The presumption that the note was so received, may no doubt be repelled by evidence, showing that it was accepted by way of compromise, and was not taken, or held as equivalent to the nominal amount in money; but, in the absence of such proof, the better opinion would seem to be, to treat the substituted note as cash. None of the objections can well arise here, that have been urged in some of the cases, that the proof must correspond with the allegation, and that proof of a note executed, will not sustain a money count, because, in this case, there was no formal pleadings, and we only look to the substance of the issue.

No valid objection can be raised to the amount of the allowance by the probate court. That was evidenced by the decree of the vice chancery court, at Natchez, and as we have held, was at least *prima facie* evidence of the amount really due upon the claim.

Let the judgment of the circuit court be affirmed.

Absent, Mr. Justice Scott.

FN1. On foreign judgments see *Barkman v. Hopkins* 11-168, note 1.

Reynolds v. Bank of State of Indiana, 18 Ind. 467 (1862).

Supreme Court of Indiana.

REYNOLDS

v.

THE BANK OF THE STATE OF INDIANA.

May Term, 1862.

The act of Congress making treasury notes a legal tender, is constitutional and valid, and the banks of Indiana, by redeeming their paper in treasury notes, do not expose their franchises to forfeiture.

Hanna, J. dissenting.

APPEAL from the St. Joseph Circuit Court.

PERKINS, J.

On the 1st day of April, 1862, John Reynolds presented to the Branch, at South Bend, of the Bank of the State of Indiana, certain notes or bills issued by that Branch, in the exercise of power conferred by the charter of the bank, and, within the usual banking hours, demanded their redemption in coin. The Branch refused to redeem the notes in coin, but offered to redeem them in treasury notes, issued under late acts of Congress, and declared, by act of Congress, to be a legal tender. These treasury notes, issued, as they are, upon no specie basis, but simply upon the indebtedness and credit of the government, and designed to circulate as money, fill the definition of bills of credit. The Circuit Court decided against the plaintiff, holding that the bank might redeem in treasury notes. The charter of the bank contains this section:

“Sec. 8. The said bank shall not at any time suspend or refuse payment, in gold or silver, of any of its notes, bills, or obligations, due or payable, nor of any moneys received upon deposit; and if said bank at any time refuse or neglect to pay any bill, note, or obligation, issued by such bank, if demanded within the usual banking hours, at the proper branch where the same is payable, according to the contract, promise, or undertaking therein expressed, or shall neglect or refuse to pay on demand, as aforesaid, any moneys received on deposit, to the person or persons

entitled to receive the same, then, and in every such case, the holder of any such bill, note, or obligation, or the person or persons entitled to demand or receive such moneys, as aforesaid, shall respectively be entitled to receive and recover interest on their said demands, until the same shall be fully paid and satisfied, at the rate of twelve per centum per annum, from the time of such demand, as aforesaid; and any branch so failing to meet its engagements, may be closed, as in case of insolvency.”

In the present condition of the country, if the bank proceeds, under this section of the charter, to redeem her circulation in coin, she will probably destroy herself, ruin a large portion of her debtors, and distress the people; while, on the other hand, if she is legally bound thus to proceed, and does not, she will thereby, also, put her own existence in jeopardy.

In this dilemma, the bank asks for a speedy decision of the pending cause, and the plaintiff joins in the request.

The Constitution of the United States, art. 1, sec. 10, ordains that no State shall “coin money; emit bills of credit; make anything but gold and silver coin a legal tender,” &c. Indiana, in loyal submission to this limitation upon her power as a sovereign State, in framing her Constitution, provides, art. 10, sec. 7, that “all bills or notes, issued as money, shall be, at all times, redeemable in gold or silver;” and, as we have seen, the Legislature, in chartering the Bank of the State of Indiana, an institution created to issue a circulating medium of paper, required of her a compliance with this constitutional provision. Sec. 8 above quoted. From such compliance, the State can not release the bank; can the United States do so? is the question.

If the United States, under the Constitution, can make treasury notes a legal tender in payment of debts between citizen and citizen, she can make them thus between the States of the Union, corporations and citizens. And, coming now to the particular case before us, as the section in the charter of the Bank of the State above quoted was inserted to make it conform to the restriction upon the power of the State, imposed by the Constitution of the United States, viz: that a State shall not create money in the constitutional sense of that word, and shall not, by her own laws, recognize anything as such but gold and silver, it is not reasonable that we should construe that section as a restriction upon the right of the bank to avail herself of the privilege of using anything else as money, as a legal tender, which the United States, by her laws, might legally declare to be such. The true interpretation of the section must be that the bank shall not refuse to redeem her bills in what the Congress shall constitutionally make legal tender money. The bank can not be compelled to receive treasury notes from the citizen, in one hand, and pay to the citizen gold and silver in the other. Under this construction of the charter, the act of Congress in

question does not impair its obligation regarded as a contract. But, it may be remarked, if Congress can impair the obligation of contracts between citizens, in this particular, it can also, between citizens and corporations, and the States and corporations.

The decision of the cause, then, must turn upon the question, can Congress make treasury notes a legal tender? Can it make anything but gold and silver coin a legal tender? The answer to this question must be drawn from the Constitution of the United States; for it is a judicially established proposition that Congress can exercise such powers only as are granted, expressly or incidentally, by that instrument And the same rule applies to every other department of the government.

It may be further observed, that if the proposition just stated is not true in every particular, then is our government practically, one of unlimited powers, and the constitution a delusive bauble.

We proceed to investigate the question above propounded.

1. The power to make treasury notes, or anything else but coin, a legal tender, is not expressly given in the constitution. The money-making power is granted to Congress in these words: "Congress shall have power to coin money, regulate the value thereof, and of foreign coin."

2. Is such power granted as an incident to any substantive power? That it is not, the following considerations strongly tend to prove, viz:

1. The convention which adopted the constitution not only did not grant, but they expressly rejected it as a substantive power, and for the distinctly declared purpose of preventing its exercise, by Congress, under any pretext or circumstances whatever; and this, too, after the power had been once expressly granted to the Federal Government; and the States subsequently ratified the constitution with this understanding. Articles of Confederation, sec. 5; Elliott's Deb. vol. 1, pp. 258, 276, 413, and 531; Madison Papers, vol. 2, p. 1,232; 3 id. 1,343, et seq.; Court. Hist. Const. vol. 2, pp. 328, 329, 364; 2 Story Com. on Constitution, 2d ed. commencing at section 1,358.

The above proposition is established by the debates in the convention; see Mad. Pap. supra; by the communication of members to their respective States; see Elliott's Deb. supra; and by the fact that members of the convention were members of the State ratification conventions.

2. Such paper is unequal to the functions of a national currency.

It is claimed that the power to emit bills is an incident to that of regulating commerce – that a medium of exchange, currency, is a necessity of commerce, and its creation an incident in the regulation of commerce. This argument is not as satisfactory as could be wished. It has apparent weaknesses.

1. As matter of fact, the bills are not emitted on account of commerce. Commerce does not apply for their issue.
2. They are not needed for domestic commerce; for foreign they are useless.
3. Currency, as a medium of exchange, is a great necessity of commerce, and it is an acknowledged power of every government to ordain what shall constitute that currency. Governments have done so; and, throughout the civilized world, they have all concurred in declaring that gold and silver shall be that currency. Why they have so declared will be seen as we advance. Now, the precise question of what should be the currency of this nation, what should be its medium of commerce, what should be used to meet that necessity, was the one that was before the convention which constructed the frame of our government, and they ordained and established, by the paramount, the fundamental law of the nation, that that currency should be gold and silver, or paper issued upon, and as the representative, of gold and silver, and not bills of credit issued simply upon the indebtedness and faith of the government. Hence, it would seem that there could be no incidental power over this question connected with the regulation of commerce.

And here the question occurs, why was it ordained by our constitution that coin should constitute the currency of this nation? As we have seen, currency is the medium of commerce, is created for commerce, and it is a necessity that it should consist of something that will circulate co-extensively with commerce; but commerce is not limited by geographic lines; its domain is the world; the republic of commerce is as expanded as the globe. Hence, to be equal to the exigencies of the subject, the currency must consist of that which will circulate with equal credit all over the globe; something that possesses an intrinsic value – a value not dependent upon the duration or condition of governments, that revolutions and changes in political organizations will not affect; for commerce looks not to, and does not depend upon, the forms of such organizations. The gold and silver in the rebel republic to-day is as good, the world over, as is that of the old legitimate republic, while its bills of credit are becoming as worthless as withered leaves. Such a currency, the experience of the world proves, paper can not be. Said Mr. Webster, in his speech on the currency, in 1837: “I am for a sound currency for the country. And by this I mean a convertible currency, so far as it consists of paper. Mere government paper, not payable otherwise than by being received for taxes, has no pretense to be called a currency. After all that can be said about it, such paper is mere paper money. It is nothing but bills of credit. It always has been, and always will be, depreciated. Sir, we want specie, and we want paper of universal credit, and which is convertible into specie at the will of the holder. That system of currency, the experience of the world, and our own experience, have

both fully approved.”

Says Mr. Crawford, in his report, in 1820: “By the term ‘currency,’ the issue of paper by government, as a financial resource, is excluded.” *Funding Systems*, p. 734.

But while bills of credit will not furnish a sound currency themselves, they tend to exclude such a currency, viz: coin, from circulation, and to drive it from the country. As such paper will not circulate in foreign countries, the importer, when he has received his balances here in that medium, is compelled to go to the banks and brokers and exchange it for coin, which he takes abroad with him; and, at present, as our main produce-exports are cut off, their place must be supplied by specie; and, as the banks are not required to retain specie for the redemption of their own paper, if the bills of credit are a legal tender, they can and it is to be feared many of them will dispose of their entire stock, as it will command a premium over paper, and, ere long, this country be left with nothing but a pure paper medium, without the basis of a dollar of specie. To illustrate: The great bulk of our produce-exports, in years past, has consisted of cotton, tobacco and rice. The report of the Secretary of the Treasury for 1861, shows that the value of cotton, tobacco and rice exported in that year exceeded two hundred and ten millions of dollars. We are now deprived of these articles of export, and the vacuum must be filled by coin, or commerce be in proportion diminished. So, the interest on our vast bond-indebtedness to foreigners must be paid in specie.

The cotton crop of last year, it would seem, is to be burned, and it is scarcely possible that a crop should be raised this year, (the loss of two cotton crops in time of peace would revolutionize the commercial and financial world,) and thus, it would seem to be inevitable that a foreign demand will exist that must drain the entire specie from the country, as the counter home demand for it is removed by the bills of credit, if they are a legal tender; and when it is all exhausted, what will be done then?

These considerations were vividly in the minds of the convention that formed, and of the States that adopted our present constitution. They had before them the recent history of the issue of Continental and State bills of credit, and the disastrous results thereof to the country, and they determined to prevent a repetition of the evils. See the subject most thoroughly discussed in 2d Story on the Constitution, 2d edition, commencing at sec. 1348.

On the other hand, the legislative and executive departments of the Federal Government have, within the past year, for the first time in the history of the government, it is true, decided in favor of such a power, and have exercised it; and the disastrous consequences to the country that must follow a denial of the validity of that exercise of power, press hard upon the judiciary to sustain the violation of the constitution, if it be such, and thus create

a precedent for further usurpations.

But with the tribunal of last resort, such considerations should not have influence. The preservation of the constitution, in its letter and spirit, should be an object outweighing, with that tribunal, all considerations of temporary inconvenience. That such would be the course of this Court, on a question arising under our State constitution, we think its past action will amply sustain us in asserting. In the case at bar, our decision is but that of a *nisi prius* Court, and we had better err in acquiescing in than by declaring null the action of Congress.

Influenced, then, by deference to the action of the Federal Government; by the rule that all doubts must be resolved in favor of the law, (a principle that tends constantly to augment the powers of limited governments,) by the exigency of the time, by the consideration of the local injury temporarily to our State that would follow a different decision, and the fact that the question can only be decided finally by the Supreme Court of the United States, we hold that the act of Congress making treasury notes a legal tender is within the constitution and valid. Such will be the ruling of this Court till the Federal Court shall determine the question otherwise.

The Bank, by redeeming in treasury notes, does not expose her franchises to forfeiture.

HANNA, J.

I would much rather a decision of the question presented and discussed in this case could, in the present crisis, have been avoided. But as, by the force of circumstances, over which I have no control, a compulsion seems to rest upon me to pass it, I deem it proper to say that, professing to be guided by the plain teachings of the constitution, and knowing in judicial decisions no higher law, I can not accord with the conclusion of the Court; for, conceding the facts and arguments, stated by the Court, to be legitimate, and it, in my opinion, as inevitably follows, as the light of high twelve succeeds the morning hour, that by the constitution the right is not vested in Congress to make a paper named a legal tender in payment of private debts. This would dispose of the question without considering the power of Congress to abrogate an express provision of a State constitution.

Per Curiam.

The judgment is affirmed with costs.

***Perry v. Washburn*, 20 Cal. 318 (1862).**

Supreme Court of California.

PERRY

v.

WASHBURN.

July Term, 1862.

APPEAL from the Twelfth Judicial District.

Application for mandamus. The petition of the relator shows that on the 24th day of July, 1862, defendant was tax collector of the city and county of San Francisco, and that the relator then owing city and county taxes assessed to him on his property to the amount of \$270.45, on that day tendered to defendant as collector the said amount in United States notes issued under the Act of Congress of February 25, 1862; that the said collector refused to receive said notes, and refused, though requested, to give relator a receipt showing the payment of his taxes as it was his duty to do, and as was enjoined upon him by law. Wherefore, a mandamus was prayed, commanding the defendant to receive the notes for the taxes, and execute the receipt. Defendant answered, admitting his official character, the correctness of the amount of taxes alleged to be due, the tender of the notes, and his refusal to receive them and to execute the receipt, and denying that it was his duty to receive the notes, or anything else than “legal coin of the United States, or foreign coin at the value fixed for such coin by the laws of the United States,” in payment of the taxes due.

The case was submitted to the District Court upon the pleadings and without argument, and judgment was rendered in favor of the defendant, refusing the mandamus prayed for, from which judgment the relator appeals to this court.

Taylor & Hastings, for Appellant.

In behalf of the appellant, we shall endeavor to establish these propositions:—

First— That the Congress of the United States has the power, under the Constitution, to create paper money and make it a legal tender, and constitute it the currency of the nation.

Second— That Congress has exercised this power.

Third— That the act of Congress making “United States notes” lawful money, and a legal

tender in payment of all debts, public and private, within the United States, obliges every individual within the United States to receive such lawful money in payment of any debt, and enjoins the State, and every municipal corporation created by the State, to receive it in payment of its taxes.

Fourth— If there be anything in the revenue laws of this State conflicting with this law of Congress, then the former are subordinate to the latter; and so far as they conflict, the State laws stand repealed.

I. Congress has power to issue these notes, make them lawful money and a legal tender, and constitute them the currency of the nation. Congress derives this power from the Constitution of the United States, article i., section 8, subdivisions 5 and 17.

They recite that Congress shall have the power. “5. To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures.” “17. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or any department or officer thereof.”

The meaning of the words quoted from subdivision 17, their scope and aim, have been defined and settled by the Supreme Court of the United States.

At an early day the bank of the United States was incorporated, with full power to issue bank bills and notes. That such incorporation and action by Congress were constitutional, has been repeatedly affirmed by the Supreme Court of the United States, and upon this single subdivision 17 of section 8. We refer at length to *McCulloch v. State of Maryland*, 4 Wheat. 316; *Osborne v. United States Bank*, 9 Wheat. 738, 859, 860; 1 Kent’s Com. § 12, pp. 268, 269, *et seq.* and notes; Story on the Constitution, vol. 2, ch. 25, §§ 1259-1271; Sargent on the Constitution, ch. 28, 30; 5 Marsh. Wash. App. n. 3; Hamilton on Bank, 1 Ham. Works, 138-154; cited in Story on Constitution, n. 4 to § 1267.

The reasoning found in these authorities, and others hereafter cited, which upholds the various acts of Congress creating the United States Bank, and the consequences incident to its creation, establishes the constitutionality of the present act.

The argument against the bank was, not that Congress had no power to create a paper currency and make it a legal tender in payment of debts, but that Congress had no power to create a corporation. It was admitted that “treasury orders” might issue, but objection was made to bank bills. (Story on Constitution, §§ 1260, 1261; Hamilton’s argument for the Bank, *supra*.)

But the court sustained the bank, on the idea “that the bank is an instrument which is necessary and proper for carrying into effect the power vested in the government of the United States.” (Marshall, C. J., in *Osborne v. United States Bank*, 9 Wheat. 860, *et seq.*) And upon the same idea and falling entirely within it, the court must sustain the legality of these treasury notes.

In brief review we bring to notice some of the incidental powers exercised by virtue of the clause under consideration to show the liberal construction it has hitherto received. Less questionable ones might be produced; but that the argument may be of the strongest character, the following have been selected: The power to lay an embargo (2 Story on Constitution, ch. 27); the power to establish a military academy (2 Story on Constitution, § 1281); the power to pass alien and sedition laws (2 Story on Constitution, §§ 1293, 1891); the power to give priority to the United States as a creditor (2 Story on Constitution, § 1278; *U. S. v. Fisher*, 2 Cranch, 202; *United States v. Howe*, 3 Cranch, 73; *Thelluson v. Smith*, 2 Wheat. 396; *Conard v. Atl. Ins. Co.* 1 Peters, 388); the power to protect domestic manufactures. (1 Story on Constitution, §§ 958-966.) And for a further summary, *vide* Walker’s Am. Law, ch. 10.

Clear and indisputable as this position is, there is another which sustains our views in regard to the constitutionality of this act of Congress.

Section 8, subdivision 5, empowers Congress “to coin money, regulate the value thereof, and of foreign coin.” This power is vested exclusively in the federal government. (Const. U. S. art. i. § 10.) Individual States are prohibited from exercising it, and appellant claims that this power, rightly interpreted, authorizes the issuance of these notes; that the issue of them is coining money; that the obvious meaning of the clause is, that Congress shall have full power to create money.

To support this view, we ask the court’s attention to the definitions of the words “coin” and “money,” and then to the consideration of the legal rules of interpretation and construction applicable to the Constitution.

Webster defines the verb “coin”:— “1. To stamp metal and convert it into money; to mint. 2. To make or fabricate for general use. 3. To make; to forge; to fabricate.” He also declares the word to mean, primarily, “striking, impressing, imprinting money.” Coinage is defined “a making; a production; a formation.”

Worcester defines “coin,” verb: “1. To convert into money. 2. To fashion or form by stamping. 3. To invent; to fabricate.” “Coinage, the art or the act of coining money.”

Barclay defines coinage to be “the stamping of metals or making money.”

“Coinage is the art of fabricating money.” (7 Ency. Britan. p. 67.)

“The States cannot coin money; can they then coin that which becomes the actual and almost universal substitute for money?” (See Webster’s speech on the Bank of the United States, May 25th to 28th, 1832; Story on Const. § 1120.)

“Money is a measure of value and medium of exchange.” “Coinage is the art of fabricating money.” (Ency. Britan. cited above.)

“Money: the medium of exchange used by any people. At the present day, among civilized nations, confined entirely to metallic coins and bank notes.” (10 New Am. Cyclo. p. 644, article “money.”)

“Money: bank notes or bills of credit issued by authority are also called money.” (Webster’s Dic.)

“Money: cash generally; any current token or representative of value – as bank notes exchangeable for coin, notes of hand, accepted bills on mercantile houses, drafts,” etc. (Wright, as quoted by Worcester.)

“Money: originally stamped coin, is now applied to whatever serves as a circulating medium, including bank notes and drafts,” etc. (Worcester.)

“Money is the very hinge on which commerce turns. And this does not mean merely gold and silver; many other things have served the purpose with different degrees of utility—paper has been extensively employed,” etc. (Hamilton on the Bank; Story on the Constitution, 152, n.) “Money is the measure of value.” (Lord Mansfield, as quoted 21 Pa. St. 178.)

Much more might be added, but enough, we trust, has been said to show that the words “coin money” cannot be restricted to the imprinting, pressing, or striking gold and silver, or metal of any kind merely.

The verb “coin,” as determined by the authorities above cited, means to impress or strike; to make, create, or fabricate; and the word “money” is defined to be “a medium of exchange authorized by a government.” What the thing or material shall be, out of which money shall be composed, is left by the Constitution with Congress to determine.

The power of coinage is given to Congress, but as regards the subject-matter upon which the power shall be exercised the Constitution is wholly silent. The power is given, but the means by which the power shall be made operative are left to the discretion of Congress. When, therefore, Congress determines that certain paper, bearing the impress of the government, shall be lawful money of the United States, the same is money, and is produced under the power of Congress “to coin money, and regulate the value of foreign coin.”

This interpretation of the words under consideration cannot be viewed with disfavor, nor pronounced strained and forced. It is fully sustained in principle by the decisions of the Supreme Court of the United States, in cases of like character and analogous to the one at bar. We refer the court to Story on the Constitution, ch. 5, §§ 422, 423, 428-434, 454; the *Federalist*, Nos. 32, 33, 44; Walker’s Am. Law, ch. 10; Sedgwick on Constitutional and Statutory Law, 488-493; *McCulloch v. State of Maryland*, 4 Wheat. 316, 402-406; *Ogden v. Saunders*, 12 Wheat. 332; *Gibbons v. Ogden*, 9 Wheat. 1, 189; *Martin v. Hunter’s Lessee*, 1 Wheat. 304, 326, 327; *Sturgis v. Crowninshield*, 4 Wheat. 112, 202; *Anderson v. Dunn*, 6 Wheat. 204, 226; *Ros v. Jingey*, 4 Dall. 37; *United States v. Fisher*, 2 Cranch, 358; *Cross v. Harrison*, 16 How. 164; 2 Dall. 419; 1 Kent, 318, 9th edition.

The question now to be asked is: May the money which the government, under the Constitution, is authorized to coin (create) be made a legal tender by government?

We cannot but think that the question answers itself in the affirmative, though aware that it was the subject of much debate in Congress when the clause was inserted in the act, and is still a question of much diversity of opinion among able lawyers.

Can it be that the government has the power to create money, yet having created it, lacks the power to impress it with that which alone gives it value – alone makes it what it professes to be, money? Is the power of government exhausted in the mere creation? Is Congress concerned with only a name, not a thing – a shadow, not a substance? If so, Congress can create the inanimate thing and employ it if it be capable of being so employed, but cannot breathe into it the vital spirit which alone can bring it into useful existence. (Marshall, C. J., 9 Wheat. 861.)

II. That Congress has exercised this power, we apprehend, will not be denied. (See the Act, § 1.)

III. Having demonstrated, as we think, to the court that Congress, under the Constitution, has the power to create these treasury notes, make them lawful money– a legal tender in payment of all debts, public or private, within the United States, and that it has exercised

this power, we have shown that every individual within these States is obligated to receive them in payment of debts. This much of our third proposition is clear; for whatever construction may be given to the words “public debts” as applicable to taxes due the State, a private debt must mean a debt existing between individuals, whether they be natural persons or artificial persons created by law. The act cannot, by the words “private debts,” refer to the debts of the State, as such construction would do violence to the word “private”; and, of course it cannot refer to the debts of the United States, as that would do still greater violence to the words “private” and “within.” The act does not read debts *of* the United States, but *within* the United States. In other words, it is plain that these notes are a legal tender in payment of every debt within the United States, except taxes. That such was the intention of Congress is evidenced by the debates upon the passage of the act.

It remains to discuss the question, is the State bound to receive them in payment of its taxes?

To this we say, that the law of Congress evidently intends to include taxes, and this intention is clearly expressed in the words of the act. The language, “shall be lawful money and a legal tender in payment of all debts, public and private, within the United States,” is simple, clear, and comprehensive.

What is the meaning of the word “debts?”

Richardson defines it: “Anything had or held of or from another, his property or right, his due; that which is owed to him; which ought to be delivered or paid to him.”

Webster says it is: “That which is due from one to another, whether money, goods or services; that which one is bound to pay or perform to another.”

Worcester: “Debt (from the Latin *debitam debeo* – to owe), that which one person owes to another, whether it be money, goods, or services; something due; obligation; due.”

“Debt: that which one person owes to another; that which any man owes to another.” (Barclay.)

“Debt (contracts) is a sum of money due by certain and express agreement. In a less technical sense, it means any claim for money. In a still more enlarged sense, it denotes any kind of a just demand.” (Bouv. Law Dic.)

“Debt: obligation, liability.” (Thesaurus of English Words, Roget.)

Thus it is seen that the word “debt” means liability, obligation; that which is due; that which should be performed, whether in money, goods, or services.

Can it be pretended that a tax does not fall within these definitions? That taxes are not obligations due? That they are not liabilities which should be paid? If not paid, are they not recognized and treated as debts to the State, and their payment enforced by ordinary judicial proceedings in almost every county of the State? This idea was not only evidently latent in the minds of the law makers, but is practically expressed. (Revenue Law, 1861; Statutes of 1861, 432.)

But why discuss this point. This court has judicially declared that a “tax is a debt due from the property holder to the State.” (*Moore v. Patch*, 12 Cal. 270; *People v. Seymour*, 16 Cal. 342; 28 Miss. 70, 74; 76 Am. Dec. 521.)

And what construction is to be placed upon the term “public and private,” found in the statute?

“Shall be a legal tender in payment of all private and public debts within the United States,” words singularly expressive, concise, and significant.

Are they to be ignored? Have they no meaning? Have they any other meaning, upon any rule of fair construction known to the law, than a payment of all debts between individuals, and between individuals and the State?

If taxes are included within the meaning and intent of the words “all debts, public and private” (19 How. 452, 453, 454), the question remains for consideration: Has Congress the power to enact a law making State taxes payable in these notes?

It may be argued that the power to tax is vested in the State; that in the exercise of her sovereignty she may tax all persons and property within her borders; that such power is vital to the existence of the State, and cannot be abridged by the federal government. And all this we do not deny, and are not wholly ignorant of those principles, nor of the authorities which sustain them.

But we contend that they are not pertinent to the issue here made. Undoubtedly a State has the inherent power to impose taxes on persons and property. Cannot the State then say in what the tax shall be collected – in what specific thing, whether grain, land, service, money – what particular kind of money, gold, silver, or paper? We answer under its power of taxation, it cannot, and that is the only power which is pretended to have been exercised by the State in its revenue act. In the exercise of its power of taxation, the State can take

or enforce the payment of money only from its citizens.

It does not militate against this view, that the government may seize and sell the property of the citizen to enforce the payment of its taxes. The creditor of every delinquent debtor may cause the same to be done – it is only a means to accomplish an end. The end in each case is to raise money; the seizure and sale only the means.

In either case, if property be sold to satisfy execution, must not whatever is made money and a legal tender by the government be accepted by the sheriff in payment? Can he discriminate and say in one case I will receive paper money, and in the other only gold and silver? If not, why is not that which is payment at the end of an execution, equally a tender, and receivable for the original debt or obligation?

If we are asked by what right does the State take a specific thing, such as land, grain, etc., at its pleasure, if not by the power of taxation, we are ready with our answer – by the power of eminent domain.

The two powers – taxation and eminent domain – are independent, separate, and distinct, and wholly different in their nature and character; and both are independent of another power, inherent in every State, known by the latitudinarian name of “police power.”

The universal definition of taxation, or the right of taxation, is the power of government to raise money. (Sedgwick on Constitutional Law, ch. 10, particularly from page 498 to 511, and cases cited; *People v. Mayor of Brooklyn*, 4 N. Y. 419; 55 Am. Dec. 266; overruling the same case in 6 Barb. 214; *Town of Guilford v. Supervisors etc.* 13 N. Y. 147; *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. [9 Harris] 147; 59 Am. Dec. 759; *Moers v. City of Reading*, 21 Pa. St. 188; *Schenby and Wife v. City of Alleghany*, 25 Pa. St. 128; *Police etc. v. McDonogle's Succession*, 8 La. An. 341; *New Orleans v. Grahle*, 9 La. An. 561.)

With reference to “police powers,” see *Fisher v. McGirr*, 1 Gray, 26-41; *American Print Works v. Lawrence*, 1 Zab.; *Surocco v. Geary*, 3 Cal. 71; 58 Am. Dec. 385.

IV. That a constitutional law of Congress, made to extend to the separate States, repeals any State law not in harmony with it, is amply sustained by authorities cited in the course of this argument, and is not susceptible of discussion. (Const. U. S. art. vi. div. 2.)

And apart from the question of power, the revenue law of the State, in so far as it conflicts with the congressional act, is constructively repealed. (*Pierpont v. Crouch*, 10 Cal. 216; *City etc. of Sacramento v. Bird*, 15 Cal. 294; *State v. Conkling*, 19 Cal. 513.)

V. Mandamus is the proper remedy. We refer the court to the revenue act itself. (Statutes 1861, p. 430, § 33.) The duty made to devolve upon the tax collector by section 33, can be enforced by mandamus. The appellant is entitled by law to have his receipt, and the word “paid” marked opposite his name, etc. (§ 33.) We refer to *McCauley v. Brooks*, 16 Cal. 15, for authorities, and to the ruling of this court in that case.

Horace Hawes, also for Appellant.

The act of Congress in question provides that the United States notes, to be issued in pursuance of the first section, shall not only be receivable in payment of all taxes and other debts (with certain exceptions) due to the United States (which was clearly within the power of Congress), but also that they shall be “lawful money, and a legal tender in payment of all debts, public and private, within the United States.”

That the terms used in this latter clause embrace taxes and other dues to the public treasury, there is scarcely room for doubt. “All debts, public and private.” It would be difficult to invent language more simple and comprehensive. A debt, according to Webster, is “that which is due from one man to another, whether money, goods, or services; that which one is bound to pay or perform to another.” Every man is bound to pay his quota of the public burdens. When it is ascertained and fixed by authority, it becomes a debt which he owes the State.

Public taxes, when lawfully imposed, are certain contributions exacted from the citizens for the support of government. These contributions are apportioned in various ways – sometimes *per capita*; sometimes in proportion to the value of each one’s possessions; sometimes by fixed amounts imposed upon those pursuing certain trades, professions, or occupations. In whatever mode the exaction is made, if rightful, a corresponding obligation rests upon the citizen to pay the amount exacted. He owes that amount to the public treasury – to the State. It is a public debt. Consequently our Revenue Act of 1861 provides for the enforcement of this obligation as a personal debts, by an ordinary action at law against the delinquent, and by summary seizure and sale of any property belonging to him. (See §§ 30, 39-44, 66, 77.) Personal judgments are to be rendered; and these judgments are to be liens upon all property of the defendant as in other cases. (§ 44, above cited.) Certainly, the amount due upon such a judgment is a debt, even in the old technical sense. But it is equally a debt before judgment; for no judgment can rightfully be rendered against any man for that which he does not owe.

The government, in the exercise of its prerogative, declares United States notes to be lawful money. Certainly lawful money ought to satisfy all debts due to the public treasury; and the more so, when this money consists of the obligations of the government itself. For

the State to repudiate its own paper, which it has declared to be lawful money, and refuse to receive it in satisfaction of any public dues, would discredit it effectually. But the government has gone further, and declared its notes to be not only lawful money, but a legal tender in payment of all debts. It obliges every person to receive them as money, and henceforth dispenses with payments in gold and silver. To exact gold and silver when it has dispensed with it in commerce, and when, consequently, it is ordinarily unattainable, would be unjust and oppressive.

It has been said that the State, having the power to levy and collect taxes, may provide for the payment thereof in coin, as the State of California has done; and that is very true. But it is equally true, that the State law may prescribe that all debts shall be paid in coin, as our law undoubtedly has done. The law which requires that private debts shall be paid in coin had the same origin, and is of the same dignity and force as that which requires that taxes shall be paid in coin. Both emanate from the sovereign power of the State. And yet this act of Congress is paramount, and repeals them, if it is constitutional.

There is a vague notion that any act of Congress is unconstitutional which derogates from State sovereignty. The Federal Constitution has no such provision. It says nothing about State sovereignty. Every legislative power that Congress possesses necessarily derogates from State sovereignty; for the sovereign has power to make laws for all cases. In so far as this power is restricted, the State is not sovereign. But, in many instances, the sovereign or legislative power is by the Federal Constitution taken away from the States and given to Congress. All this is derogatory to State sovereignty. The Constitution itself is derogatory to State sovereignty. The question of constitutionality, therefore, turns not upon the point whether the act derogates from State sovereignty, but whether it is authorized or prohibited by any particular clause in the Federal Constitution. If there be any clause in that instrument giving to Congress the power to make anything but gold and silver a legal tender in payment of private debts, that clause will be found equally to authorize Congress to make it a legal tender for public taxes – for “all debts, public and private, within the United States.”

H. H. Haight, for Respondent.

There are two questions involved. *First*. One of construction and intent. Did Congress design to enact that the treasury notes should be a legal tender to State officers for taxes imposed by State revenue laws? *Second*. A question of power. Can Congress make paper money a legal tender for private debts; and if so, can that body control State legislation upon the currency in which State taxes are to be paid?

I. If it were admitted that Congress possessed any power at all to make paper money a legal

tender, and the State revenue act were silent as to the currency in which taxes should be collected, the act of Congress might then be properly invoked by the petitioner, for the inference then would be that the State authorized the acceptance of any currency legalized by Congress.

The language of the revenue act (Stats. of 1857, 326, § 1), however, is that the taxes shall be paid in coin of the United States, or foreign coin at its legal value. This is tantamount to prohibiting the collecting officers from receiving anything else in lieu of coin. The word “coin” has a fixed and definite signification. In its derivation and invariable use, it signifies a piece of metal prepared and stamped with a die, to circulate as money. This is the literal grammatical sense of the word “coin,” and the only sense in which it is ever used when applied to money.

The primary meaning of the word was the die used for stamping metals, and thence it was applied to the metals stamped. There is a metaphorical and figurative sense in which the word is used, as “to coin a word,” or “the coinage of the brain,” in Shakespeare; and “to coin an excuse or a lie,” conveying the idea of fabrication, invention, or forgery; these uses, however, of the word, have no reference to its literal legal definition and meaning. The argument of the appellant is really to the effect that the legislature and the framers of the Federal Constitution used the word in its metaphorical and hyperbolic sense.

That the verb “to coin,” metaphorically used, means “to invent, forge, or fabricate,” is undoubted; but these figures of speech are not conveyed in the term when applied to money. Since the act of Congress was passed, thousands of contracts in this State have been made payable in “current coin.” Is this expression equivalent to “current inventions, forgeries, fabrications, or current paper issues?” Is it possible for any one to mistake the meaning of the term as used in the revenue act, or doubt that it imports gold and silver instead of every species of paper issues? The revenue act in this respect expresses the deep-rooted and traditional antipathy of the people of this State to the use of anything but coin as a circulating medium. (State Constitution, art. iv. §§ 34, 35.) The latest authority on this subject, the new American Encyclopedia, gives not the least color to the use of the word “coin” in any such sense as that contended for by appellant. It defines coin to be “metallic money,” “specie,” “pieces of metal bearing certain marks,” etc., and this is the only definition hinted at in a long article of several pages.

Webster, in defining the noun “coin,” defines it to be: “1st. Money stamped; a piece of metal, as gold, silver, copper, or other metal converted into money by impressing on it certain figures, etc. 2d. A die in architecture. 3d. That which is received in payment, as ‘the loss of present advantage to flesh and blood is repaid in a nobler coin.’”

The figurative use of the word in the last definition is made apparent by the example. So in defining the verb “to coin,” the definitions in Webster are given as follows:

“1st. To stamp a metal and convert it into money. 2d. To make or fabricate for general use, as to ‘coin words.’ 3d. To make, forge, or fabricate in an ill sense, as to coin a lie; to coin a fable.”

The above are all the definitions given by Webster. Do they give the least countenance to the use of the word contended for by the appellant?

Richardson, in defining the word to signify “an iron seal with which metal is stamped, and hence money is called coin,” gives the other definition: “To coin [met.] is to forge; to invent.” The abbreviation in brackets shows that this use of the word is purely metaphorical.

Bouvier, in his law dictionary, defines it to be “a piece of gold, silver, or other metal stamped by authority of the government, to determine its value, commonly called money.”

It is safe to assert that in the whole range of English literature no single instance can be produced of the word “coin” being used in connection with money, to signify anything but a piece of metal stamped, as defined by Bouvier.

In Rees’ Cyclopaedia, volume 9, title “Coin,” after saying that coin is a piece of tempered steel used as a die, the author defines coin “to be more generally used for a piece of metal stamped with certain impressions to give it a legal and accurate value, and to serve as a guaranty for its weight and purity. Coin differs from money as the species from the genus. Money is any matter to which public authority has affixed a value, and which serves as a circulating medium, whether metal, paper, leather, shells, etc.; but coin is a particular species of money always made of metal, and struck according to a certain process.”

Dr. Johnson, in his day, does not seem to have suspected that money signified anything but a metallic currency. He defines “coin” to be “money stamped with a legal impression,” and “money” to be “metal coined for the purpose of commerce.”

Worcester defines “coin” to be “a piece of metal bearing a legal stamp, and made current as money,” and then gives its metaphorical and poetical use as “that in which payment is made.”

In Homan’s Cyclopaedia of Commerce, the definition is: “Coins – pieces of metal, most commonly gold and silver or copper, impressed with a public stamp, and frequently made

a legal tender in payment of debts.”

In the English Cyclopedia, part “Arts and Sciences,” volume 3, the definition is “coin: metal stamped for currency.”

In the Encyclopedia Britannica, the definition is: “Coin: a piece of metal converted into money by the impression thereon of certain marks or figures; coin differs from money as the species from the genus.”

In the National Cyclopedia the definition is, “metal stamped for currency.”

In M’Culloch’s Commercial Dictionary, the definition is, “pieces of metal, most commonly gold, silver, or copper, impressed with a public stamp, and frequently made a legal tender.”

Against this array of authorities can it be pretended that “coin” means paper money, and “coining signifies the emission of treasury notes?” Yet this is the whole of the appellant’s argument.

It would have been deemed unnecessary to make more than a passing reference to the definition of the word “coin,” but that the appellant’s counsel find it necessary, in order to sustain their position, to argue that coin may signify a paper currency. This point will be briefly alluded to again in considering the provisions of the Federal Constitution.

We assume, then, that the State revenue act requires the payment of taxes in gold and silver. It results that if Congress has required the State governments to receive treasury notes in payment for taxes, there is a conflict between our State law and the act of Congress, and if Congress has legislated within its constitutional powers, the State law must yield.

Do the terms used in the act of Congress imply that the treasury notes provided for shall be a legal tender for State taxes? The language of the act is not very definite or precise. It is not very clear whether public debts signify debts due by the public or to the public. If the phrase, “all debts, public or private,” includes debts due to the government, as well as debts due by it, it becomes important to inquire whether taxes are debts within the meaning of the act.

There is a prevalent impression that this court has held contrary to the current of authority, that a tax is a debt, and this impression is founded in part on the case of *People v. Seymour*, 16 Cal. 342. The report presents a discrepancy between the syllabus of the case and the opinion; for, although the reporter in the head-note announces such a decision, upon

examining, it will be seen that the court expressly declines to decide the point.

That a tax is simply a charge or burden levied by the government to provide revenue; that it involves no idea of contract or indebtedness, and does not create the relation of debtor and creditor, would seem to be apparent; and on this point the court is referred to the following authorities: Bouvier “Debt” and “Tax”; *People v. Seymour*, 16 Cal. 342; Blackwell on Tax Titles, 205; *Pierce v. City of Boston*, 3 Met. 520; *Thompson v. Gardener*, 10 Johns. marg. p. 404; *Shaw v. Pickett*, 26 Vt. 482; *City of Camden v. Allen*, 2 Dutch. 398; *Mechanics’ and Traders’ Bank v. Debolt*, 1 Ohio, 591; 1 La. An. 435. The term “debt,” as used in the act of Congress, is used in its ordinary legal sense, conveying the idea of contract as defined by Bouvier.

That the legislature has the power to frame a revenue act defining a tax to be a debt, is probable; but the act of Congress is not framed with reference to any particular State statute, but in view of the general course of legislation. In the case in 16 Cal. it is laid down, that if a tax is merely a charge on property, it cannot be denominated a debt.

Taxes are commonly a charge on property, and if our State revenue act had placed a tax on the footing of a debt, and the revenue act of Illinois made it a mere charge on property, would treasury notes be receivable here for taxes when they would not be in Illinois? This illustrates the absurdity of attempting to make the act of Congress apply to State revenues at all, for in that case the treasury notes might be a legal tender in one State and not in another.

The language of the act seems, by the strongest implication, to negative the idea that Congress designed to make the notes receivable for State taxes. It provides, that “such notes herein authorized shall be receivable in payment of all taxes, internal duties, excises, debts, and demands of every kind due to the United States, except duties on imports, and of all claims and demands of the United States, of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin, and shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid.”

The act provides that the notes shall be receivable for taxes due the United States, which is equivalent, on familiar rules of construction, to an express declaration that they shall not be receivable for taxes due the several States. The act itself also makes an unequivocal distinction between the terms “debts” and “taxes,” speaking of them separately as distinct, and rendering the construction sought to be given by the appellant impossible. This view of the act of Congress, it is submitted, is the only one at all consistent with its terms, and disposes of the case.

It is certain, in view of the jealousy by the States of federal encroachment, that if Congress had designed to attempt the delicate and invidious task of controlling the collection of the revenues of the States from their own citizens, the intention would have been so clearly expressed as not to admit of doubt.

II. It is not necessary, however, to rest the case on construction alone. There is another question involved of incalculable importance and interest, upon which it is both desirable and necessary to have the judgment of the court, to wit, the question of constitutional power; and this, as already intimated, resolves itself into two propositions: *First*. That Congress has no power to make paper money a legal tender for debts of any description. *Second*. That if it had this power, as between individuals and toward the federal government, it cannot compel the States to collect their revenues in paper.

The affirmative of the first proposition, if it were admissible, by no means involves the second. The federal government, to quote the language of Chief Justice Marshall, is acknowledged by all to be one of enumerated powers. (*McCullough v. The State of Maryland*, 4 Wheat. 316.) That it can exercise only the powers granted to it is, as he says, universally admitted. This principle of construction of the Federal Constitution, first judicially declared by Chief Justice Marshall (himself a federalist), has been sanctioned by all the eminent men of all parties who participated in framing the system, and who have since that period shared in its administration.

The eighth section of the first article contains the definition of the powers granted to Congress, among which are the powers to “borrow money on the credit of the United States,” and “to coin money and regulate its value,” and closes with empowering it “to make all laws which shall be necessary and proper to carry into execution the foregoing powers.

The last clause, it will be conceded, neither enlarges nor restricts the powers enumerated; for as Mr. Hamilton remarks in the thirty-third number of the *Federalist*, in speaking of this clause and the clause asserting the supremacy of the Constitution and laws of the United States, these clauses “are only declaratory of a truth which would have resulted by necessary and unavoidable implication, from the act of constituting a federal government and clothing it with certain specific powers.” Judge Story expresses the same idea in his Commentaries.

No loose and latitudinarian construction of this clause, therefore, can add to the power of Congress. The Constitution with it is the same as it would be without it.

Much stress is laid by the appellant’s counsel upon the cases in 4th and 9th Wheaton,

affirming the constitutionality of a United States bank; but a slight examination of these cases will show that they have no bearing in favor of the power claimed in this case.

The question discussed in them was not the power of Congress to make paper money a legal tender, nor is there a syllable in those decisions, nor in any decision of the Supreme Court of the United States, or any other respectable court, which looks toward an admission of such a power.

The whole question was as to the right of Congress to create a corporation for the purpose of aiding the government in the execution of its powers. This right is treated in those decisions, and also in Judge Story's Commentaries, not as a power, but as a simple means or agency to assist in the execution of the powers of the government.

The cases cited have no bearing in favor of a power to make paper money a legal tender for debts. This is a power that emphatically "comes home to the business of all," and is one of vast proportions – rarely exercised by governments the most despotic, and never exercised by any without injurious consequences, sooner or later, to the commerce and prosperity of the nation. This power is not inferior in any respect to any power granted in the Constitution, much less is it implied. The greater can never be implied in its inferior, nor the equal in its equal.

The Federal Constitution, in giving Congress the power to coin money, wisely abstained from conferring the power to make unlimited paper issues and force them on the people; a power not only liable, but morally certain to end in flagrant abuse. It is a power which cannot tend to beneficial results, because the paper of the government derives its value from the confidence of the people, which is the basis of its credit, and this confidence is not the creature of compulsory legislation. The expediency of this legislation, however, will be hereafter referred to. The argument at present simply is, that so vast a power can never exist by doubtful implication, and it is morally certain that the convention, for wise reasons, carefully abstained from granting it.

The uniform practice of the government hitherto, since its origin, which was used as an argument in favor of the bank charter, weighs against this power. The government has existed now for nearly three quarters of a century, and has passed through periods of war, of commercial revulsions, and general financial derangement; but it has never until this hour claimed or exercised the power in question. Occasions have heretofore occurred, as in 1812, in which, if the exercise of it was desirable at any time, it was expedient then; but Congress has never before claimed the right to substitute its own paper for gold and silver in the business transactions of the people.

Even now the design of this act is not the regulation of the currency, but to supply the financial necessities of the government; and nothing shows in a more glaring light the fallacy of the argument which rests this power on the clause “to coin money.”

The object is really to borrow money from the people by forcing them to use government paper in business transactions; and it was supposed the validity of the provision would be rested, not on the power to coin, but the power to borrow, for this is what the transaction was in truth designed to accomplish, though we think it can be shown that it does not tend to do so. The currency of the country needed no aid from Congress.

It will not be pretended that the currency of California or the Eastern States is to be improved, by substituting for specie the inconvertible notes of the government. Even the paper money of State banks is, in theory, convertible into coin at any moment, and is not a legal tender. No one is compelled to take it. The only legal currency of the Eastern States is gold and silver.

If the Convention of 1787 had designed to make the power of Congress so broad, it would have added to the phrase “to coin money, or to borrow money,” the phrase “to emit bills of credit, and to make them a legal tender for debts.”

How would the convention, composed of statesmen who had passed through the era of continental money, worth two dollars a bushel, have received such a proposition? This inquiry will be answered presently by seeing how the convention did receive the proposition when it was made, as it was in fact.

If the government, under this clause, can make its own paper a legal tender, then it can the bonds of New York City or State, or the paper of the New York banks, or Arkansas bonds, or the paper of any private association or individual. It is incredible that such a monstrous stretch of power can gravely be claimed for a government like ours.

No one, surely, will venture before this tribunal, to set up the claim that the present rebellion has changed in any respect the nature of our system, or the rules by which the Constitution of our country has been hitherto construed.

The powers granted to Congress are now what they were in 1790, and in 1812.

Appellant’s counsel rest the power of Congress on the clause relating to coin, and it has not, therefore, been deemed necessary to refer to any other clause. The clause empowering Congress to borrow money, it is not pretended confers on it the right to make treasury notes a legal tender, and it has not been thought necessary to make in reference to this

clause any extended remarks. The words “borrow and lend” signify voluntary action on the part of the lender, and differ widely from the power to make paper a legal tender. Appellant’s counsel have therefore wisely abstained from resting their case upon that clause.

This matter, however, is not left to negative construction. The power to make paper money a legal tender for debts is spoken of in the Constitution itself as a distinct and independent power from the power either to emit bills of credit or to coin money.

In section 10 of article i., the States are prohibited from the exercise of certain powers specified, some of which are expressly granted to Congress, and some of which are withheld. Among the powers specified in that section, are the powers “to coin money,” “to emit bills of credit,” “to make anything but gold and silver coin a tender in payment of debts,” “grant letters of marque and reprisal,” “enter into treaties,” etc.

Of the powers specified, the federal executive is allowed the power to enter into treaties; Congress is allowed, in the eighth section, the power to coin money, to grant letters of marque, but the power to make anything but gold and silver a tender in payment of debts is carefully withheld.

It cannot be pretended that the convention supposed this power was involved in the power to coin money, because then there would have been no necessity to specify it; and after specifying it as a separate power, it would most certainly have been enumerated among those granted, if it had been the design that Congress should ever exercise such a power. This conclusion seems inevitable.

The prohibition of the States to exercise such a power was necessary, for otherwise the States could have exercised it; but it was of course unnecessary to prohibit Congress from its exercise, because unless expressly conferred, it could not be claimed by the federal government, more especially as any implication was negatived by the prominence given this power among those prohibited to the States.

The Supreme Court of the United States, in the case of *Craig v. The State of Missouri*, 4 Peters, 411, 433, 434, hold that, “the Constitution 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.”

Judge Story, in his Commentaries, uses the same language. We have, therefore, the highest authority that the emission of bills of credit, and the making them a legal tender, are distinct powers in the Constitution; and on the same ground *a fortiori*, the power to coin

money is distinct from either and from both.

But this is not all, though it might well be deemed conclusive. We are fortunately furnished with a complete demonstration, almost equal in authority to an express prohibition.

The framers of the Constitution understood its scope and intent, and if the opinions of its framers can be ascertained, expressed at the time of its formation, it will be at once admitted that their judgment is authoritative and conclusive.

The members of the Convention of 1787 were not only the purest patriots, but the greatest men our country has produced. They expended weeks of painful labor in perfecting its phraseology, and in making its provisions clear and exact. The original draft of the Constitution, as found in the fifth volume of Elliott's Debates, on page 378, contained the following clause in what is now section 8 of article i.: "To borrow money and emit bills on the credit of the United States."

On referring to the debate on the motion of Gouverneur Morris to strike out the words "emit bills," a debate occurred, which will be found on pages 434 and 435 of the same volume, and which sets the matter so completely at rest that I extract the whole of it:—

"Mr. Gouverneur Morris moved to strike out 'and emit bills on the credit of the United States.' If the United States had credit, such bills would be unnecessary; if they had not, unjust and useless.

Mr. Butler seconds 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. Gouverneur 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 moneyed interest will oppose the plan of government, if paper emissions be not prohibited.

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

Mr. Mason had doubts on the subject. Congress, 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 emergencies, 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. Gorham – 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 and 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.

Mr. Ellsworth 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 government, more friends of influence would be gained to it than by almost anything else. Paper money can in no case be necessary. Give the government 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 that might arise.

Mr. Wilson – It will have a most salutary influence on the credit of the United 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 government of such 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 government was restrained on this head.

Mr. Reed thought the words, if not struck out, would be as alarming as the mark of the beast in Revelation.

Mr. Langdon had rather reject the whole plan than retain the three words ‘and emit bills.’

On the motion for striking out, New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia – *Aye*, 9. New Jersey, Maryland – *No*, 2.

The clause for borrowing money was agreed to *nem. con.* Adjourned.”

To this report the editor adds the following note: –

“This vote in the affirmative by Virginia was occasioned by the acquiescence of Mr. Madison, who became satisfied that striking out the words would not disable the government from the use of public notes, as far as they could be safe and proper, and 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 convention, therefore, out of abundant caution, struck out the clause “to emit bills,” and this debate sheds a flood of light on the intent of the framers of the Constitution, and as a contemporaneous exposition is justly entitled to the greatest deference; though, as already said, the language of the instrument itself is demonstration sufficient of the intention to deny Congress this power.

After such testimony, it seems almost a work of supererogation to add anything more, and on this branch of the case we close with two additional authorities.

The first one is the case of *Gwin v. Breedlove*, 2 How. 29, 38, in which the Supreme Court of the United States say: “By the Constitution of the United States, section 10, gold or silver coin, made current by law, can only be tendered in payment of debts”; or, as expressed in the head-note, “the Constitution of the United States recognizing only gold and silver as a legal tender.”

The other is the great defender of the Constitution, Mr. Webster, who, in a speech in the United States Senate, delivered December 21, 1836 (to be found in Appendix to Congressional Globe, page 54, 24th Cong., 2d Sess.), expresses himself as follows: –

“But if we understand by currency the legal money of the country, that which constitutes a legal tender for debts and is the statute measure of value, then undoubtedly nothing is included but gold and silver. Most unquestionably there is no legal tender, and there can be no legal tender in this country, under the authority of this government or any other, but gold and silver, either the coinage of our own mints, or foreign coins at rates regulated by Congress. This is a constitutional principle, perfectly plain, and of the very highest importance.

The States are expressly prohibited from making anything but gold and silver a tender in payment of debts, and although no such express prohibition is applied to Congress, yet, as Congress has no power granted to it in this respect but to coin money, and to regulate the value of foreign coins, it clearly has no power to substitute paper or anything else for coin, as a tender in payment of debts and in discharge of contracts.

It has coined money, and still coins it; it has regulated the value of foreign coins, and still regulates their value. The legal tender, therefore, the constitutional standard of value, is established, and cannot be overthrown. To overthrow it, would shake the whole system.

I have already said that Congress has never supposed itself authorized to make anything but coin a tender in payment of debts between individual and individual; but it by no means follows from this that it may not authorize the receipt of anything but coin in payment of debts due to the United States.”

The cases cited by the appellant’s counsel upon the general subject of the nature of our federal system, and the rules applied to its construction, are familiar to the court and the profession, and might with equal propriety be cited on either side of this case.

There will be no difference of opinion between counsel as to the rules of construction dictated by reason and sustained by authority. That the federal government is one of enumerated powers on one hand, and on the other that the powers granted are to receive a fair and liberal, but not a loose and latitudinarian construction, will not be disputed.

It is in the application of these rules to the subject in hand, that the divergence begins. For this reason it is unnecessary to occupy the time of the court by quoting from, or commenting upon, the various authorities cited in support of the foregoing propositions. Among the multitude of adjudged cases, the following are simply referred to: *People v. Naglee*, 1 Cal. 233; 52 Am. Dec. 312; and cases cited in opinion; 4 Wheat. 316; 11 Peters, 316.

These authorities, it is respectfully urged, are decisive of this case.

It is, however, thought not improper to present also the reasons why, if Congress possesses the power to make paper a legal tender for private debts, it cannot control the States in the collection of their own revenue; and this is our second proposition.

The power of taxation is not only one of the highest attributes of sovereignty, but it is its most essential element. To control the power of a State to collect its revenue, would be altogether destructive of its independent action, and would place it, fettered hand and foot,

in the hands of Congress, a mere puppet, and a mockery of a government.

Mr. Hamilton, in numbers 33 and 34 of the *Federalist*, discusses this concurrent power of federal and State taxation at length, to show that the power of the State to levy taxes is not affected by the possession of the same power by Congress, and “that the particular States, under the Constitution, have co-equal authority with the Union in the article of revenue, except as to duties on imports.”

What becomes of the co-equal power, if Congress could compel the State to accept its paper, or the paper of another State, for its revenue, or *vice versa*? Has a State government the power to compel Congress to accept the State’s obligations for federal revenues? If it has not, neither has Congress power to do the same thing to the States, and this, not because of any particular expressions, but because the possession by either of this power makes it possible for it to destroy the other by destroying the food upon which it exists. As man cannot exist without food, so a government cannot exist without revenue. If Congress can force the States to receive any kind of depreciated paper for revenue, it can in effect deprive them of revenue altogether, and in this way accomplish their destruction. That any intelligent man, much more any lawyer, should at this day claim for Congress such a power, must be a subject of profound astonishment. If Congress possesses this power, it would be as well to give it all the power over the State governments which it chooses to exercise; and this would in effect be the result.

In 1 La. An. 439, the court say: “The principle that under the American Constitution, no power or individual possesses, directly or indirectly, such an overruling influence over other powers, as would enable it any time to stop their functions, and to thus disorganize government, is an axiom – a self-evident proposition.”

The right to direct in what currency taxes shall be paid, is an essential ingredient in the power of taxation. There is no such thing as a power of taxation residing in the State, unless it can control and dictate the material or currency in which payment is to be made.

The distinction between the power of taxation and eminent domain, in appellant’s brief, does not appear to have any very close connection with the questions involved in this case. The point made by the appellant is, that taxes must be collected in money; that if taxes are collected in anything but money, this is an exercise, not of the taxing power, but of the right of eminent domain, because it is the taking of private property for public use.

The point, however, is that the State may collect its taxes in any kind of money which it chooses. It may authorize the receipt of the bank notes of State banks for taxes due it, as was expressly held by the Supreme Court of the United States in the case of *Briscoe v.*

Bank of Commonw. of Kentucky, 11 Peters, 320, 321.

On the other hand, if the State chooses, it may restrict tax-payers to gold and silver, as in our revenue act. All this subject is for the State alone to regulate; because, without the exclusive control of its own revenues, it can only exist by sufferance.

The effect of the provision making treasury notes a legal tender for taxes upon our State finances and credit, if it were valid, would be disastrous in the extreme.

The State already owes a floating debt of several hundred thousand dollars. Its bonds to the amount of about four millions are mostly held in England and on the Continent.

If its revenue is collected in these government bills of credit, the State must either pay them out for interest, and violate its plighted faith by forcing the bond-holders to receive paper instead of coin, contrary to the understanding upon which the bonds were taken, or the State must sell the paper for gold, at a possible loss of twenty per cent of its entire revenue.

Practical repudiation or inevitable bankruptcy is the result to the State; in either event, an ineffaceable stain upon her honor.

But one other consequence will be referred to. The city of San Francisco has certain creditors who hold her bonds issued under the Act of May 1, 1851. To secure the payment of those bonds, certain revenues were pledged, and by the same act (§ 4) those revenues were to be collected in “current coin.” Where is the “current coin” to come from to save from dishonor the pledge of the State and city, if the appellant's claim receives the sanction of this court?

Frank M. Pixley, Attorney-General, also for Respondent.

I. The right of Congress “to coin money, and to regulate the value thereof,” did not give the general government the right to engage in banking business, to issue paper money, or to make government notes legal tender for the general use of the nation.

No torture of words can construe “the right to coin money” into the right to emit paper currency, and make it a legal tender in all the transactions of the nation, in payment of debts existing, of obligations to mature, obligations to foreign citizens, duties or debts owing to the different States.

This power was expressly disclaimed by the framers of the Constitution, and has never been affirmatively asserted, as I can find, by any authority.

The attorneys in this case have not placed their argument upon the basis assumed by the advocates of the measure in the Congress of the United States.

The claim of power was rested on a broader basis. It was asserted that the right to declare war, to borrow money to maintain an army, support a navy, coin money, and regulate the value thereof, and the further grant of power necessary to carry these express powers into effect, by implication, vested Congress with power to create any kind of money, or do anything else necessary to carry on, preserve, and maintain the government; that this issue of notes with the legal tender clause was a “war measure”; that the crisis demanded the exercise of all powers necessary to preserve the government; that as money was indispensable to the maintenance of an army in the field, a navy in efficient service, Congress had the power to make money, and in order to give that money value, declare it a “legal tender.”

This was an argument arising from the necessity of the government; it was addressed to the patriotism of the members of Congress, and it was carried as a war measure.

As a question of financial policy, we are unable to see how the legal-tender clause could have been expected to aid the government in its necessities. It could have paid its own debts without the clause. It gained nothing to itself by working a loss on matured obligations between citizens. All new obligations between individuals, and all transactions between citizens and the government, will be entered into after calculation of the character of the currency in which they may be liquidated. This view of the subject is only important if this act shall be maintained as a war measure.

The secretary of the treasury admitted his doubts of the law; but the pressure of the financial necessity determined his course, and a majority of Congress undoubtedly acted from what they supposed was demanded by the exigencies of a great financial crisis.

II. Our State is sovereign to control her own domestic affairs, and without discussing the question of the validity of these treasury notes, for all ordinary transactions of business, the State has the undoubted right, in dealing with her own citizens, to exact from them such measures of tribute, and in such kind of currency, as may be deemed best for her own interest.

That, for the sake of the argument, admitting these treasury notes, with their legal-tender clause, as legal, as valuable as the gold and silver minted coin of the United States, nevertheless our State legislature has the right to say: “We will exact from our citizens payment in coin.”

If no other motive governed the legislature than mere caprice, yet the law, which directs the collection of revenue in gold and silver coin, is to be respected and sustained.

The court will, however, presume a higher motive. Our State owes, in round numbers, \$4,000,000; our obligations are held by the citizens of foreign governments; our coupons are in the hands of other people, who contracted with us while coin was our only mode of payment. Foreigners, and citizens of other States, who, having no part in the creation or countenance of the troubles in which we are involved, should be required to support none of the burdens of our war.

Every consideration of honor and good faith requires us to pay our foreign bond-holders their interest in coin; we must collect in coin to enable us to do so.

The power of taxation is a sovereign power in the State, and must carry with it the right to determine in what currency taxes shall be receivable.

Our State has, on more than one occasion, for certain taxes, determined to receive controller's warrants.

The tax collector is now receiving certain city scrips for delinquent taxes; judgments against the city have been so received.

Gold dust, grain, or any other article of value, might be exacted for taxes.

The citizen owes the obligation to the State to aid in bearing the burdens of State government, and it is for the State, acting through her legislature, to prescribe the kind and measure of that support.

III. The act does not intend to enforce the collection of State taxes in "legal tender notes"; if so, taxes would have been particularly designated.

The Supreme Court has not decided, in the case of *The People v. Seymour*, that taxes are debts due the State, in the sense in which the word "debts" is used in the act of Congress.

FIELD, C. J., delivered the opinion of the court, NORTON, J., and COPE, J., concurring.

This is an application for a *mandamus* to compel the defendant, as tax collector of the city and county of San Francisco, to accept from the relator \$270.45, in "United States notes," tendered in payment of State and county taxes, assessed upon his property for the present year, and to execute and deliver to him a good and sufficient receipt for the taxes. The

“United States notes” were issued pursuant to an act of Congress, passed the 25th day of February, 1862, which declares that they “shall be receivable in payment of all taxes, internal duties, excises, debts and demands, of every kind, due to the United States, except duties on imports, and of all claims and demands against the United States, of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin; and shall also be lawful money, and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid.”

The general Revenue Act of this State of May 17, 1861, declares that all taxes for State or county purposes “shall be paid in the legal coin of the United States, or in foreign coin at the value fixed for such coin by the laws of the United States”; with a proviso that county taxes levied in accordance with any special act, may be collected in such funds as the special act may designate. (§ 2.) The act also declares that every tax levied under its provisions or authority shall be a lien upon the property assessed, which shall attach on the first Monday in March of each year, and shall not be satisfied nor removed until the tax is paid, or the property has absolutely vested in a purchaser under a sale for the same (§ 3); and that upon the payment of any tax, the collector shall mark the word “paid,” and the date of payment, in the duplicate assessment roll, opposite the name of the person, or the description of the property liable for the tax, and shall give to the tax-payer a receipt therefor, specifying the amount of the assessment, the amount of the tax, and a description of the property assessed. (§ 33.) As will be perceived, the tax-payer, upon the payment of his tax, or what is equivalent, a tender of payment, in the coin designated, is entitled to a receipt from the collector, and it is the duty of that officer to execute and deliver the same. It is a duty which the law specially enjoins upon him, and its performance may in consequence, under our statute, be enforced by mandamus. (Prac. Act, § 467.) The tax-payer is not obliged to trust to parol evidence of his payment, which is liable to loss; he is entitled to a record of the fact on the books of the collector, and to written evidence of the fact in his own possession. Such evidence will show that the lien which follows the property, no matter in whose hands it may pass, has been removed, and will furnish a ready answer to inquiries generally made as to the payment of the tax, when a transfer of the property is desired. If, then, “United States notes” are receivable for the taxes of the relator, in place of the legal coin of the United States, or foreign coin at its legalized value, mandamus is his appropriate remedy.

The question then presented for determination is this: Are the notes of the United States thus receivable for State and county taxes under the act of Congress? On the argument, the question whether it is within the constitutional power of Congress to make these notes a legal tender in payment of debts, was ably and elaborately argued by counsel; but from the construction we give to the act of Congress, this question is not before us. The question is one of great magnitude and importance, upon which the first legal minds of the country

differ; and until it is legitimately and directly before us, we have no disposition – nor indeed would it be proper – to express or even intimate an opinion upon it. The act does not, in our judgment, have any reference to taxes levied under the laws of the State. It only speaks of taxes due to the United States, and distinguishes between them and debts. Its language is, “for all *taxes*, internal duties, excises, *debts*, and demands of every kind due to the United States,” the notes shall be receivable. When it refers to obligations other than those to the United States, it only uses the term “debts”; the notes it declares shall be “a legal tender in payment of all *debts*, public and private.” Taxes are not debts within the meaning of this provision. A debt is a sum of money due by contract, express or implied. A tax is a charge upon persons or property to raise money for public purposes. It is not founded upon contract; it does not establish the relation of debtor and creditor between the tax-payer and State; it does not draw interest; it is not the subject of attachment; and it is not liable to set-off. It owes its existence to the action of the legislative power, and does not depend for its validity or enforcement upon the individual assent of the tax-payer. It operates *in invitum*. If authority for the distinction is required, it will be found in the cases of *The City of Camden v. Allen*, 2 Dutch. 398; *Pierce v. The City of Boston*, 3 Met. 520; and *Shaw v. Pickett*, 26 Vt. 482.

The term “debt,” it is true, is popularly used in a far more comprehensive sense, as embracing not merely money due by contract, but whatever one is bound to render to another, whether from contract or the requirements of the law. But the legal technical meaning of the term, as used in statutes, and in the Constitution both of the United States and of this State, is as we have defined it. (Const. U. S. art. i. §§ 8, 10; art. vii.; Const. of Cal. art. viii.) No one would pretend that an act providing for the collection of debts would include, by force merely of the term “debts,” the collection of taxes also.

The cases of *Moore v. Patch*, 12 Cal. 270, and *People v. Seymour*, 16 Cal. 340, are supposed to hold that a tax is strictly a debt due to the State. There are expressions in the opinions of the court which, taken by themselves, disconnected from the facts, give a color to this view; but the real purport and effect of the decisions in those cases in this: that taxes levied under the laws of this State constitute not merely charges upon the property assessed, but personal charges against the tax-payer; and if from defect of proceedings in the assessment, the property cannot be sold for the payment of the taxes, it is constitutional for the legislature to legalize the assessment, or to authorize a personal action for their recovery; in other words, that the obligation to pay the taxes is not discharged by a defective assessment of the property. In the latter case, the court said it was immaterial to consider whether taxes were “debts in the sense of money obligations existing by contract. The government has the same right to enforce a duty as a debt, and may enforce it in the same way; the circumstantial difference between the two classes of obligations is nothing, so far as the power of the government is concerned, between a man voluntarily binding

himself to pay money to the government, and the government binding him to do so, when he has no option but to obey.” (16 Cal. 344.)

But whatever view may be taken of taxes under our statute – whether in the provisions for their enforcement they can be treated as debts due the State – the question still recurs: What did Congress intend by the act under consideration? And upon this question we are clear, that it only intended by the terms “debts, public, and private,” such obligations for the payment of money as are founded upon contract.

Judgment affirmed. FN1

FN1. Toll, dockage, and wharfage charges mentioned in the “Water Front Act,” held to be within the rule of this case, and payable only in coin. *People v. Steamer America*, 34 Cal. 681; also, a fine imposed for a violation of the law against gambling, *Ex parte Whipple*, Jan. Term, 1866. But railroad fares are not taxes and do not fall within the rule. *Tarbell v. C. P. R. R. Co.* 34 Cal. 623.

State Treasurer v. Wright, 28 Ill. 509 (1862).

Supreme Court of Illinois.

THE STATE TREASURER,
Plaintiff in Error,

v.

PRESCO WRIGHT, COLLECTOR OF SANGAMON COUNTY,
Defendant in Error.

April Term, 1862.

ERROR TO SANGAMON.

The jurisdiction of the State, on the subject of taxation for State purposes, is supreme; over which the Government of the United States can have no power or control.

The mandate of the State to its officers, directing them to collect its revenue in gold and silver coin only, cannot be disobeyed. Congress has not power or jurisdiction over this subject.

THIS case is fully stated in the opinion of the Court.

(The General Assembly, at its session in 1863, has changed the law, in regard to the collection of taxes, authorizing them to be paid in the currency issued by authority of Congress.)

BREESE, J.

This case comes before us from the Sangamon Circuit Court, on the following agreed statement of facts, namely:

“It is agreed by and between William Butler, Treasurer of the State of Illinois, and Presco Wright, Treasurer and Collector of Sangamon county, that the said Presco Wright, as treasurer and collector of Sangamon county, had collected and had in his hands due to the State of Illinois on the sixth day of May, 1862, the sum of one thousand dollars, collected by him on taxes assessed, laid and collected by him in the year 1862, due to the State of Illinois for all the various items of taxation required by law to be collected and paid into

the State treasury, which sum had been collected by him from the inhabitants of Sangamon county, and received by him from them in the United States treasury notes hereinafter described, and that on that day the auditor of public accounts issued from his office the following order, to wit:

MR. TREASURER:— Receive of Presco Wright, Collector of Sangamon county, one thousand dollars, being the amount in part of taxes collected by him for the year 1861.

JESSE K. DUBOIS, Auditor.

“And it is further agreed, that on the same day, the said Presco Wright presented the said order to the treasurer, the said William Butler, and then and there, at the office of the treasurer of the State of Illinois, tendered and offered to pay to the said treasurer the said sum of one thousand dollars in demand treasury notes of the United States, issued under and in pursuance of the provisions of an act passed by the Congress of the United States, approved July 17, 1861, entitled, ‘An Act to authorize a national loan, and for other purposes,’ which treasury notes the said treasurer then and there refused to receive from the said Presco Wright; and thereupon, the said Presco Wright tendered, and offered to pay to the said treasurer the said sum of one thousand dollars in treasury notes of the United States, issued under and by virtue of an act passed by the Congress of the United States, approved February 25, 1862, entitled, ‘An Act to authorize the issue of United States treasury notes, and for the redemption or funding thereof, and for funding the floating debt of the United States;’ which last mentioned sum of treasury notes the said treasurer also refused to receive from the said Presco Wright; and it is now further agreed to submit to the decision of the court, whether the said treasurer was bound to receive the said sum of one thousand dollars in either description of treasury notes before described; and if the court shall be of opinion that the treasurer was bound to receive the said sum of one thousand dollars, in either description of treasury notes above described, then the court shall award a peremptory mandamus, commanding the treasurer to receive said sum of one thousand dollars in treasury notes, the parties hereby waiving the issuing of an alternative mandamus. And it is further agreed, that a *pro forma* judgment of the Circuit Court may be entered, awarding a peremptory mandamus, commanding the treasurer to receive said treasury notes of either kind. And the parties further agree, that an appeal may be granted by the court to the Supreme Court of the State of Illinois, to the said William Butler, on his filing a copy of this record in said Supreme Court, sitting at Ottawa, in the Third Grand Division, during the April term of said court, without bond or security. And they further agree, that said Supreme Court shall enter such judgment as in their opinion the law justifies and requires on the agreed case.

WILLIAM BUTLER, State Treasurer.

PRESCO WRIGHT, Treasurer and Collector, Sangamon County, Ill.

The error assigned is, in awarding a peremptory mandamus.

No argument has been submitted by either party in the case, the treasurer contenting himself with a reference to the act of the General Assembly of this State, regulating the collection of the revenue, as his justification in refusing the proffered notes, the county collector urging nothing in support of his proposition.

We do not know that argument could have availed either party, as the statute, by which the treasurer must be governed, is so plain and specific as to admit of no construction.

The amendatory act regulating the collection of the revenue, approved February 25, 1853, (Scates' Comp. 1085), declares in the first section, "That the county revenue shall be collected in gold and silver coin, county orders and jury certificates, and in no other currency; the revenue for State purposes shall be collected in gold and silver coin, and auditors' warrants, and in no other currency; and State taxes levied for any special purpose, other than to defray the ordinary expenses of the State government, shall be collected in gold and silver coin, and in no other currency."

The last clause of this section, excluding auditors' warrants – evidences of State indebtedness – was designed to make certain so much of the revenue to be paid in gold or silver coin, as should meet the interest on our State debt due by bonds regularly issued under the authority of the State, and now distributed all over the civilized world, and which we have pledged the faith of the State, shall be paid in coin. If, then, the treasurer could receive anything but coin for this purpose, our pledge could not be redeemed. Coin circulates throughout the world, and has, in its markets, an ascertained and established value by which all commodities are measured, and no paper obligation, even if at par with coin where issued, could be made to take the place, abroad, of coin. It is by coin, and coin alone, we can perform the obligations we are under to our creditors, and we know of no power in existence, capable of placing us in a position by which we shall be unable to meet our just engagements, save and except the action of our own legislature, which had the power to repudiate the obligation, either flatly, or by indirection.

The jurisdiction of the State on the subject of taxation, for all State purposes, is supreme, and over which, the government of the United States can have no power or control. That government acts through delegated power, and can exercise no other except such as may be necessary to carry into effect a granted power. The power has been, nowhere, delegated to the Congress to interfere with the mode which a State may adopt to raise a revenue for its own purposes, or the manner or funds in which it shall be collected. This is a subject

peculiarly belonging to the States, and wholly under State control, so that should it be deemed by the State expedient to collect its revenue for its own use, in the productions of its soil, no power on earth could interfere to forbid it. The moral obligation to pay its creditors in coin would exist, but no power exists to enforce the obligation. It is, from its very nature, an imperfect obligation, there being no superior to enforce it, and it must ever be so. Congress cannot interfere in any form.

There being nothing in our State constitution prohibiting, expressly or impliedly, this action of our legislature; and the constitution of the United States imposing no restriction, and authorizing none, the power of the State is absolute, plenary, sovereign over this whole subject, when taxation is imposed, and revenue sought for State purposes. This being so, its mandate to its officers to collect such revenue in gold and silver only, cannot be disobeyed. The law is the treasurer's warrant, which he is not at liberty to disregard or contemn. The State authorities cannot be interfered with, by any legislation of Congress upon this subject, that body having no power or jurisdiction over it.

The order awarding a peremptory mandamus is set aside, no other funds but gold and silver coin, or auditors' warrants, being receivable in payment of the ordinary revenue of the State for State purposes.

Order reversed.

***Metropolitan Bank v Van Dyck*, 27 N.Y. 400 (1863).**

Court of Appeals of New York.

THE METROPOLITAN BANK and
THE SHOE AND LEATHER BANK

v.

VAN DYCK, Superintendent of the Bank Department.

MEYER

v.

ROOSEVELT.

September Term, 1863.

The act of Congress passed February 25, 1862 (ch. 33), making certain treasury notes of the United States a legal tender in payment of debts between private persons, is constitutional and valid.

The power to borrow money on the credit of the United States carries with it, it seems, the power to attach the quality of a legal tender to the notes issued, when, in the judgment of Congress, it is necessary to make them effectual for the purpose of borrowing.

The validity of this provision, as an exercise by Congress of the power to regulate commerce, discussed and maintained by MARVIN, J.

The provision of the Constitution of this State (art. 8, § 6), that the legislature shall require the redemption in specie of all bills and notes put in circulation as money, is not self-executing, so that the refusal of a bank to redeem its bills in specie authorizes the Bank Superintendent to sell the securities deposited with him.

Until the legislature shall require the redemption of bank bills in specie, an offer to pay in treasury notes made a legal tender by act of Congress is sufficient under the general banking law (ch. 260 of 1838, § 4), which only authorizes a sale of the securities upon default in paying such bills in “lawful money of the United States.”

THE respondents in the first above entitled cause are banking associations, organized under the general banking law of this State, and the several acts amendatory thereof, and are located and doing business in the city of New York. By the provisions of those acts, the said banks were required to deposit securities with the bank department for the redemption and payment of the bills or circulating notes issued by such banks respectively. Upon default of any such bank, upon lawful demand, to pay any such note or bill "*in the lawful money of the United States*," the holder of such note was authorized to cause the same to be protested, and the superintendent of the bank department, on receiving such protest, is directed to take the proceedings prescribed by said act, to compel payment thereof, out of the securities so deposited with him for that purpose, and if need be to sell the same. (Chap. 260 of 1838, § 4.) On the 26th of March, 1863, one D. Valentine, being the owner and holder of a bill or note issued by each of the respondents, of the denomination of ten dollars, presented the same at their several banks, and demanded payment thereof in the gold or silver coin of the United States, which was refused by the respondents, but each tendered to him, and offered to pay the said note or bill in a note of the denomination of ten dollars, issued by the secretary of the treasury, upon the credit of the United States, under and by virtue of the act of the Congress of the United States, entitled "an act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the United States," approved February 25, 1862. Thereupon Valentine caused the notes to be protested, and the protest thereof to be filed with the appellant, and the appellant gave notice, requiring said respondents to pay their respective notes, within fifteen days, in gold or silver coin, or in default the appellant would proceed to sell the securities so deposited with him, and also proceed to make redemption thereof, pursuant to the requirements of said acts. Upon an agreed case, pursuant to section 372 of the Code of Procedure, the following questions were submitted to the Supreme Court at general term, for decision:

1. Whether the aforesaid act of Congress, approved February 25, 1862, is constitutional and valid, and also, whether the refusal of the plaintiffs to redeem their said notes so issued by them, upon demand, in the gold or silver coin of the United States, and their offer to redeem their said notes in the notes of equal denomination issued as aforesaid, by authority of Congress, was a failure or refusal to redeem their notes in the lawful money of the United States.
2. If the court be of the opinion that the said act is constitutional, and that the plaintiffs offered to redeem their notes in the lawful money of the United States, then judgment is to be entered restraining the defendant, as superintendent, from taking any further steps from redeeming any of the notes of the plaintiffs, in cases where the plaintiffs have offered to redeem in the legal tender notes of the United States, and that he be restrained from taking any steps towards the sale of the stocks or trust funds in his hands belonging to the

plaintiffs. But if, on the contrary, the court be of the opinion that the said act of Congress is unconstitutional, and that a refusal to redeem in gold or silver coin of the United States, is a refusal to redeem in the lawful money of the United States, then a judgment was to be entered dismissing the complaint of the plaintiffs.

In this action, the Supreme Court, in the third judicial district, held the said act of Congress to be constitutional and valid, and that a tender made in the treasury notes issued by virtue and in pursuance of said act, was a good and legal tender for all debts mentioned therein, and that the tender made by the plaintiffs to redeem their circulating notes in the said above described treasury notes, was a tender and offer to redeem their said notes in the lawful money of the United States. The court thereupon gave to the plaintiffs the relief asked for in their complaint.

In the second above entitled cause, the facts agreed upon, in the case submitted to the Supreme Court under the same section of the Code, were: That the plaintiff, Lewis H. Meyer, had become the owner in fee, in May, 1861, of certain premises, subject to a mortgage to the defendant to secure the sum of \$8,000. On the 23d of August, 1854, one Samuel Bowne was the owner in fee of said premises, and procured a loan from the defendant of the sum of \$8,000, to secure the payment of which, on the 23d of August, 1857, he made and executed to the defendant his bond in the penal sum of \$16,000, "lawful money of the United States of America," conditioned for the payment of the just and full sum of \$8,000, on said 23d of August, 1857, with interest thereon at the rate of seven per cent, payable semi-annually. To secure the payment of his said bond, the said Bowne and his wife made and executed a mortgage on said premises, bearing even date with said bond, which recited that said Bowne was justly indebted to the defendant "in the sum of eight thousand dollars lawful money of the United States of America." The mortgaged premises were conveyed to the plaintiff, and he assumed the payment of said mortgage.

On the 11th of June, 1862, the plaintiff desiring to pay off and cancel said mortgage, tendered to the defendant the sum of \$8,170, being the amount due for principal and interest on said mortgage up to the said 11th of June, 1862, in notes of the United States, issued under and by virtue of the act of Congress, approved February 25, 1862. The defendant refused to receive the same as a legal tender, and claimed that the repayment of said money should be made in gold coin of the United States. It was thereupon agreed between the parties, that the defendant should receive, and he did receive the said sum of \$8,170, in said notes, conditionally, and that the question, whether the said notes of the United States are and were a legal tender in payment of said mortgage debt and interest, should be submitted to the Supreme Court, and if such court should decide that said notes were and are a legal tender and discharge of said bond and mortgage, that then the said defendant should deliver up said bond and mortgage, and acknowledge satisfaction thereof

and discharge the same of record; but if the court should decide that said notes were not and are not a legal tender in payment of said mortgage debt, that then the plaintiff should pay to the defendant the further sum of \$326.78, with interest thereon from June 11, 1862, and that upon payment of said last mentioned sum, with interest, the defendant was to deliver up the bond and mortgage to be canceled, and acknowledge satisfaction thereof and cancel the same of record.

In this last mentioned action the Supreme Court in the first judicial district gave judgment for the defendant, and that the plaintiff should pay to the defendant the additional sum of \$326.78, and interest from June 11, 1862, and that on payment of the same, the defendant acknowledge satisfaction of said bond and mortgage, and discharge the same of record, and deliver the same up to be canceled.

From the judgment in the first above entitled action the defendant appealed, and from the judgment in the second case the plaintiff appealed to this court. The cases were argued together.

J. V. W. Doty and George T. Curtis, for the appellant; John K. Porter and Lyman Tremain, for the respondents – in first action.

Bernard Roelker and William C. Noyes, for the appellant; George T. Curtis, for the respondent – in second action.

DAVIES, J.

The question presented for our determination in these actions is one of the gravest importance, and challenges our most careful consideration. We are called upon to annul and set aside an act of the Congress of the United States, passed in conformity with the forms of the fundamental law, after grave deliberation by both houses of Congress, and which has assumed the form of a law, with the approval of the executive. Two departments of the government have therefore united, and all which by the provisions of the Constitution are required to unite, in the enactment of a law. The responsibility of determining whether these two departments have violated the Constitution is now cast upon the third department, that of the judiciary, and however great that responsibility may be, we have, in the discharge of the duties imposed upon us, to meet it, and decide whether or not the Constitution has been violated. Before proceeding to the discussion of the precise question presented for adjudication in the present cases, it will greatly aid us in arriving at a correct and intelligent conclusion to advert briefly to the system of government organized by the Constitution of the United States, the principles which should govern in the construction of that Constitution, and the decisions which have been made,

touching the powers of Congress under various provisions of that Constitution.

We are all familiar with the fact, that the first system of a general or national government, formed by the colonies in this country, upon their separation from the crown of Great Britain, and assuming the position of independent states, was that of a confederation of the several states. “Articles of confederation and perpetual union” were entered into between the several states; and the style of the confederacy was that of “The United States of America.” Each state retained its sovereignty, freedom and independence, and every power, jurisdiction and right which were not by the articles of that confederation, expressly delegated to the United States, in Congress assembled. The ratification clause of the articles solemnly declared, that “whereas it has pleased the great Governor of the world, to incline the hearts of the legislatures we respectively represent in Congress to approve of and to authorize us to ratify the said articles of confederation and perpetual union: Know ye, that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles and perpetual union. And we do further solemnly plight and engage the faith of our respective constituents, that ... *the articles thereof shall be inviolably observed by the States we respectively represent; and that the union shall be perpetual.*” History informs us of the defects and the weakness of the articles of confederation, and of the conviction of the whole country that a different and more efficient system of government must be devised to insure to the people of the several states, their common defence, the security of their liberties, and their mutual and general welfare. A convention assembled in Philadelphia in 1787, which framed a Constitution that received the sanction of the people of the several states, and under which a government was organized in 1789, which has challenged the admiration of the world, and under the benign administration of which we have become a great and powerful nation, among the first of the earth.

The address of the convention to the people on submitting the result of their labors for approval, which was signed by George Washington, its President, says: “The friends of our country have long seen and desired that the power of making war, peace and treaties, that of coining money, and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the Union. ... In all our deliberations on this subject we kept steadily in view that which appears to us the greatest interest of every true American – the consolidation of our Union – in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed upon our minds, led each State in the Convention to be less rigid on points of inferior magnitude than might have been otherwise expected; and thus the Constitution which we now present is the result of a spirit of amity and of that mutual deference and concession, which the peculiarity of our political situation

rendered indispensable.”

The Constitution, thus prepared, was submitted to the people of the several States in conventions assembled, and they aggregately declared, in ordaining and establishing the said Constitution for the United States of America, that “the people of the United States, in order to form *a more perfect Union*, establish justice, ensure domestic tranquility, provide for the common defence, promote the general welfare and secure the blessings of liberty to ourselves and to our posterity,” did ordain and establish the same.

A perpetual Union was thus established by the articles of confederation; to render that Union more perfect was the object to be attained by the Constitution. It was to secure to the framers thereof, and to their posterity, the blessings enumerated. The consolidation of the Union and its perpetuity were not all that was contemplated. Absolute sovereignty and complete supremacy in the exercise of all governmental powers confided to the national government were intended to be secured, and it is believed that such intention was accomplished.

All legislative powers thereby granted were vested in the Congress, and the powers so granted to Congress are specifically enumerated in the eighth section of article first; and lest there might be doubts suggested as to the fullness of the authority granted, to such specific enumeration this clause is added, “and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”

The omnipotence of the British Parliament is not more absolute than is the supremacy of the Congress of the United States upon all subjects which are either expressly or impliedly delegated to it. The President of the United States, upon his induction into office, is sworn to “preserve, protect and defend the Constitution of the United States.” He is the only officer in the national or state governments who is required to take that oath, and all executive, legislative and judicial officers, both of the United States and of the several states, are required to be bound by oath or affirmation to support the Constitution of the United States. (Sec. 3 of art. 6.) It is made the duty of the President, from time to time, to give to Congress information of the state of the Union, and to recommend such measures as he shall judge necessary and expedient, and it is the duty of Congress, within the powers delegated to it, to pass such laws as may be necessary and proper to aid the President in fulfilling the high and imperative trust reposed in him, and to enable him to preserve, protect and defend the Constitution. To accomplish all these purposes, and for the execution of the powers thus conferred on the government of the United States, and for its own protection and preservation, and its own defence, the Congress of the United States

has absolute control over all the citizens thereof, and of the property and resources of the nation, subject only to that accountability which a representative in a free government owes to his constituents; and that ordeal, happily, in our favored land, is of frequent recurrence. That there might not be any misapprehension as to the fact of this absolute and perfect supremacy, the Constitution emphatically declares that “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 of every state shall be bound thereby*; anything in the Constitution or laws of any state to the contrary notwithstanding.”

The judges of every state are expressly declared to be bound by the Constitution and the laws of the United States, made in pursuance thereof, and as they have all taken an oath to support that Constitution, every safeguard would seem to have been provided to ensure their fidelity to that constitution and the laws made under it. Such laws overrule the state constitutions, and the laws of every state, and if the latter conflict with the former, they are void and nugatory, and it is the imperative duty of the judges so to declare.

These views, it is believed, are fully sustained by learned commentators, as well as by the authoritative decisions of the Supreme Court of the United States, the final arbiter of the powers of that government. (Story’s Com. on the Constitution, §§ 354, 355, 356, 360.) In *Marvin v. Hunter* (1 Wheat., 304, 324), the Supreme Court said: “The Constitution of the United States was ordained and established, not by the states in their sovereign capacity, but emphatically, as the preamble of the Constitution declared, by the people of the United States.” Chief Justice MARSHALL, in delivering the unanimous opinion of the court in the case of *McCulloch v. Maryland* (4 Wheat., 416), observed: “From the conventions called to ratify it the Constitution derives its whole authority. The government proceeds directly from the people, ‘is ordained and established’ in the name of the people, and is declared to be ordained ‘in order to form a more perfect union, establish justice, ensure domestic tranquillity and secure the blessings of liberty to themselves and to their posterity.’ The assent of the states in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it, and their act was final. It required not the affirmance, and could not be negated by the state governments. The Constitution, when thus adopted, was of complete obligation and bound the state sovereignties. It has been said that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to governments, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves. To the formation of a league, such as was the confederation, the state sovereignties were certainly

competent. But when, ‘in order to form a more perfect union,’ it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people and of deriving its powers directly from them was felt and acknowledged by all. The government of the Union, then, is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit. ... It is the government of all, its powers are delegated by all, it represents all, and acts for all.” These quotations are thus liberally made, because of their pertinency to the present investigation, and for the reason that they are authoritative expositions of the objects and purposes of the Constitution, and of the source of its power, and are to be recognized and accepted as such by all tribunals. The government thus formed, is supreme and self-supporting and self-perpetuating. It cannot be dependent for its life or existence upon other governments or sovereignties, but has given to itself vigor and strength sufficient for its own preservation and perpetuity. This point was directly resolved in the case of *McCulloch v. Maryland* (*supra*), in which Chief Justice MARSHALL said: “If any one proposition could command the universal assent of mankind, we might expect it would be this, that the government of the Union, though limited in its powers, is supreme within its sphere of action. ... Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind the component parts. But this question is not left to mere reason; the people have, in express terms, decided it by saying, ‘this Constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land,’ and by requiring that the members of the state legislatures and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it.”

The same doctrine was distinctly enunciated by Chief Justice TANEY, in the case of *Ableman v. Booth* (21 How., 506, 516), where he says: “The powers of the general government and of the states, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereign ties, acting separately and independently of each other within their respective spheres; and the sphere of action appropriated to the United States, is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye.”

Again, we are to give to the various provisions of the Constitution such a construction as will most effectually subserve the great purposes of its formation, and best promote the general welfare of the grantors of the powers contained in it, the people, the source and fountain of all power. The grant of power is to be construed most favorable to the grantor, especially where the power is granted, or the agency created, for the benefit and welfare

of the grantor, or principal. The rule which should govern in such a case is clearly laid down by Story (Com. on Const., § 413). He says: “But in construing a constitution of government framed by the *people*, for their own benefit and protection, for the preservation of their rights and property and liberty, where the delegated powers are not and cannot be used for the benefit of their rulers, who are but their temporary servants and agents, but are intended solely for the benefit of the people, no such presumption, to use the words in the most restricted sense, necessarily arises. The strict or the more extended sense both being within the letter, may be fairly held to be within their intention, as either shall best promote the very objects of the people in their grant, as either shall best promote or secure their rights, property or liberty.”

This court, in the case of *The People v. New York Central Railroad Company* (24 N. Y., 485, 486), approved of the rule enunciated by JOHNSON, J., in *Newell v. People* (3 Seld., 93), that a constitution is an instrument of government, made and adopted by the people for practical purposes, connected with the commerce, business and wants of human life. For this reason, pre-eminently, every word should be expounded in its plain, obvious and common sense, and Judge DENIO, *arguendo*, in the same case, stated the principle of interpretation, which, while it commends itself to the good sense of all, is abundantly supported by authority, that a written constitution, framed by men chosen for the work by reason of their peculiar fitness, and adopted by the people upon mature deliberation, implies a degree of carefulness of expression proportioned to the importance of the transaction; and the words employed are to be presumed to have been used with the greatest possible discrimination. Chief Justice MARSHALL, in *Gibbons v. Ogden* (9 Wheat., 188), in interpreting a provision of the Constitution of the United States, says: “As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who adopted it must be understood to have employed words in their natural sense, and to have intended what they said.”

We are now prepared to enter upon the inquiry, what powers have been conferred by the Constitution upon Congress, and whether any such powers authorize the enactment by that body of the act passed February 25, 1862.

The express powers needful to be referred to, thus specifically delegated to Congress, are:

1. To levy and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States.
2. To borrow money on the credit of the United States.
3. To regulate commerce with foreign nations, and among the several States and with the Indian tribes.

4. To coin money, regulate the value thereof, and of foreign coin.
5. To provide for the punishment of counterfeiting the securities and current coin of the United States.
6. To declare war, grant letters of marque and reprisal.
7. To raise and support armies.
8. To provide and maintain a navy.
9. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions.
10. The United States having guaranteed to every State in this Union a republican form of government, and engaged to protect each of them against invasion and against domestic violence, Congress has power to fulfill those engagements.
11. Congress has also power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

We are to apply to the construction of the powers thus delegated, the rule as settled in the case of *McCulloch v. Maryland* (*supra*), that the Government of the United States can claim no powers which are not granted to it by the Constitution; and the powers actually granted must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms, and where a power is expressly given in general terms, is not to be restrained to particular cases, unless that construction grows out of the context, expressly or by necessary implication.

Chief Justice MARSHALL, in *Gibbons v. Ogden* (*supra*), in delivering the opinion of the court, says: "This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants expressly *the means* for carrying all others into execution, Congress is authorized to make all laws which shall be necessary and proper for the purpose. But this limitation in the means which may be used is not extended to the powers which are conferred; nor is there one sentence in the Constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do the gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the terms, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the

government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument – for that narrow construction which would cripple the government and render it unequal for the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent – then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded... If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can inure solely to the benefit of the grantee; but is an instrument of power for the general advantage, in the hands of agents selected for that purpose; which power can never be executed by the people themselves, but must be placed in the hands of agents or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.”

No apology is necessary for quoting thus liberally from this profound jurist and learned expounder of the purposes and objects of the Constitution, and of the powers conferred by it upon the Congress of the United States, upon the departments and officers thereof.

We should be doing great injustice to the framers of the Constitution, and a great wrong to the people who adopted it, to secure to themselves and their posterity the blessings of liberty, if we give to it such a construction as will cripple the government, and render it unequal to the objects for which it was instituted. We must also bear in mind that no interpretation of the words, in which those powers are granted can be a sound one, which narrows their ordinary import, so as to defeat the objects for which that Constitution was made. That would be to destroy the spirit and to cramp the letter of the Constitution itself. Mr. Justice STORY, in delivering the opinion of the court in *Martin v. Hunter* (1 Wheaton, 304, 326, 327), says: “This instrument (the Constitution) like any other grant, is to have a reasonable construction according to the import of its terms; and when a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grows out of the context expressly or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged. The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specification of its powers, or to declare the *means* by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not impracticable task. The instrument was not intended to provide merely for the exigencies

of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which at the present might seem salutary, might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers as its own wisdom and the public interests should require.”

We have had pressed upon us, with much force and eloquence, the tenth amendment to the Constitution, as containing a restriction upon the powers of the government of the United States. Its language is: The powers not delegated to the United States, nor prohibited by it to the states, are reserved to the states or to the people. The same reservation, in substance, was contained in the second article of the articles of confederation, except that the word “expressly” was there placed before the word “delegated.” The omission of this word in the tenth amendment is most significant, and shows the object was not to interfere with or restrict any of the powers delegated to the United States by the Constitution, whether expressly delegated or not. This is the view taken by the Supreme Court in the case of *McCullough v. Maryland* (*supra*), where it is said, in the opinion, that “there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers, and which requires everything granted shall be expressly and minutely described. Even the tenth amendment, which was formed for the purpose of quieting the excessive jealousies which had been excited, omits the word ‘expressly,’ and declares only that the powers ‘not delegated to the United States, nor prohibited by it to the states, are reserved to the states or to the people,” thus leaving the question whether the particular power which may become the subject of contest, has been delegated to one government or prohibited to the other, to depend on a plain construction of the whole instrument. The men who drew and adopted this instrument had experienced the embarrassment resulting from the insertion of the word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this was entertained by the framers of the American Constitution, is not only apparent from the nature of the instrument, but from the language.” And it is emphatically asked, if this were not so, “Why else were some of the limitations found in the ninth section of the first article introduced? There was no express delegation of any of these powers to the Congress of the United States and the prohibition

has no significance or meaning, unless it had been supposed that the powers thus prohibited could have been exercised, unless such prohibition had been made.” So also the first eight amendments to the Constitution, are all in restraint of powers, which it was supposed could have been exercised by Congress without such prohibitions. None of them are applicable to any of the express powers delegated to Congress, but embrace an enumeration of certain implied powers, which it was assumed Congress might exercise under the general delegation of powers, unless specially prohibited from so doing. The omission in the ninth section of article first, and in any of these amendments, of any restraint upon or prohibition to Congress to legislate upon the subject, of what should or should not be a legal tender, possesses great significance and importance, as we shall hereafter see, when we come to consider that precise point more attentively. It is sufficient here to observe, that the Constitution contains no prohibition upon Congress from legislating on that subject. It can be hardly necessary to say that the prohibitions contained in the tenth section, which are specially made applicable to the states, have no relation to, and in no sense, impair or affect any of the powers of Congress. If these prohibitions were equally binding on Congress, as upon the states, then they were all prohibited to Congress equally. That the framers of the Constitution did not so regard it, is conclusively shown by the fact that, while they prohibited the states from doing several things, among others, to pass any bill of attainder, *ex post facto* law, or grant any title of nobility, those three things were only prohibited to the Congress, and the reasonable and legitimate deduction from such omission is, that the other things not prohibited to Congress were allowed to be exercised by it, if those matters came within the purview of either the express or implied powers granted. This argument is not weakened by the fact that the Constitution expressly delegated to Congress the power to grant letters of marque and reprisal, and to coin money, and omitted saying anything on the other matters prohibited to the states.

Such would seem to have been the view taken by distinguished members of the house of representatives of the United States in the debate on the bill to incorporate the United States Bank, in June, 1811. Mr. Crawford, of Georgia, afterward Secretary of the Treasury, said: “If the state governments are restrained from exercising this right to incorporate a bank, it would appear, *ex necessitate rei*, that this right is vested in the United States. The entire sovereignty of this nation is vested in the state governments and in the federal government, except that part of it which is retained by the people, which is solely the right of electing their public functionaries.” Mr. Alston, a member for South Carolina, said: “In the tenth article, first section, it is said, no state shall coin money, emit bills of credit, or make anything but gold and silver coin a legal tender in payment of debts; the interpretation which I give to it is, that the United States possess power to make anything besides gold and silver a legal tender. If what I conceive to be a fair interpretation be admitted, it must follow that they have a right to make bank paper a legal tender. Much more, then, have they the power of causing it to be received by themselves in payment of

taxes.” (Elliott’s Debates, vol. 4, pp. 367, 368.) These positions do not appear to have been controverted in the debate.

It seems here appropriate to refer to the provision of the particular act of Congress now under consideration. It was passed on the 25th of February, 1862, and is entitled “an act to authorize the issue of United States notes, and for the redemption or funding thereof, and for funding the floating debt of the United States.” The first section authorized the Secretary of the Treasury “to issue, on the credit of the United States, one hundred and fifty millions of the United States notes,” and declared that the same “shall be receivable in payment of all taxes, internal duties, excises, debts and demands of every kind, due to the United States, except duties on imports, and of all claims and demands against the United States of every kind whatsoever, except for interest upon bonds and notes, which shall be paid in coin, and shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid.”

The question presented for decision in these actions is, has Congress the power, under the Constitution, to make a law declaring treasury notes, issued by the United States, and payable at its treasury, for the redemption of which the credit of the federal government is pledged, and for the payment whereof the entire property of the government and that of each citizen, which may be reached by taxation, is also pledged, a legal tender in the payment of debts, and lawful money of the United States?

Before proceeding to the consideration of this question, it will be instructive to revert to the proceedings of the convention which framed the Constitution.

The second clause of section eight of article first of the Constitution was originally reported in these words: “To borrow money and emit bills on the credit of the United States.” This clause coming up for consideration in the convention, Mr. Gouverneur Morris moved to strike out the words “and emit bills on the credit of the United States,” remarking that, if the United States had credit, such bills would be unnecessary – if they had not, unjust and useless. Mr. Madison said, 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. Morris replied, that striking out the words will leave room still for notes of a responsible minister, which will do all the good without the mischief. Mr. Gorham was for striking out without inserting any prohibition. He also said, as to Congress having the power to issue paper money: “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, and was, consequently, opposed to a prohibition of it altogether. He said “it would stamp suspicion on the government to deny it a

discretion on this point.” The clause was stricken out (Madison Papers, vol. 3, p. 1343, &c.), *but no prohibition* on Congress was inserted to issue paper money or to make the same a legal tender.

Mr. Madison adds, in a note at page 1346, that the vote of Virginia in the affirmative was occasioned by the acquiescence of Mr. Madison, who became satisfied that striking out the words would not disable the government from the use of public notes, as far as they could be safe and proper, and would only cut off the pretext for a paper currency, and particularly for making the bills a tender either for public or private debts.

Mr. Morris subsequently reported the Constitution to the convention, and the second clause of section eight was reported as it now stands, the words “on the credit of the United States,” which had been erased, having been reinserted. The power was, therefore, given to Congress to borrow money on the credit of the United States, and it would appear to have been the understanding of the members of the convention, that such power authorized the issuing of notes or bills by the government. It is undeniable, that the convention, with its attention particularly directed to the consideration of the question, declined to prohibit their issue, and also declined to prohibit the making of them a legal tender in payment of either public or private debts. The exigencies of the government at an early day compelled a resort to the power of borrowing money on the credit of the United States, and such power has been exerted and rendered beneficial in the form of treasury notes, issued by it and on the public credit. On the 30th of June, 1812, the first act was passed authorizing the issue of these notes to the amount of \$5,000,000, and the sixth section of the act declared that they should be received in payment of all duties and taxes laid by authority of the United States, and of all public lands sold by its authority. These notes, therefore, became a legal tender for debts of this character due the United States, and the act was approved by President Madison.

Issues of treasury notes have been authorized by acts of Congress of February 25, 1813; March 4, 1814; December 26, 1814; October 12, 1837; January 31, 1842; August 31, 1842; July 22, 1846; January 28, 1847; December 23, 1857.

President Madison, in approving the act of June 30, 1812, entirely overcame the scruple or doubt suggested by him that the bills which might be issued under the authority to borrow money, ought not or could not be made a tender for public debts. That Congress possessed that power is now settled by judicial authority. In *Thorndike v. The United States* (2 Mason, 1, 18), STORY, J., said: “By the statutes of the United States, under which treasury notes have been from time to time issued, it is enacted, that such notes shall be receivable in payment to the United States, for duties, taxes and sales of public lands, to the full amount of the principal and interest accruing due on such notes. It follows, of

course, that they are a legal tender in payment of debts of this nature due to the United States, and by the very tenure of the acts, public officers are bound to receive them.”

We find, therefore, a long continued practice on the part of Congress in the issue of treasury notes on the credit of the United States, and declaring such notes to be a legal tender in payment of certain debts due to the United States, and the legality of such notes sanctioned by all departments of the government, and the power of Congress to issue the same and make them such legal tender, expressly affirmed by the courts. The deductions to be made from such facts will be hereafter adverted to. It should be observed here, that the power to issue treasury notes, on the credit of the United States, was distinctly conceded on the argument by the learned counsel, who appeared in opposition to the act of Congress now under consideration.

Congress have continuously, since the year 1792, exercised the power of declaring what shall be a legal tender in payment of private as well as public debts, in reference to a metallic currency. Now, it is conceded that there is no express delegation of power to Congress to legislate at all, on the subject of legal tender, and, as has been remarked, neither is there any prohibition in the Constitution, upon Congress, forbidding such legislation, or declaring what it shall or shall not make a legal tender. This scrupulous omission to make any provision in the Constitution, on this subject, was not accidental. The attention of the convention was particularly attracted to it, as we have seen, and we cannot doubt that the members of the convention intentionally omitted inserting any provision on the subject, preferring to leave its exercise to the implied powers delegated to Congress. It is clear, from the remark of Mr. Madison in the convention, already quoted, that in his opinion Congress would have the power to declare bills or notes issued on the credit of the United States, a legal tender, unless prohibited from so doing, by some provision of the Constitution.

Another significant circumstance as indicating the opinion of the convention that Congress had the power to legislate on the subject of legal tender, is found in the fact, that on the 6th of August, 1787, the Constitution, as previously agreed upon in the Convention, was reported by the committee of detail, nearly in the form it was subsequently passed. But article thirteenth of the then proposed Constitution, declared that “no state, without the consent of the Legislature of the United States, should make anything but specie a tender in payment of debts.” This proposed clause of the Constitution, therefore, contained a distinct and unequivocal acknowledgment that it would be competent for Congress to give its consent to the legislatures of the several states, to make something else than a specie tender in payment of debts. It is also an explicit admission that such a power was vested in Congress, and that it, by consent, might permit state legislatures to do the same thing. It is an absurdity to say that Congress could consent that the legislatures of the states could

do this, and not have the power of doing the thing itself; it of course could not grant to others powers it did not itself possess. On this clause coming up for final consideration, it was amended by making the prohibition upon the state legislatures peremptory and absolute, as the same now stands in the first subdivision of section ten of article first. The fact that the convention made the prohibition positive upon the states, does not militate at all against the argument derived from the conceded admission, that something else than specie could be made a tender for the payment of debts, with the consent of Congress.

This seems an appropriate place to consider the legislation of Congress under the powers conferred upon it to coin money, regulate the value thereof, and of foreign coins. It is to be borne in mind, that no express power is given by the Constitution to Congress to establish, or make anything a legal tender in payment of debts; neither, as has been already observed, is there any prohibition contained in the Constitution forbidding legislation by Congress on that topic, or declaring what it shall or shall not make a legal tender. The framers of the Constitution could not have been ignorant that the power to declare what shall or shall not be a legal tender, or, in other words, lawful money of a country, was a necessary incident of sovereignty, and had ever been exercised by the sovereign power in all civilized nations. They were equally cognizant of the fact, that the colonies had invariably exercised this power; and that the states, on the application of the Continental Congress, and pursuant to its recommendation, had made the issue of paper money by the Continental Congress, for the purpose of carrying on the war of the revolution, a legal tender in payment of debts. This legislation by the states was invoked, because that Congress had no power to legislate on any subject, and such legislation could only be had through the instrumentality of the states. Such weakness and defect, in the powers of the Continental Congress, were among the controlling reasons for the formation of the new system, brought into being by the Constitution.

In examining the history of legislation on this subject, we find that the first act of Congress relating to legal tender, is that of April 2d, 1792, establishing “the mint for striking and coining gold and silver coins;” and by section sixteen it was enacted, that all the gold and silver coins which shall have been issued from said mint, shall be a lawful tender in all payments whatsoever. The first issue of silver dollars from the mint was not before October, 1794; and of gold coin not before July, 1795; and the whole amount of metallic money issued from 1793 to 1795, was only \$463,541.80 in value. To provide a legal medium of commerce, an act was passed on the 9th of February, 1793, declaring that, from and after the first day of July, 1793, foreign gold and silver coins should pass current as money within the United States, and be a legal tender for the payment of all debts and demands, at the several and respective rates therein mentioned and prescribed. This act embraced the coins of Great Britain, Portugal, France, Spain, and the dominions of Spain. It was practically the first legal tender act ever passed by Congress.

On the 4th of August, 1790, an act was passed by Congress, to provide for the collection of duties, which declared that certain foreign coins, therein enumerated, should be received in payment of duties at prescribed rates of value, but did not declare the same should otherwise be a legal tender. This provision of the act of 1790, was repealed by the act of February 9, 1793, the repeal to take effect July 1, 1793. Subsequently other acts have been passed by Congress, from time to time, changing the value of certain foreign coins and making them a legal tender, for the payment of all debts and demands, sometimes by weight and then again by tale. (Act of April 10, 1806; act of March 3, 1823, making foreign coins receivable in payment of public lands; act of 25th June, 1834, declaring certain foreign silver coins to be of the legal value, and to pass current as money within the United States by tale for the payment of all debts and demands; act of March 3, 1843.)

By the act of June 28, 1834, foreign gold coins were directed to pass current as money within the United States, and be receivable in all payments by weight, of the fineness and at the rates therein mentioned. By the act of January 18, 1837, the standard for both gold and silver coins of the United States, was thereafter to be such, that of one thousand parts by weight, nine hundred should be of pure metal and one hundred of alloy, and the alloy of the silver coins should be of copper, and the alloy of the gold coins should be of copper and silver; provided, that the silver do not exceed one-half of the whole alloy. The weight of the gold and silver coins was prescribed, and they were declared to be legal tenders of payment according to their nominal value. And it was further provided in and by said act, that the silver coins theretofore issued at the mint of the United States, and the gold coins issued since July 1, 1834, should continue to be legal tenders of payment for their nominal value, on the same terms as if they were of the coinage of that act.

By the act of 27th February, 1853, the weight of the half-dollar was reduced from 206 $\frac{1}{4}$ grains to 192 grains, and all the coins of lesser denominations in proportion, and they were made legal tenders in payment of debts for all sums not exceeding five dollars. We thus see that Congress, since the organization of the government, commencing in the presidency of Washington, has exercised plenary power and control over the subject of currency and legal tender laws; it has established the value of certain foreign coins at one time and changed it at another; has made them a tender in payment of all debts, now by weight, and then again by tale; repealed such laws and enacted them again, sometimes making such coins a legal tender in payment of all debts, and at other times limiting them to the payment for public lands or for duties and taxes, also making the evidences of the public debt or stock of the United States a legal tender in payment for public lands. (See act of March 3, 1797.)

We also see that Congress has changed, from time to time, the standard of value of the coins struck by our own mint, debased them by altering the fineness and weight and the

relative value of the gold and silver, and making the debased coins, as well as those of a greater value, not debased, equally a legal tender for the payment of all debts, public and private, at their respective nominal values.

As has been before observed, there is no express grant of power to Congress to make gold and silver or anything else a tender in payment of debts, public or private. It is conceded that Congress may properly say what the United States may receive in payment and discharge of debts due to it, and that it may therefore rightfully say in what currency or metals or things payment may be made of them. Admitting this, it is contended that it does not follow that Congress has the power to say what shall be a tender and discharge of a debt due from one individual to another. Our review of the legislation of Congress has shown us, that under the clause of the Constitution authorizing it to coin money and regulate the value thereof, Congress has uniformly declared that the money so coined, and the value of which has thus been regulated, should be received as a legal tender in payment of all debts, equally whether due to the government or to private individuals, and that under the power to regulate the value of foreign coins, it has so, from time to time, regulated and prescribed their value, and made them a legal tender in payment of all debts. It has made coins of unequal intrinsic value and fineness equally a tender in payment of debts at their respective nominal values.

All these powers have been thus exercised by Congress from the foundation of our government, and so far as my investigations have enabled me to say, they have been unchallenged. We are not furnished with any case where they have been questioned by the courts, and what inference such a uniform course of legislation, acquiesced in by the courts and by the country, should have, would seem to be well established. The general rule of construction which has been sanctioned is, that contemporaneous and legislative exposition regarding a power furnishes strong proof of the existence of such power.

Judge STORY says, in reference to a question of jurisdiction of the Supreme Court: "This weight of contemporaneous exposition by all parties, this acquiescence of enlightened State courts, and these judicial decisions of the Supreme Court through so long a period do, as we think, place the doctrine upon a foundation of authority which cannot be shaken without delivering over the subject to perpetual and irremediable doubts." (*Martin v. Hunter*, 1 Wheat., 421.) In *Cohens v. Virginia* (6 Wheat., 421), Chief Justice MARSHALL observed, that "this concurrence of statesmen, of legislators and of judges, in the same construction of the Constitution, may justly inspire some confidence in that construction." "An uniform course of action, involving the right to the exercise of an important power for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightfully exercised." (*Briscoe v. Bank of Kentucky*, 11 Peters, 257.)

“The uniform construction given to a provision of the Constitution by the legislature, with the silent acquiescence of the people, including the legal profession and the judiciary, and the injurious results which would come from a contrary interpretation, are proper elements of a legal judgment on this subject.” (Per BLACK, Ch. J., *Moore v. City of Reading*, 21 Penn., 188; see also *Norris v. Clymer*, 2 Penn., 277.)

MARCY, J., in *People v. Green* (2 Wend., 274), says: “Great deference is certainly due to a legalized exposition of a constitutional provision, and especially when it is made almost contemporaneously with such provision, and may be supposed to result from the known views of policy and modes of reasoning, which prevailed among the framers of the instrument expounded.” Chancellor WALWORTH, in the case of *The People v. Coutant* (11 Wend., 511), said: “Upon a question of real doubt as to the meaning of a particular clause in the Constitution, a legislative construction, if deliberately given is certainly entitled to much weight, although it is not conclusive upon the judicial tribunals.” Many more cases might be cited in maintenance of the same propositions, but they are entirely unnecessary. Applying these rules to the points now under consideration, no doubt can remain that the early and long continued and uniform practice of Congress in passing legal tender enactments was warranted by the Constitution, and the acts thus passed were constitutional and valid. The power to make tender laws by Congress is an implied power, and it may be derived from many of the express powers conferred upon that body. If the power exists, then the government is, what it was intended it should be, sovereign, within its own sphere of action, as much so as if this power had been given in express words; and we have seen that Congress is expressly authorized by the Constitution to make all laws necessary and proper to carry this or any other granted power into execution. The general rules of construction apply here, that when a power is granted in general terms, the power is to be construed as co-extensive with the terms of the grant, nor is it to be restricted to particular cases, because it may be susceptible of abuse.

This point is very ably and conclusively discussed by Judge STORY, in his work on the Constitution, and as this alleged or anticipated abuse of the power has been much pressed upon us in this argument, as a reason why we should hold that the power does not exist, a more particular reference to the suggestions and reasons of this learned and authoritative commentator may be permitted. In section 425 he says: “A power given in general terms is not to be restricted to particular cases merely because it may be susceptible of abuse, and, if abused, may lead to mischievous consequences. This argument is often used in public debate, and in its common aspect addresses itself so much to popular fears and prejudices that it insensibly acquires a weight in the public mind, to which it is in nowise entitled. But the argument from a possible abuse of power against its existence or use, is in its nature not only perilous, but in respect to governments would shake their very foundation. Every form of government unavoidably includes a grant of some discretionary

powers. It would be wholly imbecile without them. It is impossible to foresee all the exigencies which may arise in the progress of events, connected with the rights, duties and operations of the government. If they could be foreseen it would be impossible, *ab initio*, to provide for them. The means must be subject to perpetual modification and change: they must be adapted to the existing manners, habits and institutions of society, which are never stationary; to the pressure of dangers or necessities; to the ends in view; to general and permanent operations, as well as to fugitive and extraordinary emergencies. In short, if the whole society is not to be revolutionized in every critical period, and remodeled in every generation, there must be left to those who administer the government a large mass of discretionary powers capable of greater or less actual expansion, according to circumstances, and sufficiently flexible not to involve the nation in utter destruction from the rigid limitations imposed upon it by an improvident jealousy. Every power, however limited, as well as broad, is in its own nature susceptible of abuse. No Constitution can provide perfect guards against it. Confidence must be reposed somewhere; and in free governments, the ordinary securities against abuse are found in the responsibility of rulers to the people, and in the just exercise of the elective franchise, and ultimately in the sovereign power of change belonging to them, in cases requiring extraordinary remedies. Few cases are to be supposed, in which a power, however general, will be exerted for the permanent oppression of the people, and yet cases may easily be put in which a limitation upon such a power might be found in practice to work mischief, to incite foreign aggression or encourage domestic disorder. The power of taxation, for instance, may be carried to a ruinous excess; and yet a limitation upon that power might, in a given case, involve the destruction of the independence of the country.”

Nothing could be added to the pertinency, cogency or conclusiveness of these views. Mr. Justice JOHNSON, in delivering the opinion of the court in *Anderson v. Dunn* (6 Wheat., 204, 220), uses the following apt and expressive language: “The idea is Utopian that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility, and stated appeals to public approbation. Where all power is derived from the people, and public functionaries, at short intervals, deposit it at the feet of the people, to be resumed again only at their own wills, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger.”

If, then, Congress has the power to establish a legal tender, is there any constitutional reason why the exercise of the power should be restricted to a particular medium? If Congress can coin any metallic substance, under the power to coin money, and stamp it with an arbitrary value, as it is conceded it may, then it follows from the practice of the government, and the rules and principles enunciated, that it can make such stamped metal a legal tender, at any designated value. Intrinsic value of the thing stamped or coined, has

nothing to do with the question of power. Such metals, so stamped, are not issued or put in circulation on the faith or credit of the United States government. No pledge is made to redeem them, and they may possess little or no intrinsic value; yet it is not denied, that such pieces of metal so stamped or coined may be lawfully issued, and made a legal tender, and thus become lawful money of the United States. It is difficult to perceive, if this can be done with pieces of metal, why it is not equally within the power of Congress to declare the treasury notes which it may lawfully issue as a circulating medium, and which it may lawfully make a tender in payment of debts due to it, a legal tender also in payment of all debts. These notes are issued on the faith and credit of the whole Union, and the property of which, and of all its citizens, are pledged for their ultimate redemption; and if the metals may be made a tender, why may not notes equally be made a legal tender in payment of all debts, if the exigencies of the government should require it to be done, and Congress, in its wisdom, should think such necessity existed? That Congress was not confined to the use of the precious metals in providing a currency for the people is apparent from the views expressed by Mr. Madison, than whom no man better understood the powers of Congress, and the necessities and wants both of the government and the people. In his annual message to Congress of December 5, 1815, he says: "The absence of the precious metals will, it is believed, be a temporary evil, but until they can again be rendered the general medium of exchange, it devolves on the wisdom of Congress to provide a *substitute*, which shall equally engage the confidence and accommodate the wants of the citizens throughout the Union. If the operation of the state banks cannot produce this result, the propable operation of a national bank will merit consideration; and if *neither* of these expedients be deemed effectual, it may be necessary to ascertain the terms upon which the notes of the government (no longer required as an instrument of credit) shall be issued upon motives of general policy, *as a common medium of circulation.*"

History informs us that the effect of serious and protracted wars is to produce a hoarding and withdrawal of the precious metals from circulation, and a suspension of specie payments on the part of banking institutions. So inevitable is this result that no legislation is effective to prevent it. The Bank of England, with the assent of the privy council, suspended specie payments in 1797, during the war with France, and such suspension continued, with the assent of parliament, until in 1823. Parliament, by the act of May 3, 1797, sought to give currency to the Bank of England notes, and compelled the use of them in payment of debts, by prohibiting the arrest and holding to bail of any person, unless it should appear, that no offer to pay the sum of money claimed, in notes of the Bank of England, payable on demand, had been made. And the act of 3 and 4 William IV, 1833, declared that the Bank of England notes should be a legal tender in payment of all sums above five pounds.

In the United States, during the war of 1812, the government was compelled to make use

of the money of the suspended banks to enable it to carry on the war. The results of that experiment are graphically depicted, by a great statesman of that period, familiar with all the operations of the government, and a principal actor in the events of his day. Mr. Calhoun, in his speech in the Senate of the United States, on the 16th of January, 1840, on the motion of Mr. Benton to strike out the nineteenth and twentieth sections of the Independent Treasury Bill, the clauses which permitted the reception and disbursement of federal paper, after remarking that he was the friend of the final and complete divorce of the government and the banks, and that if the government should have the blindness to repudiate its own credit, it would go far to defeat the policy of the bill, by restoring, in the end, the very union it intended to dissever, said: “The reason is obvious. Paper has to a certain extent a decided advantage over gold and silver. It is preferable in large and distant transactions, and cannot, in a country like ours, be dispensed with in the fiscal actions of the government, without much unnecessary expense and inconvenience, the truth of which would soon be manifest if the government should consent to dispense with the use of treasury drafts. But this is not the only form in which it may be necessary or convenient for it to use its own credit. It may be compelled to use it for circulation in a more permanent form, as the only means of avoiding what I regard a great evil – a federal debt. I am decidedly opposed to government loans. I believe them to be in reality little better than a fraud on the community, if made in bank notes, and highly injurious if made *in large amounts in specie*. I saw enough in the late war to put me on my guard against them. I saw the government borrow the notes of insolvent banks, the credit of which depended almost exclusively on the fact that they were received and disbursed by the government as money. I saw the government borrow these worthless rags – worthless but for the credit it gave them – at the rate of eighty for one hundred, that is for every eighty dollars it borrowed of these notes, it gave one hundred dollars of its stock, losing six per cent interest. Still worse, I saw the government, with the view of conciliating the notes of the banks, which were fleecing the community, permit them to discredit its own paper, by refusing to receive the treasury notes at par, though bearing six per cent interest, for their own worthless trash, without interest, and thus degrading and risking its own credit below that of insolvent banks. All this I saw.

“Now sir, I hold that it is only by the judicious use of *government credit*, that a repetition of a similar state of things can be avoided in the event of another war. It may be laid down as a maxim, that without banks and bank notes, large government loans are impracticable, and without *some substitute*, such loans, in the event of war, will be unavoidable. The only substitute will be found to be in the *direct use by the government of its own credit*. Now, as I regard the borrowing from the banks, not only as one link in the connection between government and banks, but as inevitably leading to the use of bank notes in the collection and disbursement of the revenue, I also regard *the use by the government of its own credit, in the form of treasury notes*, or some other or better form, *as indispensable* to the

permanent success of the policy of this bill. If the government had relied *on its credit*, instead of loans from the banks, in the late war, if it had then refused to receive and pay away bank notes, as this bill proposes, or had had but the manliness to refuse to receive the notes of banks which refused to receive its own at par, I venture little in saying, that the expenses of the war might have been reduced forty millions. For these reasons I cannot assent that the government should repudiate the use of its own credit; nor do I believe that such is the sense of this body. Should there be any one of a contrary opinion, let him submit a direct proposition to prohibit the government from the use of its credit. I would be glad to see the vote on such a proposition. Instead of being unanimous in its favor, as the mover of the amendment would have us believe, it is far more probable, it would be nearly so the other way.”

And in his speech of the 19th of September, 1837, on the bill authorizing the issue of treasury notes, Mr. Calhoun advocated the issue of such notes, without interest, in order to introduce them into general circulation in the place of bank notes. He goes on to state that a paper currency in some form, if not necessary, is almost indispensable in financial and commercial operations of civilized communities, and that paper issued on the credit of the government is less liable to fluctuation in value and abuse, and that bank notes do not possess these requisites in the same degree; that paper money ought to rest on demand and supply simply, which regulates the value of everything else; that nothing but experience could determine what amount and of what denomination might be safely issued, and he concludes by saying: “Believing that there might be a sound and safe paper currency founded on the credit of the government exclusively, I was desirous that those who are responsible and have the power, should have availed themselves of the opportunity of the temporary deficit in the treasury.”

It is certainly a matter of great felicitation that, in the present crisis and condition of the country, the government, warned by the evils and the enormous sacrifice attendant upon, and the embarrassments created by the use of the depreciated paper of suspended banks, for the purpose of carrying on the present war waged by the insurgents who are seeking its overthrow, has availed itself of its own credit, and has thus far been abundantly supplied with means to prosecute a war, gigantic in its proportions, and calling for enormous expenditures.

We have abundant authority, if any were needed, for taking judicial notice of the existence of the present war, of its extent, and of the condition of the country. The Supreme Court of the United States, in the recent prize cases, say: “They cannot ask the court to affect a technical ignorance of the existence of a war which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the government, and paralyze its powers by subtle definitions and ingenious sophisms.” We

take notice of the fact that, to maintain armies and provide a navy for the prosecution of the war, more money is needed annually than all the specie within the United States, and that a resort by the government, to the use of its own credit, was not only a matter of necessity, but the result has demonstrated that it was a measure of prudence and wisdom.

Notwithstanding the vast amounts which have been raised and expended, and the enormous debt created, the credit of the government is now higher than it was at the commencement of the struggle, and a generous and patriotic people are now daily voluntarily pouring into its treasury, millions of money to aid and enable the government to preserve, protect and defend the Constitution and the Union. Fortunate will it be for the government and the people, if, on a careful examination, it shall be ascertained by the courts that these measures which have produced such benign and important results, are in harmony with the letter and spirit of the Constitution, and authorized by it. We have seen that the issue of treasury notes by the government, upon the faith and credit of the nation, is a lawful means of obtaining money. Instead of using these notes, as was done in the war of 1812, to procure in exchange for them the notes of suspended banks at ruinous rates, to be used as a circulating medium, the advantage is apparent, if the government can legitimately use its own notes for that purpose. The slightest reflection will show that they must be more valuable, and entitled to a higher degree of credit than the circulating notes of any banking institution. The bills of the latter have only pledged for their ultimate redemption the property of the corporation issuing them, while those of the government, as already observed, have pledged for their redemption the faith and property and revenues of the nation, and that of its citizens which may be reached by taxation, the extent of which has no limits, provided only that it is uniform. We have seen that the notes so issued by the government, have been, and lawfully might be made, a tender in payment of all debts due to the government, and that the government lawfully used them in payment of all debts owing by it, and received them in payments of all debts, dues, taxes, excises and imposts collected or received by it or due to it. We cannot fail to see that the government, in making these payments to its soldiers, who are fighting its battles, to its hardy and brave mariners who are maintaining the honor of their country's flag upon the ocean, and to the various and numerous persons who do work for it, and furnish supplies for it, will but imperfectly have made such compensation and payment, if the notes so paid out cannot be used by the recipients for the purpose of discharging debts also due by them. The making such notes, therefore, a legal tender in payment of all debts, gives to them the element of general circulation and credit, and is a means for conferring upon them universal convertibility in payment of all debts.

If Congress possesses this power, we cannot but perceive that its exercise in the present emergency is of incalculable benefit and advantage to the government and the people, whose agent it is. The question then for consideration is, whether the provision in the act

of February, 1862, making these notes a legal tender, was a means useful or conducive or adapted to carry into execution any of the powers expressly conferred upon Congress. Those who challenge the validity of the act, must show, that at no time, and under no circumstances which may arise, is such a law useful, necessary or proper to aid in the execution of any or all of the powers expressly conferred upon Congress. Is such a law necessary to carry into effect any specific power given to Congress? Have these means a natural connection with any specific power? Are they adapted to give it effect? Are they appropriate means to an end? Are such means conducive to the exercise of any power granted to Congress? It is believed the doctrine is so well settled by authority upon this branch of our discussion, that it cannot be shaken, and that at this day it is not open for debate. Analogous cases will show the extent to which the doctrine has been carried. It is known that the United States, from an early day, have claimed and exercised, by virtue of an act of Congress, priority in the payment of all debts due to it by citizens of the several States, over those due to such citizens or to the States. There can be no authority for saying that there is any express grant in the Constitution to Congress to declare such priority, yet it was so declared, and has been uniformly sustained and recognized by the courts. In the case of *The United States v. Fisher* (2 Cranch, 358), the power of the United States Congress to declare such priority was ably and instructively discussed by the most eminent counsel of that day, and the opinion of the court by MARSHALL, Chief Justice, unequivocally affirms the power. He says: "In the case at bar, the preference claimed by the United States is not prohibited; but it has been truly said, that under a Constitution conferring specific powers, the power contended for must be granted or it cannot be exercised. It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the government of the United States, or in any department or officer thereof.

In considering this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. *Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution.* The government is to pay the debt of the nation, and must be authorized to use the means which appear most eligible to effect that object. It has, consequently, a right to make a remittance by bills or otherwise, and to take those precautions which will render the transaction safe. This claim of priority on the part of the United States will, it has been said, interfere with the right of the State sovereignties respecting the dignity of debts, and will defeat the measures they have a right to adopt to secure themselves against delinquencies, on the part of their own revenue officers. But this is an objection to the Constitution itself. The mischief suggested, so far as it can really

happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of Congress extends.”

The case of *McCulloch v. Maryland* (*supra*), claims a more extended and careful examination than it has yet received. No case in the judicial history of the country was ever more carefully and elaborately argued, and the learned and exhaustive opinion of Chief Justice MARSHALL is a model of profound reasoning, evincing an intimate knowledge of constitutional law and a thorough acquaintance with the structure and principles of our government. “*Monumentum ære perenius.*” Well might the eloquent and erudite William Pinckney prophetically say, of this opinion, that he saw in it “a pledge of the immortality of the Union.” It is an authoritative commentary upon the Constitution and a judicial exposition of its powers and those of the different departments of the government. As such it is to be received and adhered to.

The question before the court was as to the power of Congress to create corporations. It was admitted that no such express power had been delegated to it by the Constitution. No slight importance was attached to the circumstance that in the Convention which framed the Constitution it had been proposed to confer this power expressly, and that the proposition was negatived. Mr. Webster, in his argument, said: “It was not the intention of the framers of the Constitution to enumerate particulars. The true view of the subject is, that if it be a fit instrument to an authorized purpose, it may be used, not being specifically prohibited. Congress is authorized to pass all laws ‘necessary and proper’ to carry into execution the powers conferred on it. These words ‘necessary and proper’ in such an instrument are properly to be considered as synonymous. *Necessary* powers must here intend such powers as are *suitable* and *fitted* to the object; such as are *best* and *most useful* in relation to the end proposed. If this be not so, and if Congress could use no means but such as were *absolutely indispensable* to the existence of a granted power, the government would hardly exist; at least it would be wholly inadequate to the purposes of its formation.”

Mr. Wirt, the attorney-general, *arguendo*, said, it was not requisite that the particular thing done by Congress “should be *indispensably* necessary to the execution of any of the specified powers of the government. An interpretation of this clause of the Constitution, so strict and literal, would render every law which could be passed by Congress unconstitutional; for of no particular law can it be predicated that it is absolutely and indispensably necessary to carry into effect any of the specified powers, since a different law might be imagined, which could be enacted, tending to the same object, though not equally adapted to attain it. As the inevitable consequence of giving this very restricted sense to the word ‘necessary,’ would be to annihilate the very powers it professes to create; and, as so gross an absurdity cannot be imputed to the framers of the Constitution, this interpretation must be rejected.” In relation to the argument, that all powers to be exercised

by Congress were enumerated in the Constitution, Mr. Wirt also observed: “The Convention well knew that it was utterly vain and nugatory to give to Congress certain specific powers, without the means of enforcing those powers. The auxiliary means, which are necessary for this purpose, are those which are useful and appropriate to produce the particular end; ‘necessary and proper’ are there equivalent to *needful* and *adapted*. Such is the popular sense in which the word *necessary* is sometimes used. That use of it is confirmed by the best authorities among lexicographers. Among other definitions of the word ‘necessary,’ Johnson gives ‘needful;’ and he defines ‘need’ the root of the latter by the words ‘want, occasion.’ Is a law then *wanted*, is there *occasion* for it, in order to carry into execution any of the enumerated powers of the national government, Congress has the power of passing it. To make a law constitutional, nothing more is necessary than that it should be fairly adapted to carry into effect some specific power given to Congress. This is the only interpretation which can give effect to this vital clause of the Constitution, and being consistent with the rules of the language, is not to be rejected because there is another interpretation equally consistent with the same rules, but wholly inadequate to convey what must have been the intention of the Convention. Among the multitude of means to carry into execution the powers expressly given to the national government, Congress is to select, from time to time, such as are most fit for the purpose. It would have been impossible to enumerate them *all* in the Constitution; and a specification of some, omitting others, would have been wholly useless. The court, in inquiring whether Congress has made a selection of constitutional means, is to compare the law in question with the powers it is intended to carry into execution; not in order to ascertain whether other or better means might have been selected, for that is the legislative province, but to see whether those which have been chosen, have a natural connection with any specific power; whether they are adapted to give it effect; whether they are appropriate means to an end.”

Chief Justice MARSHALL, in the unanimous opinion of the court, said: “Among the enumerated powers of the government we find the great powers to levy and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies and navies. The sword and the purse, and all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may be with great reason contended, that a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depend, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution, by withholding the most appropriate means.”

“The government which has a right to an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means, and those who contend they may not select any appropriate means, that one particular mode of affecting the object is excepted, take upon themselves the burden of establishing that exception. ... But the Constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers, is added that of making ‘all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department thereof.’ The counsel for the State of Maryland have urged various arguments to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right which might otherwise be implied, of selecting means for executing the enumerated powers. ... But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the government, but such only as may be ‘necessary and proper’ for carrying them into execution. The word ‘necessary’ is considered as controlling the sentence and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory: that it excludes the choice of means and leaves to Congress in each case, that only which is most direct and simple. Is it true that this is the sense in which the word ‘necessary’ is always used? Does it always import an absolute physical necessity so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its uses, in the common affairs of the world, or in approved authority, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, when taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive should be understood in a more mitigated sense – in that sense which common usage justifies. The word ‘necessary’ is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind will the same idea be conveyed, by these several phrases. This comment on the word is well illustrated by the passage cited at the bar, from the tenth section of the first article of the Constitution. It is,

we think, impossible to compare the sentence which prohibits a state from laying ‘imposts, or duties on imposts or exports, except what may be *absolutely* necessary for executing its inspection laws,’ with that which authorizes Congress ‘to make all laws which shall be necessary and proper for carrying into execution,’ the powers of the general government, without feeling a conviction that the convention understood itself, to change materially the meaning of the word ‘necessary,’ by prefixing the word ‘absolutely.’ This word, then, like others, is used in various senses, and in its construction the subject, the context, the intention of the person using them, are all to be taken into view. Let this be done in the case under consideration. The subject is the execution of these great powers, on which the welfare of a nation essentially depends.

It must have been the intention of those who gave these powers, to ensure, as far as human prudence could ensure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. To have prescribed the means by which the government should, in all future time, execute its powers, would have been to change entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by inscrutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone, without which, the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. ... This clause, as construed by the State of Maryland, would abridge, and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended is, we should think, had it not been already controverted, too apparent for controversy. We think so, for the following reasons:

1st. The clause is placed among the powers of Congress, not among the limitations on those powers.

2d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted.

No reason has been or can be assigned for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the Constitution wished its adoption, and well knew that it would be endangered by its strength, not its weakness... The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair *the right of the legislature to exercise its best*

judgment, in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble... But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all the means which are appropriate, which are plainly adapted to the end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.”

We have made these very liberal extracts from this opinion, because the points discussed and decided in it dispose of those principally presented for consideration in the present actions. The attempt would be futile to restate them, in language equally clear, appropriate and forcible. The doctrines of this opinion have been recognized as the law of this country for nearly half a century, and judicial propriety forbids that the points thus deliberately decided should again be opened for discussion and examination. They have lately received the approval of the Supreme Court in the case of *The People v. The Tax Commissioners*, (2 Black, 620). The principle settled in this case is decisive, we think, of the present actions. It was there held that Congress, under the power to borrow money, had the power to declare that the stocks or securities issued by the government of the United States, in the execution of that power, although held as property by citizens of the several states, could lawfully be exempted from taxation, under the laws of the several states. If this immunity can be granted by Congress, to the stocks and securities issued by the United States, under the power to borrow money, it is difficult to perceive why Congress may not, under the same power, make the treasury notes, issued for that purpose, a legal tender, if it thought that so making them was a means for the more readily accomplishing and making effectual the expressly delegated power. If the one is constitutional, it logically follows that the other is also.

We accept these expositions of the powers of Congress by the Supreme Court of the United States as unquestionable, and we concede that upon all questions arising upon the construction of the federal Constitution, the decisions of that court are to be received as authority and final, and they will be followed by the courts of this State, whatever may be their own views upon the question. Such has been the uniform current of authority in this State. (*Hicks v. Hotchkiss*, 7 Johns. Ch., 297; *Mather v. Brook*, 16 Johns., 233; *People v. Platt*, 17 Id., 195; *Matter of Wendell*, 19 Id., 153; *McCormick v. Pickering*, 4 Comst., 276; *Roosevelt v. Cebra*, 17 Johns., 108; *Cochran v. Van Surlay*, 20 Wend., 365; *Kunsler v. Kohans*, 5 Hill, 317; *North River Steamboat Company v. Livingston*, 3 Cowen, 713.)

We find, therefore, the law to be settled that, where the power is given to Congress to do a particular thing, the means necessary and proper for its execution are also delegated, and that Congress alone is the judge of the means most proper to be selected to aid in the execution of the power. The end must be legitimate, that is in good faith necessary to execute and make effectual some one of the delegated powers, and thus brought within the scope of the Constitution, then all means, which are appropriate, which tend, or are adapted to the end, and which are not prohibited, but are in harmony with the letter and spirit of the Constitution, were also delegated to Congress, and may constitutionally be adopted by it. It must be seen that this necessarily is so. The Constitution was framed for coming ages and for all time, and for a great country, and for millions of people. It was to render more perfect a perpetual Union. When framed its constituents were less than four millions. Its benign provisions now afford protection to over thirty millions, and it would be idle to speculate upon the increase, growth and power which the people, sheltered by its ægis, may yet attain. A Constitution, thus framed for an expanding country, increasing in population, in arts, wealth, and national resources, must necessarily be general in the enumeration of its powers; and all means necessary and proper, in execution of those powers, had also to be left to the exigencies of the times, and the wants and necessities of the people, for whose benefit the Constitution was made, and for whose protection it is administered, by their agents. Such an emergency, it is believed, had arisen in the prosecution of a war, forced upon the government by the most formidable rebellion known to history. The Constitution and Union must be preserved, protected and defended. For this purpose armies and navies had to be provided and maintained, and enormous expenditures incurred. It has been settled that the government had the authority to issue treasury notes upon the faith and credit of the United States, to such an amount and in such denominations as it thought expedient and proper. It was not doubted that such notes might be used as a circulating medium, and the government had either to use its own notes as such, or upon the credit of them, as in the war of 1812, borrow the notes of suspended banks at a ruinous sacrifice and loss, and use them in payment of its army and navy, and for the supplies which it needed. Wisely, it is believed, Congress determined to rely upon the means and credit of the nation, and do directly what was heretofore done indirectly, and the ruinous consequences of which were so eloquently depicted by Mr. Calhoun. The notes of the government, being thus to be used, and a lawful tender in payment of all debts due to the United States, were not the powers conferred upon Congress rendered more effectual by making them a legal tender in payment as well of private as of public debts? As a simple question of power, as already suggested, it is not apparent why Congress had not the same power to make them a legal tender in the one case as in the other. It was certainly never intended by the founders of the government that it was to have a currency for itself and a different one for the people.

The provision that all taxes should be uniform, is indicative of the idea that the currency

of the country should be uniform also, and it is not believed that this important and express injunction of the Constitution can be observed unless the currency be uniform throughout the United States. The effect of making our own coins and foreign coins a legal tender in payment of debts, has been to make them of uniform value throughout the United States, and the same result is attained by making treasury notes a legal tender. That which is a legal payment to the soldier in the field, the laborer who toils for the government, or the farmer or mechanic who supplies it with the products of his farm or workshop, is equally available to them to discharge debts which they owe. If this were not so, it is plainly to be seen that the notes of the government must remain in the hands of those to whom they are first paid, or be parted with by them at great loss. To obviate all these inconveniences and difficulties, Congress has declared, when it authorized the issue of these notes, that they should be a legal tender as well for private as public debts, adopting this as a means to give full effect to the power it possessed of borrowing money, and to raise and support an army and navy, and to levy and collect taxes. It cannot be denied that the end sought to be attained is legitimate; that it is within the scope and spirit of the Constitution, and it is for Congress to select the appropriate means, and if they are adapted to the end and not prohibited, they are constitutional. It is not the province of the judiciary to say that the best means have not been adopted, or that those adopted were indispensable. The range of selection of means rests solely in the discretion of Congress, and if that discretion is unwisely exercised, the remedy is by a change of members of that body and a repeal of the law.

A similar principle has been declared by the courts of this State in an analogous case. By section 1 of article 1 of the Constitution of this State, it is declared that corporations may be formed under general laws, and shall not be created by special act, except in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. By this provision of the Constitution it is left to the legislature to decide whether the objects of a corporation can be attained under a general law. It is well settled in this State that whether a special act of incorporation is necessary or not, is a matter entirely for the judgment and discretion of the legislature, and that the courts have no power to review this action of the legislature. (*Mosher v. Hilton*, 15 Barb., 657; *United States Trust Co. v. Brady*, 20 Barb., 119; *People v. Bowen*, 30 Barb., 24.) These two last cases have been affirmed in this court. (21 N. Y., 517.)

It must certainly be conceded that the choice of means, in the present case, is more clearly legitimate than those selected by Congress in other instances, in the exercise of its delegated powers, and if such means were constitutional, it is not perceived why those adopted, in the act under consideration, will not stand the same test. We have seen that under the power to coin money and regulate the value thereof, Congress has, unquestioned, since the organization of the government, made the money so coined a legal tender in

payment of all debts. So, under the clause to regulate the value of foreign coin, in like manner, it has made such foreign coin a legal tender. In pursuance of the authority to borrow money on the credit of the United States, it issued treasury notes and made them a legal tender in payment of all debts due the United States.

So, in virtue of the authority to pay the debts of the Union, it has been said by the Supreme Court, that Congress might lawfully give to all debts due to the United States a priority of payment over debts due to the States, or to any citizen. For instance, the Constitution confers on Congress the power to declare war. Now the word “declare” has several senses. It may mean to proclaim, or publish. But no person would imagine that this was the whole sense in which the word is used in this connection. It should be interpreted in the sense in which the phrase is used among nations, when applied to such a subject matter. A power to declare war is a power to make and carry on war. It is not a mere power to make known an existing thing, but to give life and effect to the thing itself. (1 Story Const., § 428, and *Bas v. Tinney*, 4 Dall. 37.) And the true doctrine has been expressed by the Supreme Court: “If, from the imperfection of human language, there should be any serious doubts respecting the extent of any given power, the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction.” (*Gibbons v. Ogden*, 9 Wheat., 188, 189.) No power is given in express terms to Congress, to exact or require an oath from any officer of the government, or any security for the faithful discharge of the duties of an office. Yet we are well aware that such securities have been required by virtue of many acts of Congress, and in numerous instances have been enforced against the sureties. The power vested in Congress, may certainly be carried into execution without prescribing an oath of office. The power to exact this security for the faithful performance of duty is not given, nor is it indispensably necessary. All the powers delegated to Congress may be exercised without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the Convention was not unmindful of this subject. The oath which might be exacted – that of fidelity to the Constitution – is presented, and it may be contended that no other can be required. Yet, he would be charged with insanity, who should contend that the legislature might not superadd to the oath, directed by the Constitution, such other oath of office as its wisdom might suggest. (*McCulloch v. Maryland*, *supra*.)

So with respect to the whole penal code of the United States. Whence arises the power to punish in cases not prescribed by the Constitution? All admit that the government may legitimately punish any violation of its laws, and yet this is not among the enumerated powers of Congress. The right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility, because it is expressly given in some cases. Congress is empowered to provide for the punishment of counterfeiting the

securities and coin of the United States, and to define and punish piracies and felonies committed on the high seas, and offences against the law of nations. The several powers of Congress may exist in a very imperfect state, to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given. Take, for example, the power to establish post offices and post roads. This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post roads, from one post office to another. And from this implied power has again been inferred the right to punish those who steal letters from the post office, or rob the mail. It may be said with some plausibility, that the right to carry the mail and to punish those who rob it, is not indispensably necessary to the establishment of a post office and post road. The right is, indeed, essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So of the punishment of stealing or falsifying a record or process of a court of the United States, or of perjury in such courts. To punish these offences is certainly conducive to the due administration of justice. But courts may exist and may decide the causes brought before them, though such crimes escape punishment. (Per MARSHALL, Chief Justice, in *McCulloch v. Maryland*, *supra*.)

The case of *The United States v. Marigold* (9 How., 560), is an important one upon the point now under discussion. In that case the prisoner was indicted and convicted of the crime of having brought into the United States false, forged and counterfeited coin, in the resemblance and similitude of the gold and silver coins of the United States coined at its mint, knowing the same to be false, forged and counterfeited, with intent to utter, publish and pass the same. This was in violation of the 20th section of the Crimes Act of 3d March, 1825. Justice DANIEL, in delivering the opinion of the court, says: "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 prohibition, 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 day, be open to doubt, that every subject falling within the legitimate sphere of commercial regulation may be partially or wholly excluded, where either measure shall be demanded by the safety or by the important interests of the entire nation." He further says: "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 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." He also says: "We trace both the offence and the authority to punish it to 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. While we hold it 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.”

We think it has been demonstrated that, as Congress has the power to issue treasury notes on the credit of the United States, if it be necessary to render such notes effectual for the purposes for which they are issued that they should be made a legal tender in payment of all debts, Congress may, in its discretion, adopt such means to carry out a delegated and conceded power. That such necessity existed to make the notes so issued, a legal tender, is evidenced by the action of the executive and legislative departments of the government.

It is no unimportant consideration, in support of the act of Congress making the government notes a legal tender in payment of private debts, that such tender insures uniformity in the currency, and puts all creditors on an equality. The soldier, who earns his dues by perilous services, and those who aid the government in furnishing it with labor or materials, are compelled to take this currency, and by this act it is available equally to them in discharge of their debts. Those whose patriotism leads them to serve or trust the government of the country, are not compelled to do so on any less advantageous terms than those who labor for or trust private citizens. If there is any hardship in receiving the notes of the nation, it falls equally on all, and if it be a contribution for the support and maintenance of our liberties, it is equally made by all in exact proportion to the means which each possesses.

Again, it is urged that this act of Congress is unconstitutional and void, as it impairs the obligation of contracts. To arrive at this result, it is argued that, as the bond and mortgage mentioned in the second action, were made before the passage of the act and, by their terms, the amount secured thereby was payable in lawful money of the United States, the obligation is impaired by something being made lawful money which was not such at the time the contract was made. In the bank cases, it does not distinctly appear when the bills, payment of which were demanded in gold and silver, were issued; but assuming that they were issued anterior to the passage of the act, then the same question is presented as that which arises upon the bond and mortgage.

While all must concede that legislation on the part of Congress which should, in effect, impair the obligation of a contract, would be unjust and to be deprecated, yet it is also apparent that there is no constitutional prohibition upon legislation of that character. The prohibition contained in the Constitution is applicable only to the states. This point was expressly decided by Judge WASHINGTON, in *Evans v. Eaton* (1 Peters C. C. Rep., 322).

He said there is nothing in the Constitution of the United States, which forbids Congress to pass laws violating the obligation of contracts, although such a power is denied to the states. Congress, in the exercise of its delegated powers, may unquestionably pass laws, the effect of which would undoubtedly be to impair or affect the validity of contracts. An act declaring war would annul a vast amount of contracts, based on a contemplated peace, yet the power to declare war by Congress is undoubted, and the effect its exercise would have on existing contracts could in no manner circumscribe or affect the exercise of the power.

The embargo acts, passed during the administration of Mr. Jefferson, not only impaired but destroyed numerous contracts, entered into upon the assumption that commercial relations were to continue uninterrupted, but the acts were adjudged to be constitutional on the ground that the power to make them was incidental to and a corollary from the right to regulate commerce. The bankrupt act of 1841 impaired the obligation of contracts in the most decided manner, yet the law was held to be constitutional under the general power granted to Congress. In *Matter of Kleim* (1 How. S. C., 277), Judge CATRON said that the reason why the power to pass bankrupt laws was given to Congress was to secure to the people of the United States, as one people, a uniform law by which a debtor might be discharged from the obligation of his contracts, and his future acquisitions exempted from his previous engagements; that the right of debtor and creditor equally entered into the mind of the framers of the Constitution. The great object was to deprive the states of the dangerous power to abolish debts. Few provisions of the Constitution have had more beneficial consequences than this, and the kindred inhibition on the States that they should pass no law impairing the obligation of contracts. In *Kunzler v. Kohans* (5 Hill, 325), COWEN, J., in delivering the opinion of the court, says: "The directly granted power over bankruptcies, however, carries the incidental authority to modify such obligation, so far as the modification may result from a legitimate exercise of the delegated power. Having satisfied myself that it is plenary, and with a single qualification, viz., uniformity, entirely equal to the power of parliament, I shall devote very little time to the inquiry what that may be. No one will deny that parliament may modify and discharge the obligation of contracts in exercising the powers over bankrupts and their creditors. Such a power is, indeed, prohibited to the States." See also *Thompson v. Alger* (12 Metcalf, 442). It follows, therefore, that if Congress had the constitutional power to pass the act of February 25, 1862, it is not in conflict with the Constitution, and therefore void, for the reason that the effect of the act may be to impair the obligation of contracts.

But it is correctly argued that such is not the legitimate effect of the act, and that the obligation of no contract is impaired by it. Take, for instance, the contract contained in the bond and mortgage – it is to pay the sum of \$8,000 in lawful money of the United States. Now what was lawful money at the time the debt was payable or paid, or tender of payment

made, if so used for such purpose, would be a compliance with or fulfillment of the terms of the contract. Such would seem to be the uniform current of decision, and such was the rule of law recognized at a very early period. In the case of *Faw v. Marteller* (2 Cranch, 20), where Faw had, in the year 1779 covenanted to pay as rent yearly, well and truly, the sum of twenty-six pounds, Virginia currency, which consisted at that time of paper money, but it was withdrawn from circulation by a law of 1781, and it was claimed that the sum contracted to be paid was paper money and not specie, on the ground that paper money was lawful currency when the debt was contracted. Chief Justice MARSHALL, in delivering the opinion of the Supreme Court, however, said: "This can only mean money current at the time the rents shall become payable. It cannot be contended that he could satisfy the terms of the lease by paying the rents in 1782 in paper currency." He further said: "The position, then, that the value of the money at the time when the consideration for which it was to be paid was received, is the standard by which the contract is to be measured, is not a correct one."

Dowmans v. Dowmans' Exrs. (1 Wash. Virg. Rep., 26), was a suit on a bond for £ 53, payable in Virginia currency, to which the defendant pleaded a tender. The Court of Appeals of Virginia held that the tender must be money current at that time (that is, the time the tender is made), otherwise it is not money at all. There was no paper money current as money in April, 1790, when this plea was offered, and the tender was held bad, although made in the currency named in the bond. In *Pong v. De Lindsay and others* (1 Dyer, 82 A.), in debt on bond for payment of £24 sterling, plea of tender: that at the time of the payment of said sum of money, certain money was current in England in the place of sterlings called pollards, viz., two pollards for one sterling, and that at the day aforesaid, the defendant tendered a moiety of said debt in pollards. The tender was held good, and the note of the case is, that if, at the time appointed for payment, a base money is current in lieu of sterling, tender at the time and place of that base money, is good, and the creditor can recover no other. A case is also cited from the year books (11 H. VII, 5 b.) where one is to pay at such a day five quarters of wheat; at the day of the contract they were worth fifty pounds, at the day of payment five pounds. The judgment shall be, that he recover five quarters of wheat or five pounds. And the defendant may deliver the wheat if he please, but the sum of money ought, of necessity, to be referred to the day of the payment.

Queen Elizabeth, in order to pay the royal army, which was maintained in Ireland for several years, to suppress the rebellion of Tyrone, caused a great quantity of mixed money, with the usual stamps of the arms of the crown and inscription of her royal style, to be coined in the tower of London, and transmitted that money to that kingdom, with a proclamation dated May 24, in the 43d year of her reign, by which she declared and established this mixed money, immediately after the said proclamation, to be lawful and current money of the kingdom of Ireland, and expressly commanded that this money

should be so used, accepted and reputed by all her subjects and others using any traffic or commerce within the kingdom. In April, before the proclamation was issued, when the pure coin of England was current in the kingdom of Ireland, one Brett, a merchant of Drogheda, bought certain goods of one Gilbert, in London, and became bound in an obligation in the penal sum of £ 200, on condition to pay to said Gilbert, his executors, &c., one hundred pounds sterling, current and lawful money of England, at which day, &c., Brett made a tender of the £100 in the mixed money of the new standard, in performance of the condition of the obligation; and the question before the council was on the petition of said Gilbert to the privy council in Ireland, whether the defendant Brett should now, upon the change or alteration of money within the kingdom, be compelled to pay the said one hundred pounds in other or better coin than in the mixed money, according to the rate and valuation of it, at the time of the tender. And inasmuch as the case related to the kingdom in general, and was also of great importance in consideration and reason of state, the Lord Deputy required the chief judges (being of the privy council) to confer on and consider the case, and return to him their resolution touching it, who, on consideration of all the points, resolved that the tender of the one hundred pounds in mixed money was good and sufficient in the law to save the forfeiture of the bond, and that the defendant should not be obliged, at any time after, to pay any other money, in discharge of the debt, than this mixed money, according to the rate and valuation it had at the time of the tender; and, thereupon, it was resolved, by the privy council, among other things, that though at the time of the contract and obligation made in the present case, pure money of gold and silver was current within this kingdom (Ireland) where the place of payment was assigned, yet the mixed money being established in this kingdom before the day of payment, may well be tendered in the discharge of the said obligation, and the obligee is bound to accept it; and if he refuses it and waits until the money be changed again, the obligor is not bound to pay other money or better substance; but it is sufficient, if he be always ready to pay the mixed money according to the rate for which they were current at the time of the tender; and this point was resolved, on consideration of two circumstances, viz.: the time and place of the payment, for the time is the future, viz.: that if the said Brett shall pay or cause to be paid £100 sterling, current money, &c., and therefore such money shall be paid, as shall be current at such future time; so that the time of payment, and not the time of the contract, shall be regarded (Davies Rep., page 28.) To the same point is the case of *Barrington v. Potter* (Dyer, 81 b., fol. 67.) After the fall and debasement of money, in 5 Ed. VI, debt was brought against executor of lessee for years, for rent arrears for two years, which fell due at Michaelmas term, 2 Ed. VI. The lease was dated on the 21st of November, in the thirty-first year of Henry VIII. At the time the rent fell due, the shillings, which at the time the action was brought were decreed to 6d., were current at 12d. The defendant pleaded tender of the rent, at the days when it was due, in *peciis monetæ, anglicæ vocat* shillings, and said that every shilling at the time of the tender was payable for 12d., but that plaintiff, nor any one for him, was ready to receive it, and concludes that he is *uncore prist* to pay the

currency, *in dictis peciis vocat shillings secundum ratum*, &c. The plaintiff demurred, but afterwards accepted the money *secundum ratum predictum*, without costs or damages. If money be made current by proclamation, at a higher rate than its intrinsic value, a tender in such money, according to its current value, is good. If a foreign coin be made current in this kingdom by proclamation, a tender in such money is good, for it thereby becomes a lawful money of the kingdom. (Bacon Ab., Tender, b. 2, vol. 7, p. 325.) An obligation to payment generally is discharged by a payment in legal currency. (Per MARSHALL, Ch. J., in *United States v. Robertson*, 5 Peters, 644.)

In *James v. Stull* (9 Barb., 482; affirmed in the Court of Appeals in 1852), it was held that where a mortgagor authorized the mortgagee, in case of default, to proceed and sell the mortgaged premises “according to law,” it means the law in existence at the time of sale, not that in existence at the date of the mortgage, and that a law, passed after the date of the mortgage, prescribing a shorter time of sale than that existing at the date of the mortgage, was not repugnant to the Constitution of the United States, as impairing the obligation of contracts. (See also *Conkey v. Hart*, 4 Kern., 22; *Mason v. Haile*, 12 Wheat., 370.)

We have arrived, therefore, at the conclusion, that the act of Congress under consideration is not obnoxious to the imputation, that it impairs the obligation of contracts. The notes of the respondents, and the bond and mortgage, were each payable in lawful money of the United States, and we have seen by a uniform current of authority that what is lawful money at the time of payment, or at the time of tender of payment, is the lawful money, intended and referred to in the obligation. Such money, thus lawful at the time of payment or tender, can be used to discharge the obligation. It has universally been so held, in all cases, where the coin has been debased or changed intermediate the date of the contracts and the time of payment.

Take the case, so forcibly put by one of the learned counsel in this case. It was contended that the bond stipulated for so much gold. It however speaks of a repayment of \$8,000 of lawful money of the United States. Let the theory be tested. If a debt was owing of one thousand dollars, and the debtor tendered to his creditor, in payment of this sum ninety-four eagles, struck and coined before 1834, which, as to quantity and value of gold contained in them are equal to one hundred eagles struck and coined after 1834, would this be a legal or lawful tender? If the sufficiency of the tender consists in the fact of the amount of gold tendered, it certainly would, but if it is to be determined by the amount of lawful money, it clearly would not. The court must hold that the debtor contracted to pay the one thousand dollars, lawful money of the United States, and that such obligation is not discharged by the payment of \$940 in gold, though those pieces tendered might contain the same amount and value of gold, as one thousand dollars of lawful money, in coin, contains.

It is the lawful money of the United States, made such by its authority, that can only be effectually used, in payment of debts, without reference to the intrinsic value of the thing tendered or paid. It cannot but be a matter of congratulation that our government, when it had a rebellion to put down, far more formidable than that of Tyrone, in Ireland, instead of imitating the bad example of the British government, by debasing the coin, and issuing mixed money, and making it a legal currency, availed itself of its constitutional right, of issuing money on the faith and credit of the nation, for the redemption of which the whole property thereof is pledged. Such money will ultimately be redeemed by the precious metals on the resumption of specie payments, a day not far distant, we may hope, if we read correctly the auspicious indications of the times.

We have endeavored to bring to the consideration of the question presented in these cases, all the deliberation and care, which its great importance demanded. It has appeared to us, that the great principles which control them have long been settled by the Supreme Court of the United States, and that applying those doctrines to the cases under consideration, the result is inevitable, and not doubtful. Our aid has been invoked, to declare unconstitutional and void, an act of the Congress of the United States, passed after grave deliberation, with the concurrence of some of the most eminent men of the country, passed in a crisis of our national affairs when it was deemed by the legislative and executive departments of the government vital to our national existence. No tribunal can approach such a question without a deep sense of its importance and of the grave responsibility involved in its decision. We must not fail to reflect upon the universality of the rule, that whenever the constitutionality of a law of Congress or of a state legislature is involved, the legal presumption exists in favor of its validity. There is this distinction to be made in considering an act passed by the legislature of the State, and one passed by the Congress of the United States. In reference to a state law, the question of its constitutionality depends upon whether the act falls within any of the express or implied prohibitions of either the state or national Constitutions. In passing upon the constitutionality of an act of Congress, the question is, whether the act is embraced within any of the great powers expressly granted to Congress, or may be included among the more numerous and incidental powers, and the means which are legitimate and appropriate to carry these powers into execution. But in both classes of cases, the obvious and natural intendment must be indulged in favor of the law arising from the fact that it has received the approval both of the legislative and executive departments of the government, the departments charged with the duty of making laws, the incumbents of which have given their sanction to the law, acting under a sense of their official responsibility and the obligations of an oath to support the Constitution. It is, therefore, a well settled rule, prescribed in adjudged cases, for the action of the courts, that a law which has been regularly enacted, must not be set aside by the judiciary rashly, or inconsiderately, or for light causes, or because they may have doubts of its wisdom or necessity, that every doubtful question is to be thrown

in favor of the law, and that it can only be adjudged void when its repugnancy to the Constitution is plain and clear. (*Morris v. The People*, 3 Denio, 381; *Ex parte McCollom*, 1 Cowen, 564; *Fletcher v. Peck*, 6 Cranch, 87; *Ogden v. Sanders*, 12 Wheat., 29; *Adams v. Howe*, 14 Mass., 345.)

Chief Justice SAVAGE, in *Ex parte McCollom* (*supra*), says: "Before the court will deem it their duty to declare an act of the legislature unconstitutional, a case must be presented in which there can be no rational doubt." And Chief Justice MARSHALL, in *Fletcher v. Peck* (*supra*), said: "It is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. 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." Judge LOTT, in the case of *Morris v. The People* (*supra*), said: "The presumption is always in favor of the validity of a law, if the contrary is not clearly demonstrated." PARKER, Ch. J., in *Adams v. Howe* (*supra*), said: "We must premise, that so much respect is due to any legislative act, solemnly passed and admitted into the statute book, that a court of law, which may be called upon to decide its validity, will pronounce it to be constitutional, unless the contrary clearly appears. So that in any case, substantially doubtful, the law will have its force. The legislature is, in the first instance, the judge of its own constitutional powers, and it is only when manifest assumption of authority or misapprehension of it, shall appear, that the judicial power will refuse to execute it. Whenever such a case happens, it is among the most important duties of the judicial power, to declare the invalidity of an act so passed." A legislative act is not to be declared void upon a mere conflict of interpretation between the legislative and judicial powers. Before proceeding to annul by judicial sentence what has been enacted by the law-making power, it should clearly appear that the act cannot be supported by any reasonable intendment or allowable presumptions. (*People v. Supervisors of Orange*, 17 N. Y., 235.)

It is urged by the counsel for the appellant, in the first above entitled cause that, as the Constitution of this State declares that the legislature shall provide by law for the registry of all bills and notes, issued or put in circulation as money, and shall require ample security for the redemption of the same in specie (sec. 6 of art. 8), it is not lawful to redeem the same in anything else than specie. A complete answer to this argument is, that the legislature have never acted under this injunction of the Constitution. As already observed, the provision of law in this state is, that the bills of the banking associations are to be redeemed in lawful money of the United States, and if the same are redeemed, or offered to be redeemed, in such lawful money, the bank superintendent has no authority conferred upon him by law, to sell the securities deposited with him. The legislature have never authorized him to sell the securities so deposited, in the event of any banking association refusing to redeem its bills in specie. It is only in the event of their refusal to redeem in

lawful money of the United States, that he is authorized to proceed and sell the securities. If the views hereinbefore stated are sound, it follows, that neither of the respondents in the first above entitled cause has refused to redeem its bills in the lawful money of the United States, and that therefore the bank superintendent has been properly restrained from proceeding to sell the securities of the respondents deposited with him.

For the reasons already stated I arrive at the clear conviction that Congress, under the authority conferred upon it to borrow money on the credit of the United States, had the authority to make the treasury notes of the government, issued for such a purpose, a legal tender, as well in payment of debts due to the United States, as those of a private nature. I do not wish to be understood as intimating that the same thing could not be done by virtue of the authority conferred upon Congress to levy and collect taxes, duties, imposts and excises; to regulate the commerce of the Union; to coin money and regulate the value thereof and of foreign coin; to raise and support armies, and to provide and maintain a navy; to fulfill the guarantee of the Constitution that each State shall ever have a republican form of government, and shall be protected against invasion and domestic violence, and to enable Congress to discharge the solemn and imperative duty resting upon it, to make all laws necessary and proper for carrying into execution the high trust devolved upon the President, to preserve, protect and defend the Constitution of the United States, and to provide for and furnish him with all the means necessary for that purpose. It is sufficient for the present discussion, that the power which has been exercised by Congress is believed to be authorized by the Constitution, and arriving at that result, the cases under review are disposed of.

If my brethren concur in these views, the judgment in the first above entitled cause will be affirmed, with costs, and the judgment in the second above entitled cause will be reversed and judgment given for the plaintiff with costs, and that the defendant therein deliver up the bond and mortgage mentioned in the case submitted, and acknowledge satisfaction thereof, and discharge the same of record.

BALCOM, J.

The notes tendered were issued under and by virtue of the act of Congress approved February 25, 1862 (Laws of U. S., vol. 12, p. 345), which authorized the Secretary of the Treasury of the United States to issue, on the credit of the United States, \$150,000,000 of United States notes, not bearing interest, payable to bearer, at the treasury of the United States, in denominations not less than five dollars; and the act declares that such notes "shall be lawful money, and a legal tender in payment of all debts, public and private, within the United States," except duties on imports and interest on certain bonds of the United States.

The principal point made by the defendant's counsel is, that Congress had no authority to pass this act; and the principal questions in the case are, whether Congress has power to make anything but gold and silver coin a tender in payment of debts, or to pass any law impairing the obligation of contracts.

I agree that Congress does not possess this power, if it is not conferred upon it by the Constitution of the United States; for whatever power or authority it has is granted to it by that instrument.

The Constitution expressly confers power upon Congress "to borrow money on the credit of the United States;" "to coin money, regulate the value thereof and of foreign coin;" "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;" "to raise and support armies;" "to provide and maintain a navy;" "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;" "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes;" "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;" and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." (Const., art. 1, § 1.) It declares that "the United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion." (Art. 4, § 4.) Also, that "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; anything in the constitution or laws of any State to the contrary notwithstanding." (Art. 6, sub. 2.)

The Constitution authorizes the formation or erection of new States within the jurisdiction of others; and also the formation of new States by the junction of two or more States or parts of States, by the consent of the legislatures of the States concerned as well as of the Congress. (Art. 4, § 3.) All the States (subject only to this exception) must forever remain in the Union in the same shape they were admitted. No right of secession is reserved to any State, or its citizens, by the Constitution, and none can be implied or spelled out from its provisions or history, or by the application of any principle of public law. The Union is indissoluble, except by an amendment of the Constitution, or its abrogation, in a legal manner.

The doctrine, that the Federal Constitution is but a compact between the States, and that any State can lawfully withdraw from the Union by a legislative act of such State, or a

resolution of a convention of its people, needs no special notice. It is almost as absurd as the idea that the Constitution of a State is a mere compact between counties, and that a county can secede from the State Government at the pleasure of the inhabitants of such county.

I have enumerated but a small number of the powers specifically granted to Congress and the Government of the United States by the Constitution. But I have mentioned enough to show that the Constitution provides a strong Government, which has the right of self-preservation against all unlawful combinations or revolutionary proceedings for its overthrow. And no one can doubt that an army and navy, as well as the militia of the several States, are lawful and constitutional means, when others are insufficient, for putting down a rebellion and preserving the Union. The authority to call forth the militia to execute the laws of the Union, suppress insurrections and repel invasions, implies no prohibition against employing the army and navy for such purposes; nor does it imply that the militia cannot be used for suppressing a rebellion as well as a mere insurrection. A contrary doctrine would make the government of the United States almost as feeble as the old Confederation was, which was abandoned by reason of its weakness.

These views are entirely consistent with all legitimate State rights. They only make such rights subordinate to certain great powers that the people granted to Congress and the national government, by the adoption of the Constitution of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity. (Preamble to Const.)

No State can coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; or pass any law impairing the obligation of contracts. (Art. 1, § 10, sub. 1.) But Congress is not prohibited from doing either of these things, although it is prohibited, as well as the States, from passing any bill of attainder or *ex post facto* law, or granting any title of nobility. (Art. 1, §§ 9, 10.)

The colonies commenced, as early as 1703, to make their notes a legal tender (see *Briscoe v. The Bank of Kentucky*, 11 Peters, 333-338); and there is some authority for saying that tobacco in one colony, and beaver skins in another, were once declared to be such a tender.

Some of the states, under the confederation, made their notes or bills of credit a tender in payment of debts. But such notes or bills of credit were of little value out of the particular state that issued them. (See Story on the Con., § 1371-1372.)

The fair inference from these facts is, that the states were prohibited by the Constitution

from emitting bills of credit, or making anything but gold and silver coin a tender in payment of debts, and from coining money, in order to rid the country of every circulating medium or currency which had no intrinsic or legal value beyond the lines of the states that authorized it; and so Congress would provide money, or a currency, that would be of value throughout the Union. And to enable Congress to provide such a circulating medium, for all ordinary purposes, the power was expressly conferred, “to coin money, regulate the value thereof and of foreign coins.”

The Constitution does not declare, in so many words, that Congress may prescribe what shall be a tender in payment of debts; but this power is included in those expressly conferred, and especially in the authority “to make all laws which shall be necessary and proper for carrying into execution” the powers enumerated in the Constitution, and the other powers vested by it “in the government of the United States, or in any department or officer thereof.” And Congress has exercised such power, in respect to metallic money, from the organization of the government; and that it has rightfully exercised this power, in respect to such money, is not questioned.

But has Congress authority to make anything but gold and silver coin such a tender? The inference is very strong that, if the people had intended to deprive Congress of the power to do such an act, they would have expressly prohibited it, as well as the states, from making anything but gold and silver coin such a tender.

The trying times of the revolutionary struggle had taught them the evils as well as the temporary benefits that flow from the use of paper money; and if they had intended to deprive Congress of the power of making bills of credit or government notes a legal tender at any future time, it is highly probable they would have expressly inhibited such acts in the Constitution. The sagacious statesmen who framed the Constitution probably believed the United States would be one government under that instrument, until the States should contain hundreds of millions of inhabitants; and that there might be times and emergencies when there would not be sufficient gold and silver money for the maintenance of the government and the carrying on of the commercial and other dealings of the people; and that, in certain exigencies, it might be necessary and proper for Congress to make something besides such money a tender in payment of debts in order to carry into execution some of the powers expressly granted to Congress by the Constitution, and therefore omitted to prohibit Congress from doing such an act. This probability is strengthened by the limited amount of the precious metals which had been discovered when the Constitution was framed. And it is much easier to believe, the authors of the Constitution foresaw the certain increase of population in the United States and acted in reference thereto in shaping that instrument, than that they anticipated the discovery of such inexhaustible mines of gold and silver, as would at all times prevent any necessity for

a paper currency.

The fact that there is no clause in the Constitution declaring, in so many words, that Congress may make anything besides gold and silver coin a tender in payment of debts, falls far short of establishing that Congress can make nothing but such coin such a tender; for it is very clear that Congress may make something besides such coin a legal tender, whenever necessary and proper for carrying into execution any power that is expressly granted to Congress by the Constitution. But whether there was a necessity for such an act, at the time the one in question was passed, requires consideration.

When this act was passed, the legislatures and conventions in nine States of the Union had adopted pretended ordinances of secession from the Union; and a large portion of the inhabitants of such States, if not a majority of them, were in open rebellion against the government of the United States, and at least three hundred thousand of them were armed and doing all they possibly could to overthrow such government; and their numbers were rapidly increasing.

So formidable a rebellion had never been known; and the means to be provided for its suppression were necessarily greater than any government, ancient or modern, had ever furnished suddenly for any purpose. It forebode the greatest and bloodiest civil war the world has ever seen. The very existence of the Union was imperiled and at stake; and the question that agitated all minds was, can the federal government be maintained, or must it be overthrown by the wickedest and most groundless rebellion ever organized in any age or country.

These facts show that a navy of unprecedented magnitude and an army of at least half a million of soldiers, besides the militia of the several States, were necessary to preserve the government, maintain the Constitution, and execute the laws of the Union.

Congress had the authority, and it was its duty, to provide and maintain such a navy – to raise and support such an army, and to provide for calling forth the militia. But such a navy could not be provided and maintained, or such an army raised and supported, and the expense of calling forth and supporting the militia defrayed, without adequate pecuniary means, and without the expenditure of vastly more money than could have been borrowed in coin in the entire world.

Could Congress have been justified, by the Constitution, if it had permitted the Republic to be overthrown, because enough gold and silver coin could not be borrowed to save it? I answer no; and it seems to me every person must answer this interrogatory the same way who concedes that the national government possesses the right of self preservation.

The Constitution plainly required Congress to pass all laws which were necessary and proper for raising, maintaining and supporting a navy and armies, large enough and powerful enough to put down the rebellion, and preserve the Union and the Constitution. And when Congress could not do all this without making the notes of the United States a legal tender in payment of private, as well as public debts, it was its duty to do that, even though the act impaired the obligation of contracts.

It seems to me to be very plain, that the Constitution authorizes Congress to pass such a law whenever necessary and proper for raising, maintaining and supporting a navy and armies to maintain the Union, preserve the Constitution and execute the laws of the United States. And the Supreme Court of the United States has decided, in *McCulloch v. The State of Maryland* (4 Wheat., 316), that the word necessary, in this connection, may mean needful, requisite, essential, or conducive to.

Whether the act in question was necessary and proper at the time it was passed, was for Congress to determine. But I do not doubt that it judged correctly and wisely when it determined this act was necessary and proper in view of the then existing condition of our national affairs. That it judged wisely in passing this act the astonishing success that has attended its execution fully proves. No nation has ever succeeded so well financially, in any great war, as the United States have in this, by reason of this law. All loyal citizens have prospered pecuniarily from the time it was passed. Such a thing as pecuniary distress, in the loyal states, on account of the war, or by reason of the financial measures of the government, has not been heard of.

Without this law there must have been the most terrible distress throughout the land. We should have had the most frightful intestine commotions; anarchy would have taken the place of law and order in our cities and most populous towns. And it is probable the republic itself would have been subverted ere now, or have become too weak to be respected by other nations, if this law had not been passed.

I cannot doubt, as the states only are prohibited by the Constitution from making anything but gold and silver coin a tender in payment of debts, or from passing any law impairing the obligation of contracts, that Congress may enact that the notes of the United States shall be a legal tender in payment of debts, and designate such notes lawful money, and also pass laws impairing the obligation of contracts, whenever such laws are necessary and proper for carrying into execution any of the powers expressly conferred upon Congress, or vested in the government of the United States by the Constitution. And as this act was necessary and proper for carrying into execution powers expressly granted to Congress by the Constitution, to wit, the powers to borrow money, to raise and support armies, to provide and maintain a navy, to provide for calling forth the militia to execute the laws of

the Union and suppress insurrections, Congress had power to pass it.

This act is constitutional, because it is a means of carrying into execution the power conferred upon Congress, “to borrow money on the credit of the United States.” It provides for the conversion of the notes, issued under it, into bonds of the United States, which are to be paid in coin with interest at six per cent. (U. S. Statutes at Large, vol. 12, p. 345.)

That Congress could pass this act, as a means of carrying into execution the power to borrow money, may properly be inferred from the reasoning of the judges of the federal court, who delivered the opinions in *McCulloch v. The State of Maryland* (*supra*), and *The People, ex rel. The Bank of Commerce, v. The Commissioners of Taxes of the City of New York* (2 Black’s U. S. Rep., 620.)

It is not probable such an act as this will ever be deemed necessary or proper in time of peace; and the one in question will undoubtedly be repealed, and the notes under it called in, and a metallic currency restored, as soon after the present rebellion shall have been suppressed, as the interest of the people shall require, or as such a course will conduce to the general welfare.

If this act impairs the obligation of contracts, it is, nevertheless, valid; for Congress may pass laws, having that effect, whenever necessary and proper to carry into execution any power specifically conferred upon that branch of the government. Declarations of war and embargo acts impair the obligation of innumerable contracts; yet they are constitutional. (2 Story on the Con., §§ 1289-1293.)

I will not say this law could not be sustained on the broad ground that the government of the United States has the right of self-preservation, and that it was necessary for that purpose. Nor shall I hold that Congress was not authorized to pass it, by virtue of the power granted to it to coin money and regulate the value thereof. A very able argument has been made by one of the defendant’s counsel, to show that this power authorized the passage of this law, in which he quotes from Blackstone, that “money is an universal medium, or common standard, by comparison with which the value of all merchandise may be ascertained; or it is a sign which represents the respective values of all commodities.” (1 Blk. Com., 276.) But it is unnecessary to determine these questions and I will not express any opinion respecting them.

This act is not an *ex post facto* law. For it is well settled that the phrase “*ex post facto* laws,” is not applicable to civil laws, but only to penal and criminal laws. (*Watson v. Mercer*, 8 Peters’ Rep., 89.)

It can hardly be said that this act impairs the obligation of contracts, though it compels creditors to receive notes of the United States in payment of debts which they might have exacted in gold and silver coin if this law had not been passed. It certainly is not in conflict with the constitutional inhibition against depriving persons of property without due process of law. (Amend. Con., art. 5.) It does not deprive any person of property, for it makes the notes issued under it as valuable as gold coin, in the hands of every person receiving them, for all commercial purposes, and for the payment of all debts, except those for duties on imports; and this exception is too insignificant to justify a holding that the act deprives persons of property in any legal sense of the term. I of course lay out of view the difference created by brokers and speculators between the value of gold coin and such notes, as having no legitimate bearing upon the question. That difference cannot be regarded, because it is not recognized by law; and all agreements to pay any such difference are utterly void.

A judgment cannot be recovered for more than one thousand dollars, besides interest, for the wrongful conversion of one thousand gold dollars, whatever premium may be paid therefor at the board of brokers in the city of New York or elsewhere; and such a judgment may be paid, dollar for dollar, in notes of the United States.

Each five dollar note, issued under this act, is precisely of the same value, in legal contemplation, as a piece of gold coin of the denomination of five dollars; and if all citizens would strictly observe this law, as they should, any person could obtain five dollars in gold coin for one of these notes at any place where such coin is to be had.

If a promissory note should now be given for one hundred dollars, for a loan of twenty of these notes, and this law should be repealed before the repayment of such loan, the person making the loan could exact one hundred dollars and interest, in gold and silver coin, in satisfaction of the debt.

This law must be judged as if every person lived up to it, and had full faith in the ability and willingness of the federal government to pay these notes in coin, and to maintain itself under all conceivable circumstances; and when it is judged in this manner, it does not deprive any person of property in any legal sense of the term.

I have not deemed it either necessary or expedient to go into the history of the Constitution, or to refer to the debates of the convention that framed it; or to cite many authorities to sustain the foregoing positions or conclusions. They seem to me to be so clearly correct, and so well grounded in good sense, that such labor is wholly unnecessary. I will, however, remark, that there is nothing in the history of the Constitution, or in the debates of the convention that framed it, or in any book of authority, in conflict with the

views and conclusions I have expressed. For these reasons I am of the opinion the act of Congress, approved February 25, 1862, is not repugnant to any provision of the Constitution of the United States, and is valid.

It follows that the judgment of the Supreme Court in the first case should be affirmed, and that in the second should be reversed, and one given for the plaintiff, declaring that the notes of the United States, issued under such act, were and are a legal tender in payment of the defendant's bond and mortgage, and that he deliver the same to the plaintiff to be canceled, and acknowledge satisfaction of the mortgage, and cancel the same of record, and that the plaintiff recover the costs of the appeal to this court.

WRIGHT, J.

There are minor questions in each case; but the paramount one, common to and decisive of both cases is, the power of Congress of the United States to enact the law of the 25th February, 1862. That act declared, in terms, that the notes issued should be lawful money and a legal tender in payment of all debts, public and private, except duties on imports and interest on United States securities. If Congress could authorize the issue of the notes with the properties imparted to them by the law, it conclusively determines the cases against the defendants. The obligation of the banks was to redeem their circulating notes in "the lawful money of the United States," and if the United States notes were such lawful money, and a legal tender in payment and discharge of the mortgagee's debt, in the second case, the mortgagee was not entitled to recover the difference between the market value of the notes and gold coin.

The government of the United States, as it need hardly again be repeated, is one of enumerated powers. Its powers are also limited, but within their scope and its sphere of action, it is supreme. Emanating from the people, all the powers granted are to be exercised directly upon them, and no state, as such, can control its operations. The government was, also, meant to be perpetual, and the powers with which it was invested were admirably fitted to maintain, preserve and defend the national existence. All the attributes of sovereignty to be exercised by a nation, in peace or in war, for insuring domestic tranquillity, providing for the common defence, promoting the general welfare, and securing the blessings of liberty forever, were expressly or impliedly granted in the great ordinance of government. Manifestly the framers of the Constitution, and the people who adopted it, did not put forth the instrument, in the language of Chief Justice MARSHALL, as a "splendid bauble," but as a governmental creation, efficiently endowed with all the powers and capacities to effect the ends and purposes of its being. In a general sense, the government thus created does not possess an omnipotence equal to that of the parliament of Great Britain; but in respect of all the subjects of legislation, specifically enumerated

and necessarily implied (where there is no express prohibition or restriction upon its exercise) complete sovereign legislative power was designed to be and is conferred upon Congress; and that body, I think, possesses an omnipotence in these things equal to that possessed by the British parliament, or any other supreme legislative body. The powers expressly conferred in order to constitute and perpetuate the nation are unlimited in every particular.

Among the specified powers are these: 1st. 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; 2d. To borrow money on the credit of the United States; 3d. To regulate commerce with foreign nations, and among the several states; 4th. To coin money, regulate the value thereof, and of foreign coin; 5th. To provide for the punishment of counterfeiting the securities and current coin of the United States; 6th. To declare war; 7th. To raise and support armies; 8th. To provide and maintain a navy; 9th. To suppress insurrections and repel invasions. These are substantive powers, and if the Constitution were silent on the subject, the power of Congress to carry them into execution would be necessarily implied. When the power is given, in general terms, to lay and collect taxes, to borrow money, to regulate commerce, to coin money and regulate the value thereof, and to support and maintain armies and navies, it involves the incidental legislative power of adopting and selecting the means and measures to carry into execution the specific power. But the instrument itself removes all doubt on the subject. Following an enumeration of the substantive powers, is an express grant of authority to make all laws which shall be necessary and proper for carrying the enumerated powers into execution. (U. S. Const., art. 1, § 8.) The specific power is conferred, and the mode of executing or giving effect to it intrusted to Congress. The measure of the legislative authority is not restricted to an enactment indispensably requisite to carrying the specified power into execution, but extends to things that conduce to its exercise. Congress possesses the choice of means of legislation, and may use any means which are, in fact, conducive to the exercise of the power granted. If the means are appropriate and adapted to the end, and are not repugnant to the Constitution itself, they are not invalid. The question whether a thing is necessary and proper under a specific power, or whether it is necessary and proper to execute a specific power, in respect of which there may be a choice of modes and means, in a particular manner, is primarily to be determined by Congress. Possessing an uncontrolled right of selection, and the presumption being that the selection will be made in good faith and with reference to the public exigencies, and not for purposes of usurpation, the exercise of the legislative judgment will not be interfered with, unless it is plain and clear that the means chosen are prohibited or do not consist with the letter and spirit of the Constitution. Whether the means are appropriate or adapted to the end is a fact, and if it be an appropriate measure, not prohibited, the degree of its necessity is a question of legislative discretion, not of judicial cognizance. It is not for the judiciary to determine

whether a law of Congress has a direct relation as a means to the execution of an enumerated power. If, in any sense, or in any degree, the means employed are appropriate or conducive to the exercise of the power – if there be any possible relation of the means to the end – the judiciary is limited to the inquiry whether the use of such means is repugnant to any provisions of the Constitution itself. The judicial department of the government cannot declare that, because, to the judicial mind, Congress, in the execution of a specified power, seems to have employed means not having a direct, but a circuitous, remote and indirect relation to the end of such power, its act is constitutionally invalid. These are the views, in substance, of the federal judiciary. In the case of *The United States v. Fisher* (2 Cranch, 358), a law of Congress gave to certain debts due to the United States the preference over all other debts, whether due to the states or individuals. It was claimed that the law was unconstitutional; that the authority to pass it was not expressly given to Congress by the Constitution; that it was not incidental, and that there was a seeming injustice in giving the preference as against the states and individuals in the states. The same argument was substantially urged, as in one of the present cases, that the effect of the law was to impair the obligation of contracts. But Chief Justice MARSHALL said: “Congress must possess the choice of means, and must be empowered to use any means, which are in fact conducive to the exercise of a power granted by the Constitution. The government is to pay the debts of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object.” It would be difficult to show how an act giving a preference to certain United States debts over other debts due to states or individuals, bears a direct relation, as a means, to the execution of the power to pay the debts of the Union. The fact is apparent that it was using means to enable Congress to exercise the power of paying the debts of the nation; but there was no direct, obvious relation of the means to the object to be accomplished. Indirectly, the act conduced to the execution of the power. In *McCulloch v. The State of Maryland* (4 Wheat., 316), it was held that an act incorporating a bank, was a law made in pursuance of the Constitution. It was not within any of the enumerated powers. There was no direct relation as of means to an end in the creation of a bank and paying the debts of the government. Creating a corporation put nothing into the treasury. It was no exercise of the taxing power; nor was the government, in any degree, enabled thereby to pay the public debt. All that can be said is, that it furnished the government with a convenient, and, as Congress adjudged, an appropriate instrument, to be used by its executive officers in the collection and disbursement of the public revenues. The creation of a bank was the use of means that were, in a constitutional sense, “necessary and proper,” not because a bank stood in the direct relation of means to the ends of collecting the revenue and paying the public debts; but because it was an appropriate instrument, in the judgment of Congress, capable of being advantageously employed in the exercise of those constitutional powers. It was in the sense of an executive agent of the government, that the bank, as a means, conduced to an effectual execution of the power of collecting the revenues and paying the debts of the

nation. In the case of *The People, ex rel. The Bank of the Commonwealth, v. The Commissioners of Taxes*, the Supreme Court of the United States, at its recent term, held a law of Congress valid which exempted the securities of the United States from taxation under State authority. Such a law could only have been adjudged necessary and proper in the execution of the specific power to borrow money on the national credit. There was no direct relation as means between exempting United States securities from state taxation, and borrowing money on the credit of the United States. But there is no difficulty in perceiving how such an exemption would conduce, indirectly, to an effectual execution of the power. The government goes into the market to borrow money to meet the public exigencies and tenders securities exempt from state taxation. Can there be any doubt that such exemption strengthens the public credit, and imparts an increased value to the security? A bond or note of the government is certainly more valuable, and sold in the market, would put more money in the national treasury, if exempted from State taxation, than if subject to the taxing power of the States. Thus the exemption, as a means, indirectly conduces to an effectual execution of the borrowing power.

In *United States v. Marigold* (9 Howard, 560), the only question involved was, whether Congress could pass a law making it criminal to import spurious coin. The court held that the power existed, and that it was derived from the power to coin money and regulate its value. No argument can be adduced to show that punishing the importation of spurious coin is a means having a direct relation to the end of “coining money and regulating its value.”

In executing, therefore, the powers specifically conferred, the government may use all appropriate means, that directly or indirectly conduce to their effectual exercise, unless such means are forbidden by the Constitution itself. It can make no difference, even if the indirect effect of the means employed to carry into execution a specific power, be to impair the obligation of private contracts. Guided by these rules, the act in question is to be considered and construed.

We are not to close our eyes to the fact that when the law now alleged, in some of its particulars, to be unconstitutional, was passed, a rebellion and civil war existed of such proportions and magnitude as to threaten the destruction of the national government. The exigency demanded the prompt and efficient exercise of all the important and vital functions of that government in maintaining and preserving it. Armies were to be raised and supported, and navies equipped. It was not only within the express power, but the duty of Congress to provide the ways and means for suppressing the widely extended insurrection; and that body would have been recreant to the important trusts confided to it, had it failed to employ all constitutional measures in the attainment of the end. But money was required to raise and support armies, maintain navies, and provide the munitions of war. The money in the treasury, and the ordinary revenues of the government

were utterly inadequate. The imminent nature of the crisis rendered a resort to direct taxation to supply the necessary resources impracticable. The only recourse left was to resort to the borrowing power. Money was to be obtained to meet the wants of the government, if at all, on its credit; and to this power, in the emergency, Congress resorted. It is conceded that Congress had a perfect right to authorize the issue of treasury notes as a mode of borrowing money, and that, indeed, all the provisions of the law of February, 1862, are admitted to be constitutional, except the clause imparting to the notes the quality of money, and making them a legal tender. And why not this, if it would aid or conduce to the effectual exercise of the constitutional powers to borrow money, collect the internal revenue, or pay the public debts, and, as a means, is not prohibited? The government must raise money by borrowing. It requires no argument to prove that any means that strengthen the national credit, and inspire public confidence in its securities, will enable it to borrow more readily, and on more advantageous terms; and if so, the government may use them in effecting the object. It may borrow on its bonds or notes, bearing interest, and payable at a future period; and I know nothing to hinder its borrowing on notes payable on demand, without interest, and with the qualities of a circulating medium attached to them. Pursuing the first mode, the government is driven to dispose of its securities in the market, at rates corresponding with the confidence, at a particular juncture, felt in its credit by capitalists. In the latter way, it is emphatically a popular loan – the whole public are lenders. The individual who holds a legal tender note, is in effect a lender to the government to its amount, whilst an additional value is imparted to it as a security, from the fact that it is endowed with the properties of money. In either mode of borrowing, it is essential to the effectual execution of the power that the security should be made ample; and if by endowing the treasury note with the function of money, that end is attained, it is a means that may be resorted to by the government. It cannot be, that in carrying into execution the power to borrow money on the credit of the government, means not forbidden by some provision of the constitution, which elevate its credit, preserve confidence in its securities, and make them equivalent to and perform the function of money in effecting exchanges of property, are not within the measure of the legislative authority of Congress. It follows as an inexorable result, that the higher the confidence in the public credit and the more valuable government securities are made, the more promptly and effectually may the borrowing power be exerted. If, as a means of borrowing, notes are issued with qualities to serve the purposes of a currency, and fundable at the pleasure of the holder, in my opinion it is nothing more than the government may do in the exercise of the power. Again, take the power of internal taxation. This embraces the right of levy and collection. As a means for collecting the internal revenue, is it not competent to attach to a note of the government the characteristic of money? It is an instrument which the government sees fit to use in the direct execution of a conceded constitutional power. It cannot be any objection that in collecting the public revenue, Congress deems the use of a legal tender note the most eligible mode of accomplishing the object. So, also, take the power to pay

the public debts. May not the government use a treasury note, as money; in paying the debts of the nation, and if so, can there be any real objection to Congress declaring such purpose? It is conceded that the government may pay its debts in what is denominated a paper currency – the million of soldiers and sailors in its service may be paid in legal tender notes, without violating the Constitution. Creating such a currency and using it, is the use of means to effect the object.

The purposes of the act in question were threefold: First, to borrow money; second, to pay the public debts; and third, to collect the internal revenue and other demands of the government. The mode devised for borrowing money was by the issue of treasury notes. It is not denied that Congress possessed the power to use treasury notes; and I think it was empowered to impart to them such properties as would enable them to be used most advantageously in executing the borrowing power. If a note of the government, having the function of money, among other characteristics, was an eligible and appropriate means for effecting the object, Congress had the right to select those means, unless prohibited in the choice of them by the Constitution. They are not repugnant to the Constitution, unless, as is contended, that instrument was established for the express purpose of creating and maintaining an exclusive metallic standard of value; which proposition, in my judgment, cannot be successfully maintained. It is no objection to the means chosen to execute a constitutional power, that private contracts may be indirectly affected or impaired. This may be the indirect effect of carrying into execution many of the express or implied powers of government. The embargo laws impaired the obligation of numerous private contracts, yet these laws were adjudged to be constitutional. The government may debase the coin, and has done it, yet the obligation of private contracts would be affected precisely as by attaching to a paper currency the quality of money, and subjecting it to the fluctuations of the market. As parcel, therefore, of the means that might be constitutionally used in executing the power to borrow, was a note of the government, clothed with the capacity to circulate, and having the functions of money. It is not denied that Congress may create and use such an instrument, without the money and legal tender clause as to private debts, in the exercise of the borrowing power, or the power of paying the public debts, or of collecting the internal revenue. If it is constitutionally fit and proper in the exercise of those powers to impart to the treasury notes the quality of money for any purpose, it is no objection that they are constituted a medium in which private debts may be paid. The question is, whether they may be lawfully made money at all. If Congress can clothe them with the attributes of money, and as such, use them in payment and discharge of debts due from and to the government, there is no valid reason why they may not be made to have the same operation in respect to private debts. Individuals are always parties on one side or the other in transactions with the government; and the idea that it is an invasion of private rights even to be compelled in private money transactions to use the same currency, having the same standard of value as that used in transactions between the government and

individuals, rests on no just or sensible foundation. It is not true, however, that the direct result of the legal tender clause as to private debts, is to compel the creditor to surrender a portion of his debt to the man who owes it. This effect is only worked out by assuming that the creditor is entitled to have his debt paid in gold or silver coin, and that whatever may be the difference in value in the market between coin and legal tender notes, is so much surrendered to the debtor. But his right is to have his debt paid in lawful money, whether it be coin or paper, and what he loses or gains cannot be estimated by the market fluctuations in value of the medium. A treasury note of the denomination of ten dollars is legally as valuable for the purposes of money as a coined eagle. The value of each is fixed at ten dollars money of account. If a gold eagle be worth more in the market than a ten dollar legal tender note, it is because it is wanted to pay duties and settle balances abroad. Indeed, what is called a demand note of the government, receivable for duties, has a value in the market about equal to gold or silver coin. The market value of gold and demand notes is, therefore, regulated by the demand and supply. This demand for gold may be for legitimate purposes, as suggested, and it may be for speculative or illegitimate purposes; and, unfortunately, at the present time, most of the difference in value of gold coin and legal tender notes, is the result of a species of gambling in the metallic medium of circulation, as private or public stocks are gambled with. It cannot be said that a measure of value thus effected by extraneous causes, fluctuating in its character, which may be more to-day and less to-morrow, can be any just criterion of what a creditor loses or gains. Applying the test to-day to the private creditor's contract, he may lose; to-morrow the market difference in value between gold and legal tender notes may be nothing, so that whether he is compelled to surrender anything by the legal tender provision depends upon circumstances fluctuating in their nature, and extrinsic to the action of the government or the creditor. But that the creditor releases anything is more ideal than actual. Take the case of the defendant in one of the present cases. What of value does he, in fact, release by the operations of the legal tender provision? He did not lend gold, nor was the debtor's contract to repay in the specific article. He drew his check for \$8,000, and the bank transferred so much of his credit to the borrower. The debtor received \$8,000, but not in gold. The medium of dealing between the parties was a bill of credit. But now the creditor claims that he is entitled to be paid so many dollars in gold, stamped and valued at the United States mint, because when the transaction was had such coinage was the only lawful money and a legal tender. Not getting it, however, how can it be said that he has actually released value to his debtor? He receives for his debt as many dollars in money by being paid in treasury notes as if paid in gold eagles. One description of money satisfies the contract equally with the other. Indeed, the paper money discharges the debt by the currency in which it was created. If the creditor surrenders value at all to the debtor, it is because he may dispose of coin in the market at a higher rate than he can a treasury note, and the former is more valuable as a medium of exchange in the commercial world than the latter. In this way, and in no other, can the proposition that the operation of the legal

tender provision is to transfer a part of a creditor's property to another, be worked out. It might better be characterized as an attempt to extort from the debtor more than the law justifies or requires.

I am of the opinion, therefore, that the selection by Congress of the legal tender note as a means of carrying into execution the borrowing power, the power of collecting the internal revenue, and paying the debts of the nation, was within the measure of its legislative authority under the Constitution. As means, it was not forbidden by that instrument; there is nothing in it expressly prohibiting Congress from creating and using a paper currency in the exercise of its specific constitutional powers, and this is admitted. But it is said that the Constitution was established for the express purpose of creating and maintaining a metallic standard of commercial and monetary values, and hence the making treasury notes money and a legal tender is the exercise of a power repugnant to the spirit of the instrument. There is nothing in the letter of the Constitution indicative of a design of its framers or the people that the government should be exclusively a metallic currency government. It is true, that one of the express powers conferred by Congress was that of coining money and regulating the value thereof, and of foreign coin; but the grant of this power does not show that ours was intended to be an exclusively metallic money government. Full effect may be given to the coining-money clause without imputing to the great and sagacious men who framed the instrument any such visionary idea. The same duty and trust in respect to this power was imposed on Congress as in respect to all others of the enumerated powers in the Constitution. It would be going a great way to argue, from the fact that the power to emit "bills of credit" was proposed to be given to Congress in the first draft of the Constitution and was subsequently stricken out, that the purpose of inserting the coinage clause was to impose on the government a special trust to create and maintain a national metallic currency, to the exclusion of any other. But the fact has no significance for any purpose. In the first draft of the Constitution, one of the clauses, in enumerating the powers of Congress, read: "To borrow money and emit bills of credit." In the progress of the deliberations of the convention, the words "and emit bills of credit" were stricken out; but as the instrument was finally adopted, the clause read: "To borrow money on the credit of the United States." It is claimed that by striking out the words "and emit bills of credit," the convention evinced the intention that Congress should not possess the power of creating or issuing a paper currency, or passing laws making anything but gold or silver a legal tender in the payment of debts. The question is, not what the members of the constitutional convention intended, but what was the intention of the people who adopted the Constitution; and this can only be determined from the instrument itself. There is nothing in the Constitution expressly prohibiting Congress from passing laws providing for issuing notes of the government to be used as currency, and making them a legal tender, though the passing of laws making anything but gold and silver a legal tender in payment of debts, was expressly prohibited to the states. This latter prohibition is significant as

showing that the subject of tender was not overlooked by the convention or people, and that having it in mind, any restrictions upon the legislative power of the federal government were omitted.

My conclusions are, that the act of Congress, approved on the 25th February, 1862, is not in any of its features unconstitutional. The clause objected to, which makes the notes issued by the government lawful money and a legal tender in payment of public and private debts, was not outside of the measure of the authority given to Congress in the execution of its powers. In carrying into execution the power to borrow money on the public credit (if in the execution of no other specified power), it was fully justified, as a means. There is no prohibition of the use of such means in the Constitution, and Congress, in executing the great governmental powers conferred by that instrument, may use any modes or means, not prohibited, most fit and appropriate in its judgment, whether directly or indirectly conducive to the attainment of the end of the power. That the public exigencies required a resort to the particular means complained of, is most manifest, though that was a question to be determined by Congress. We cannot, however, shut our eyes to the magnitude of the necessity. If the Constitution and the national life were to be preserved, more money was required than had ever been coined at the national mint from the precious metals, and when the act was passed, four times greater in amount than there was gold and silver in the whole country. This money must be borrowed, and mainly from our own people. We have been admonished of the frightful consequences in the future, to result from an irredeemable paper currency, based on the credit of the nation; but if all the evils so strongly pictured, and which are mainly figments of the imagination, were to occur, how insignificant in comparison with a destruction of the government. If this magnificent governmental structure of ours falls, it will matter little that, in the effort to save it, disorder and ruin were brought on the commercial and monetary interests of the country.

I am in favor of affirming the judgment of the Supreme Court in the first of the above entitled cases, and reversing it in the latter.

EMOTT, J.

The magnitude of the interests depending upon the ultimate decision of these cases, and the momentous principles which they involve, justify, in my opinion, an expression by any judge who either concurs in or dissents from the judgments now to be pronounced, of the reasons which may lead him to his conclusion. I will attempt to state my views of the cases with all possible brevity. I consider the question presented to be the same in each of the cases, and that is, simply, whether Congress may, constitutionally, make anything but gold and silver a tender in the payment of private debts, or may prescribe what shall be a tender for the payment of such debts.

It is immaterial that, when the contract in the first case was made, nothing but gold and silver was such a tender, if Congress has power to authorize a tender in a different sort of money. It is said that the act making these government notes, equally with gold, a tender for the payment of this and other debts contracted before its passage, is unconstitutional as impairing the obligation of contracts. The opinion, however, has been expressed, and would seem to be well sustained, that the states only, and not the federal government, are forbidden by the Constitution to pass laws impairing the obligation of contracts. However this may be, if this act of Congress is open to no other exception, it cannot be successfully impeached for impairing the contracts between debtors and creditors to which it may apply. The contract of the obligor in this bond was simply to pay the amount stipulated, as so many dollars, in the lawful money of the country, that is, in that which should be its lawful money when such payment was due. It was not, either in terms or in effect, a contract for the delivery or the return of so much gold and silver, except as that was involved in the idea of payment of the debt while gold was the only medium in which debts could be paid. Gold and silver coin, and money, are not necessarily convertible terms. The latter word is used in various senses, and has various shades of meaning, according to its employment or connection. It is, generally, the representative of values and the instrument of exchanges. But it is no part of a contract of debt, made at one time for the repayment of money at another, that this representative or instrument should possess the same exchangeable value or the same purchasing power at the time of payment as at the time of incurring the debt. All that the debtor contracts to do is to return to his creditor in dollars and cents as much as he received; and the advance and repayment are alike to be made in that which, by competent and valid authority, is made the medium of account and payment. The only question here is, whether, under the Constitution of the United States, Congress has the power to make notes or bills issued by the government such a medium and tender in payment of debts.

In the case of *The Metropolitan Bank* and *The Shoe and Leather Bank v. The Bank Superintendent*, the same question is presented, between the holders of their notes issued as money and the banks which have issued them, as arises in the other case between creditor and debtor. Each is bound to redeem or fulfill its obligations in that which is the lawful money or medium for the payment of debts; and the superintendent of the bank department cannot require, or be compelled to require, of a banking association, any more, in respect to its bills, than an individual debtor can be compelled to do by his creditor.

The rights and duties of the superintendent, in applying the peculiar remedy given by the statute for the payment or redemption of this currency, are to be measured by the statute. The Constitution of this State, it is true, declares that the legislature shall require ample security for the redemption of bank bills in specie. (Const., N. Y., art. 8, § 6.) This constitutional provision, however, does not execute itself. It calls for legislation, and must

remain inoperative until such legislation is had. The present Constitution of this State was adopted since the passage of the general banking law, containing the provisions to which I have referred. These provisions must be construed according to their plain import, and the remedy which they give can only be pursued in the cases and to the extent specified in the law itself. If these banks have offered to redeem their bills in lawful money of the United States, they have complied with the law, and are not exposed to its inflictions. Lawful money of the United States means in this statute what it means in a bond or obligation – money which is a lawful tender for the payment of debts. Thus the same issue is presented here as in the case of *Meyer v. Roosevelt*, to wit, whether the act making government notes a tender for the payment of debts is a constitutional exercise of legislative power. If it is, the judgment of the Supreme Court, in the bank case, must be affirmed, and that in the *Meyer case* reversed. If, on the contrary, this court should be of opinion that Congress had no power to declare treasury notes a legal tender, then the result will be the reverse in each case.

The Constitution of the United States is a grant of powers, and creates a government of limited authority. Although sovereign within the range of its authority, the federal government cannot transcend that range nor exercise any power which is not either expressly or impliedly conferred by the instrument creating it. It is not claimed that the Congress of the United States is expressly prohibited from making anything but gold and silver a tender for the payment of debts. Undoubtedly, however, it is not sufficient that no such express prohibition exists in the Constitution. There must be authority either expressly given or implied in some express grant of power, and resulting from it as needful to its exercise, to pass such an act or to legislate upon the subject to which it refers. It is not asserted, on the other hand, that power is expressly given to Congress by the Constitution to make the treasury notes of the United States a tender in payment of debts, as indeed no power is expressly given to legislate upon the subject of tender at all. But it is contended that, in the exercise of certain powers which the Constitution does confer upon Congress, it is necessary and proper to issue treasury notes and to make them a legal tender, not only to the government but between individuals.

It has been sometimes said, in the discussion of this subject, and oftener implied or suggested, that the power to regulate the circulating medium, and to establish the currency in which payments and exchange may be made, is a necessary function of every government, and that it is implied or involved in the very creation of the government of the United States, independent of any express grant conferring or involving the power to legislate upon the subject. I cannot, however, yield to a theory which would impute to the federal legislature these indefinite powers. If we were dealing with a government neither constituted nor controlled by a written fundamental law, it would be impossible to deny that such legislation as that which we are considering would be within its proper and

ordinary functions. To authorize or direct the issue of paper money by the government, and to make that money a tender in the payment of debts, are acts not foreign to the idea of government abstractly considered, and not unprecedented in the history of other governments. But we are dealing with legislative authority conferred by a written Constitution, and restricted to the measures or the subjects specified in that Constitution. Supreme and sovereign as the federal government is within its scope, and although it is a government of the people, acting upon them individually as its citizens, and not through the States as a confederacy of separate sovereignties, yet it is, as has been said, a government of limited powers. It can draw to itself nothing as inherent in the idea of government, but must look to the written charter of its existence for the warrant of any act which it seeks to do. It can only exercise the powers granted to it, and a grant of any particular power cannot be presumed from its appropriateness or its supposed necessity to the idea or the existence of a nation. There is no presumption or implication to be indulged as to the powers of the federal government, except that, when a power is expressly given, authority to do whatever is fairly appropriate to its execution is implied in the grant of the power itself.

The Congress of the United States has power, by the eighth section of the first article of the Constitution, “to coin money and regulate the value thereof, and of foreign coin.” The term money is used in different places in the Constitution, as it is elsewhere, in somewhat different senses. Here, however, it means, in my judgment, metallic money, gold, silver, and copper, or the metals used for coin, and nothing more. The phrase “coining” cannot, without violence, be applied to the issue of paper money. To coin money is to make, stamp and issue coins as money. Coins are pieces of metal, of a particular weight and standard, and to which a particular value is given in account and payment. The clause which follows, “to regulate the value thereof,” evidently means to authorize the regulation of the value of the coin thus issued, or the money coined; and that this is strictly metallic money, appears from the words immediately following, “and of foreign coin.” The design was to confer upon Congress the power to regulate the value of domestic and foreign coins, and as the domestic money, whose regulation is thus conferred upon Congress, is the money whose coinage is authorized by the first part of the clause, the inference is irresistible that this money is simply domestic coin or metallic money. The clause confers upon Congress absolute and exclusive power over the circulating coin of the country, domestic and foreign, by regulating the standard and coinage of the former, and the value in account of the latter.

The second subdivision of the same section of the Constitution authorizes Congress “to borrow money on the credit of the United States.” Here the meaning of the word “money” is necessarily somewhat different. “Money,” says Mr. J. Stuart Mill, in his *Principles of Political Economy* (vol. 2, book 3, chap. 8, p. 9), “which is so commonly understood as the

synonym of wealth, is more especially the term in use to denote it when borrowing is spoken of. When one person lends to another, as well as when he pays wages or rent to another, what he transfers is not the mere money, but a right to a certain value of the produce of the country to be selected at pleasure, the lender having first bought this right by giving for it a portion of his capital. What he really lends is so much capital; the money is the mere instrument of transfer-But the capital usually passes from the lender to the receiver through the means either of money or of an order to receive money; and at any rate it is in money that the capital is computed and estimated. Hence, borrowing capital is universally called borrowing money.”

The importance of these observations, and their application to the subject in hand, will be seen in a moment, when we advert to the supposed inconsistency in borrowing money by issuing bills or notes which are themselves to circulate and perform the functions of money. In borrowing money on the credit of the United States, it is obviously not only competent but necessary to issue obligations of some sort, as evidences of the debt, and binding the United States to repayment. It could not be contended that these obligations must be issued only in return for money received, and not for capital or commodities of which money is the representative. As the government requires articles of various descriptions, or the services of men, for its exigencies in war and in peace, it may give, as it constantly has given for these values, its own obligations or evidences of indebtedness, and these are valid and properly issued under the power to borrow money. Such has been the construction, both practical and theoretical, of every school of our statesmen and jurists, and no one would probably dispute the doctrine at this day. Nor is it essential to the exercise of this power that the contract between the government and the lender, or the obligations issued, should provide for the repayment of the money borrowed at any specific future day, or with interest. This also must be considered to have been settled by general consent and the practice of the government. From a very early day treasury notes, or government bills, payable on demand and without interest, have been issued in payment for property and services. These bills or notes are what were known at the date of the Constitution, and are mentioned in it, as “bills of credit.” Their issue is forbidden to the States. (Const., art. 1, sec. 19.) It is not authorized by the federal government, except by the general authority to borrow money. In the case of *Craig v. The State of Missouri* (4 Pet., 410), Chief Justice MARSHALL, speaking for a majority of the Supreme Court of the United States, defines bills of credit to be “a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society.” In the subsequent case of *Briscoe v. The Bank of the Commonwealth of Kentucky* (11 Pet., 257, 314), the same court, by Mr. Justice MCLEAN, while expressly adhering to the principles of the case of *Craig v. The State of Missouri*, made the definition of a bill of credit, as used in the Constitution, somewhat more exact. “It is,” said that learned judge, “a paper issued by the sovereign power, containing a pledge of its faith, and designed to

circulate as money.” To the same effect Mr. Webster said, in his speech on the currency, in September, 1837: “Any paper issued on the credit of the State, and intended for circulation from hand to hand, is a bill of credit, whether made a tender for debts or not, or whether carrying interest or not.” I think it very material to the present question that the issue of treasury notes, which evidently answer this definition and are “bills of credit,” should have been, by general consent, considered a constitutional exercise of the power to borrow money. In May, 1838, Mr. Calhoun said, in the Senate, that the right to issue treasury notes had been exercised from the commencement of the government without being questioned, and, according to his conception, came within the power expressly granted to Congress to borrow money, which meant neither more nor less than to raise supplies on the public credit. Interest was not essential to borrowing, and it would be ridiculous to suppose that the framers of the Constitution intended to authorize the raising of supplies with interest, and to prohibit it without. In 1837-8, at the time of a great financial panic and distress, when the relations of the government to the banks, and consequently of the banks to the community, were changed by the measures of the administration and of Congress, it was proposed to aid the emergency by the issue of treasury notes. Mr. Webster, while not averse to that particular expedient, desired that the treasury notes should be of large amount and bearing interest, so as to make them sought as an investment. Mr. Calhoun, on the contrary, distinctly urged that the treasury notes should be without interest, in order to keep them in circulation. He said: “I am of the impression that the sum necessary for the present wants of the treasury should be raised by a paper which should at the same time have the requisite qualities to enable it to perform the functions of a paper circulation.” He added that he objected to the interest to be allowed on the notes proposed to be issued, because it would throw them out of circulation. He proceeded to argue in favor of the issue of government bills, redeemable or payable on demand, and receivable in payment of all public dues, as a sound paper currency, both constitutional and beneficial, in a higher degree than the notes of State banks or of a Bank of the United States. Both he and his great antagonist, as well as all the public men of that day, differing widely from each other upon questions of constitutional power, clearly held that the issue of such bills as a currency would be a constitutional exercise of the power to borrow money.

It may be observed here, that the fact that the Constitution forbids the emission of such bills of credit by the States was not supposed to furnish any implication that Congress did not possess that power; and it as little results from the prohibition to the States to make anything but gold and silver a legal tender, that Congress may not exercise such a power. No inference either way can be drawn from that prohibition.

It appears from the journal of the convention which framed the Constitution, and from the Madison Papers (volume 3, p. 1343), that the clause authorizing Congress to borrow

money was originally reported to the convention with the addition of the words, “and emit bills on the credit of the United States,” and that this latter part of the clause was stricken out by the convention. Mr. Madison says that this was done to cut off the pretext for a paper currency, and particularly for making the bills a legal tender. These facts are urged to show that the power now in question was expressly and intentionally withheld. They do undoubtedly show that such was the design of a portion, perhaps of a majority, of the framers of the Constitution. But, on the other hand, the practical and theoretical construction of this part of the Constitution, in the subsequent administration of the government, to which I have referred, shows that one part of this design was not accomplished. Although the authority “to emit bills on the credit of the United States” was expressly struck out and apparently intentionally withheld, it has constantly been recognized, and in this argument was conceded to belong to the government, under its general authority to borrow money. The design of the advocates of the alteration which was made in the draft of the Constitution is not entirely clear to me from Mr. Madison’s account of the transaction; but, whatever it may have been, it must yield to the actual and legal construction of the words as they stand in the written instrument itself.

The construction given to the Constitution by its framers and their contemporaries, the discussions in the convention which framed it, and the apparent intention with which certain clauses were added or stricken out in their deliberations, are constantly and justly referred to upon questions of the meaning of constitutional provisions. But the arguments derived from such sources are not necessarily final or conclusive. A stronger case, or one more indicative of purpose, could not easily be put than the instance which has been cited, of striking from the Constitution, in its formation, a proposed express power to issue bills of credit; yet it is obvious that, in exchanging bills of credit, or government evidences of debt intended for circulation as currency, for property or labor, the government does borrow money, or the capital of which money is the symbol; and it has, therefore, been seen that, while the power to borrow money remained, the right to emit bills of credit exists, notwithstanding the latter had been in terms expunged. The issue of such notes is an exchange of credit for money or property. All political economists recognize the fact that, in issuing paper promises to circulate as currency, their makers, whether governments or individuals, are in effect borrowing on the credit of these promises whatever of value they receive in exchange for them. In spite, therefore, of what may have been the design of the framers of the Constitution in this particular, the language which they have left in that instrument has been found to bear a construction contrary, it may be, to that design, but conformable to the exigencies of the times and the needs of the country.

It would be subjecting written constitutions to a severe test, as instruments of government, if the opinions, the declarations, or even the intentions of their framers were accepted as final upon questions of their construction, where there is a fair difference of opinion. Wise

and far-seeing as the men who framed the Constitution of the United States unquestionably were, it would be attributing to them more than human sagacity to suppose that they contemplated such a history of growth, extension and change, as has been accomplished by this country, or such an emergency as is now trying both its institutions and its people. The element of weakness in written constitutions, as in written codes, is their inflexibility and inability to adapt themselves to the ever-changing necessities of history and progress. So far as such constitutions consist of express grants or express prohibitions, this is inevitable, and it is undoubtedly a part of the security which they offer to the citizen, and even to the government itself, that it should be so. But when we enter the domain of implied or constructive powers, the rules by which we are to be governed must depend somewhat upon additional considerations. Admitting, what no one denies, that the powers and functions of the federal government are limited, yet, in the exercise of those powers and functions, the legislature must be allowed a wide discretion in the means to be employed for that purpose. In the governance of that discretion, upon questions of appropriateness or necessity, the circumstances and exigencies of the time must be more decisive than the opinions or purposes of those who framed the instrument conferring the discretion, without being able to foresee the occasions which the future would bring forth for its exercise.

I am not contending that necessity can confer any additional powers upon such a government as ours, but simply that in the history of the country occasions will arise for the use of means to accomplish the recognized objects of the Constitution, different from what its founders could have anticipated, and perhaps contrary to their expectations, and that in such event the question of constitutional power is to be decided by a fair construction of the Constitution itself, and by the appropriateness of the proposed means to the proposed end, tested rather by the facts of the day than by the judgment of the past or its history.

Taking it for granted that Congress has power to issue treasury notes or bills of credit to circulate as currency, in order to borrow money upon the credit of the United States, the question before us comes to whether Congress may confer upon these notes the character of a legal tender in order more effectually to accomplish the object of borrowing money by or upon them.

The principles upon which the Constitution is to be construed, in cases where the act in question is neither expressly authorized nor expressly forbidden, received, as is well known, an exhaustive discussion in the case of *McCulloch v. The State of Maryland* (4 Wheat., 316). The memorable and masterly judgment of Chief Justice MARSHALL, in that case, leaves nothing to be said upon the abstract questions which lie at the bottom of this and similar disputes. In discussing the meaning of the words “necessary and proper,” as

used in the general authority conferred to pass laws for carrying into execution the express powers of Congress, the Chief Justice said: "The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to ensure, as far as human prudence could ensure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which the government should, in all future time, execute its powers, would have been to change entirely the character of the instrument, and give it the proportions of a written code. It would have been an insane attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which could best be provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." And he gives the rule in language often quoted: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." If the measure proposed is an appropriate means to a legitimate end, the degree of its necessity is to be discussed elsewhere than in a judicial forum. So again the Chief Justice said in the same case: "When 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."

We are brought by such considerations, I conceive, to a narrow issue, after all, in this case. It is not denied that making treasury notes a tender between individuals is not in terms prohibited to Congress by the Constitution, although it is to the several States. The question that remains is, whether such a measure is appropriate to the object of borrowing money upon them. I cannot doubt, after long and anxious consideration of the subject, that it is.

It is conceded that Congress may issue these notes in a form and manner to make them readily pass and continue in circulation as currency, in order more easily to borrow or obtain property or value by its use. Nor is it disputed that the power which has been heretofore exercised, of making such notes a tender for dues to the government, is appropriate to the same end. Mr. Calhoun considered it so much so that he supposed that nothing else was needed to make such notes a permanent and perpetual paper currency, and of course to enable the government to obtain, as a loan, without interest, for an indefinite

time, the whole amount of that currency. It is sufficiently plain that to make such notes also a tender between individuals must, or at least may, add still more to their use and currency, and so tend to keep a much larger amount in circulation. When the point is established that government has power to issue a currency as a means of borrowing from the people, the inference is irresistible to my mind that it may confer upon such a currency any and all attributes, not expressly forbidden by the Constitution, which will enhance its value and increase the amount likely to be retained in circulation and use.

It does, indeed, at first consideration, appear like a solecism to say that Congress is authorized to issue paper money, as a means of borrowing money. But the confusion arises from the different senses or shades of meaning in which the word money is used, as a circulating medium, or as a synonym of capital or value. The fact itself is simply an instance of the theory upon which all issues of exchequer bills, bank notes or paper credits, to circulate as currency, are made profitable, to wit, that whoever parts with value, in exchange for such paper credits, in fact lends to the government or the individual which issues them. There is really no solecism or contradiction in the idea of borrowing money, by issuing paper currency. Making the bills of credit which constitute this currency a legal tender, is a measure of the same general nature, and as appropriate to the end to be accomplished by their exercise, as it is to confer upon them any of the other attributes of use or value which have, from time to time, been given to them or to other obligations of the government. It is a means, directly related to that end by a connection which is palpable and distinct. The necessity, or the degree of necessity of such a measure, is a question which belongs to the legislature, and not to the courts. It is enough to forbid our interference that we shall be able to see that the act is not forbidden by the fundamental law, and that it appropriately and properly tends to the accomplishment of one of the material objects of the government, or to the exercise of one of the great powers conferred upon the federal legislature to effect these objects. Of the wisdom of such a measure, or of the necessity which demanded a resort to it, another branch of the government, and not the courts, is the judge, and for the consequences of its use, whatever they may be, others are responsible.

The conclusion thus indicated is not without strong support from decisions of the Supreme Court of the United States in cases strongly analogous to the present. In *Weston v. The City of Charleston* (2 Pet., 449), it was held, and the principle has been affirmed and extended in the recent tax case, in which the judgment of this court was reversed, that Congress can exempt from all State taxation the bonds or stocks issued by the United States. No express power to confer such a right upon government bonds or their owners is contained in the fundamental law, and no other property or evidences of value can be endowed by Congress with such a privilege. The power to make this important exception to the reach of State legislation is derived wholly by implication from the power which the Constitution

contains to borrow money on the credit of the United States.

The analogy to the legislation now under consideration is, in one aspect, very exact. It is said that the subject of contracts is left by our system to State legislation exclusively. But the assessment and collection of local taxes is equally within the domain of State power, and no right is more jealously asserted, as an attribute of sovereignty by the several States, than the right to subject all property within their limits to the taxes necessary for the support of their governments. Yet large masses of property and values are abstracted from the reach of State laws by the federal legislation to which I refer – legislation resting wholly upon a power implied from the propriety or advantage of conferring such attributes on federal evidences of debt, in order to aid the federal government in borrowing money.

In all such instances, the incidental consequences to the States or to individuals, however far-reaching, are no answer to the assertion of a power by the general government, if it be appropriate and adapted to an object which that government was expressly authorized to pursue.

It should also be observed that, although the laws of contracts, with their rights and remedies, as between citizen and citizen, do unquestionably belong to the States, and not to the federal government, yet the regulation of the value and denomination of the money or medium in which contracts of indebtedness are to be performed, is within the control of Congress, and with it necessarily the general subject of tender. The money of account and payment in all private as well as public transactions is the money of the United States; and no one has ever questioned the power always exercised by Congress to declare its own or foreign coins a tender in the payment of debts. The power to declare what shall be such a tender obviously belongs to the federal government, and not to the States; and our inquiries have therefore been limited, in effect, to the question whether this power is restricted to the use of gold and silver only.

By the course of reasoning which I have thus indicated, and which might, of course, be much elaborated, I have been brought to the result that the Congress of the United States possesses the power to make the United States treasury notes or bills of credit lawful money and a tender in the payment of debts, and that judgment should be rendered in these two cases accordingly.

In concluding these observations, which have already been made more extended than I supposed they would or intended they should be, I will only add a single remark. It is, I think, proper for me frankly to say that I approached the consideration of this great question with a desire to sustain the act of Congress, whose validity is called in question. As much as this is due, in my judgment, to any and every act of the supreme legislature of

the nation. But this just repugnance to thwart that legislative will or prohibit its exercise is enhanced in the present instance by the consideration of the grave responsibility assumed by any citizen, who, in any way or in any sphere of action, will interpose hindrances or obstacles to the efforts of the government to suppress the great and wicked rebellion, which has brought so much misery upon us – a rebellion as little justified in morals as in legal or constitutional right.

Notwithstanding such considerations, however, the question for us, as judges, is simply one of law; and if our judgments had been adverse to the right of Congress to pass this law, our oaths and our consciences are paramount to all other considerations. In this connection I must also say, that I commenced the examination of this question with serious doubts of the power of Congress to pass this law, and with an impression adverse to its validity. Deliberate examination has removed these doubts, and I give my judgment with a clear and unhesitating conviction of the power of Congress to make government notes a legal tender, as a pure question of constitutional law, and with the satisfaction which attends a clear belief so carefully reached upon a point of such importance.

MARVIN, J.

The questions presented and argued by the appellant's counsel are in this form: "First. Has Congress the power to make the paper promises of the federal government a legal tender in payment of any debts not due to that government? Secondly. If it has this power in respect to any debt, not due to the federal government, can a bank of this state avail itself of such an enactment and tender these federal paper promises in redemption of its bills, and thus estop the execution of the trust by which the state has secured the redemption of those bills out of a fund pledged for the express purpose by solemn provision of law?" It is conceded that Congress has power to authorize the issue of treasury notes, and make them receivable in payment of all debts and dues to the federal government. But the authority of Congress to make them "lawful money and a legal tender in payment of all debts, public and private, within the United States," is challenged and denied.

I shall assume, without stopping to prove what has often been established upon judicial investigation and by judicial decisions by a court having the right to investigate and decide, that the instrument known as the Constitution of the United States, is a Constitution ordained and established by the people of the United States. That it contains certain specified powers and provisions which, when carried into effect, produced a government, possessed of the right to maintain and perpetuate itself for all time. The product of the Constitution is government, and such was the intention of those who ordained and established it. It is not a league, a compact, an alliance of states, but it provided for a government, that should have, by the exercise of the powers therein specified, a right to

make laws and compel obedience to such laws. The powers of such government, though limited and specified, are supreme within their sphere of action, and so also are the powers of the state governments, the latter not being usually specified in the state constitutions.

There can never, in theory or legally, be any conflict between the two jurisdictions, and we owe allegiance alike to each. There can be no conflict, and there should be no embarrassment touching the question of allegiance; as the Constitution of the United States declares: "This Constitution, and the laws of the United States, which shall be made in pursuance thereof, &c., shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." (Art. 6.) When, therefore, any act of the government is challenged, the sole inquiry and question for decision is, was such act authorized by the Constitution? If the act is done under a law of the United States, the inquiry will be, was such law "made in pursuance of the Constitution." If the question raised is answered in the affirmative, state laws and constitutions in conflict therewith must yield. They are invalid and not binding upon the citizen. If the question is answered in the negative, then the act done was unauthorized and is void. Much has been said and written touching the rules proper to be adopted for the construction of the Constitution; some claiming a liberal, enlarged construction; others, a narrow, strict construction. Governments are established for the benefit of those subject to them. This is emphatically so of republican governments. The state government is for the benefit of the people as well as the United States government, and in times of peace and the harmonious action of both governments, the state government operates upon and affects the interest of the people far more than the United States government. Its jurisdiction embraces vastly more subjects, and affects more interests. As both governments are for the benefit of the people, I apprehend, that when a question of conflict between the two governments arises, the rule that a liberal construction should be applied, because the government is beneficial, can have little application. The true rule, in my judgment, in such a case, is to consider fairly the provisions of the Constitution of the United States, and ascertain whether the given case is within them, and if not, then to abstain from exercising jurisdiction. It is very important that all the jurisdiction of the states over matters exclusively confided to them, should be carefully preserved, and that the government of the United States should be confined to the limits prescribed by the Constitution to which it owes its existence.

These suggestions do not question the rule of liberal construction, as applied to the subjects which may be embraced in the specific powers conferred upon Congress; and when it becomes a question, whether such powers authorize the doing of certain things, undoubtedly all the attending circumstances are to be taken into consideration, as in the construction of contracts, with a view of determining whether the power fairly embraces the cases. The nature of a constitution, in the language of Chief Justice MARSHALL,

“requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.” He says: “A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a code, and could scarcely be embraced by the human mind. It would probably never be understood by the public.”

The nature of a constitution, then, is to mark the great outlines, and designate the important objects of the government to be established. This is of necessity so; as to all organized bodies, some fundamental canons are enacted defining their creed or specifying their powers.

The Constitution, after specifying certain powers to be exercised by Congress, adds: “And to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.” In *McCulloch v. The State of Maryland* (4 Wheat., 314), this provision underwent a most elaborate examination by Chief Justice MARSHALL, and I shall not attempt to add anything to his masterly exposition of it.

I do not know that I object to the exposition of this provision of the Constitution, as made upon the argument of this case, by the learned counsel (Mr. Curtis) for the appellant. Undoubtedly the law enacted under this provision must sustain a proper relation to the previously granted powers, and must be necessary and proper for carrying into execution some one or more of those powers, or some other power vested in a department or an officer thereof. And I agree that Congress is not necessarily the exclusive judge of such relation, and of the necessity and propriety of making such law. Its decision may be questioned before the judicial power, which may decide that the relation, necessity and propriety did not exist, and thus adjudge the congressional act unauthorized. The judicial power will not be justified in considering the degrees of necessity and propriety, or in instituting comparisons between the measure adopted by Congress and some other measure better calculated, in the opinion of the court, for carrying into execution the granted power. Chief Justice MARSHALL, in the case referred to, sums up the argument by saying: “We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent

with the letter and spirit of the Constitution, are constitutional.”

Let us now bring into view some of the “foregoing powers” expressly conferred upon Congress. They are: “to levy and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defence and general welfare of the United States;” “to borrow money on the credit of the United States;” “to regulate commerce with foreign nations, and among the several states;” “to coin money, regulate the value thereof, and of foreign coin;” “to declare war, grant letters of marque and reprisal;” “to raise and support armies;” “to provide and maintain a navy.” (Art. 1, § 8.) There are some prohibitions. Let us notice them here. “No capitation or other direct tax shall be laid, unless,” &c.; “no tax or duty shall be laid on any article exported from any state.” (§ 9.) There are some other limitations upon the powers not necessary to be here noticed. There are some limitations of the powers of the states which should be carefully noticed. “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 debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.”

“No state shall, without the consent of Congress, lay any duty or tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.” (§ 10.) Let us add, for the purpose of showing the independent character of the government within its proper sphere: “The executive power shall be vested in the president of the United States of America.” (Art. 2, § 1.) The Constitution makes provision for courts in which the judicial power of the United States shall be vested. Some amendments were made, and in article 10 it is declared: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” On reading these clauses containing powers and limitations, and certain prohibitions of powers to the States – powers national and common to all nations possessed of independence – of full sovereignty – what impression is produced upon the mind, touching the character of the government about to be brought into being? Its powers are not numerous, but they are of the vastest importance to the well-being of all the people occupying the country included within the limits of the United States; and the happiness and prosperity of such people was, and is, to depend mainly upon the faithful execution of these powers. The people, through their state organizations, can enter into no treaty, alliance or confederation; they cannot engage in war, nor coin money. These, and some other powers are prohibited to them, and are conferred upon the federal government exclusively. They are prohibited from making anything but gold and silver coin a tender in payment of debts; and unless the federal government has this power it is extinct, and can have no existence among the people who have established the state and national governments. Whatever the emergency, however

fatal it may be to the states, to the United States, to the people, that gold and silver coin, under all circumstances, shall be demandable in payment of debts, there is no power to relieve them. The people have annihilated this power, unless it is possessed by the United States government; and they are in a condition unknown to any people that have ever constituted a community, under any form of government known to mankind. The relation of debtor and creditor has, in all ages, in civilized nations, been regarded as a matter of great importance, and has always been subject to the regulation and control of the sovereign legislative power. History informs us of numerous instances in which the legislative power of nations has been invoked to interfere between the debtor and the creditor, and they have interfered for the relief of the debtor, and thereby saved the nation from convulsions, and, perhaps, ruin.

But with us, if the power is gone, whatever may be the condition of the country and its money, though the “gold and silver coin” may have disappeared – though its value, compared with all property, real and personal, may have appreciated an hundred fold – yet the debtor must produce it in payment of his debt. In short, the creditor may have the power of appropriating ten or a hundred times as much of his debtor’s property as he transferred to his debtor a year or two before, for the very debt he is collecting. These are not extravagant suppositions; but whether they are or not, they illustrate my position – that the debtor class in time of national calamity, in the absence of the precious metals, may be ruined, and their property transferred to the creditor class, though there may be as much or more property and real wealth in the country as there had been at any time previous. I repeat that this power of interference by the government, between the debtor and the creditor, has always existed in other nations, and has, in times of emergency, been often exercised; and a mode for extinguishing debts, other than with the precious metals, has been authorized. The power has been exercised for the good of the nation as a whole, if not for its very salvation. I concede, of course, that if this important governmental power is extinguished throughout the limits of the United States, this is an end to the question we are considering.

In my opinion it is not extinguished; and I will proceed to state some reasons for this opinion:

In giving construction to contracts, wills, statutes – indeed any written instrument – it is important to understand clearly the subject to which the written language was or should be applied. This rule is emphatically applicable in giving construction to the Constitution. The meaning of the language used must be understood, and the subject matters to which the language relates, or which may be fairly embraced within the language creating the powers: the condition of things coëxisting with the making of the Constitution, and which might be reasonably anticipated to exist in the future, should be considered in giving

construction to the various provisions of the Constitution, and to the Constitution as a whole. There existed at the time thirteen states, and it was understood that this number would be increased. Each of these states possessed all the powers pertaining to independent nations, except as modified or restricted by the articles of confederation. They possessed powers common to all independent nations: of regulating their own commerce, and the law of contracts; of making money or declaring what should constitute money; and, of course, what should pay debts. They could emit bills of credit; issue their own paper money, and make it receivable in payment of debts. They could discriminate, in regulating commerce, in favor of their own citizens, and against the citizens of other states or nations. Under such circumstances it was obvious, indeed it was already proved, that there could be no such thing as harmony touching any of those matters. Most of the then states possessed harbors upon the ocean, and were engaged in foreign commerce, and commerce among themselves. There could be no uniformity of regulations touching such commerce.

Some of the States tried to agree upon a system for themselves, and failed. The system of one State would nullify the system of another, or other States. Free importations by one State would render impracticable the system of other States, imposing duties for revenue or for the protection of home industry. Embarrassing and unreasonable regulations, touching commerce between the citizens of one State and other States would be made. Each State might have a moneyed system unlike that of any other State; a system of weights and measures entirely different. Commerce between the citizens of one State and other States might be prohibited and destroyed. The confederacy had no power to derive a revenue from importations, nor had the states practically this power, as they would never be able to agree upon a common system, and owing to their geographical positions, any system other than free trade would be practically nullified by the action of the other States.

This state of things could not last. The people were powerless to protect their interests. A change was necessary, if they were to indulge hopes of future prosperity. This practically powerless condition of the people was an important, if not the most important, reason for making an effort to devise a remedy, and the remedy devised was the Constitution. A leading object of the Constitution was to get rid of all conflicting commercial interests and, as to commerce, to effect a union of all the people of all the states, great and small, and make them one people, one nation, without divided interests, and without power, as states, to produce divided interests or conflicts. This was a leading idea in favor of the Constitution, and to me it has always seemed the most valuable one.

Was this idea carried into effect by the Constitution? I think it was clearly and fully. It required several provisions to effect the object; some conferring powers upon the new government; others prohibiting the exercise of certain powers to the state governments. Hence were granted the powers: "To regulate commerce with foreign nations, and among

the several states, and with the Indian tribes.” “To establish uniform laws on the subject of bankruptcies throughout the United States;” “to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;” and, in addition, the power to make all laws necessary and proper for carrying into effect these powers. The prohibitions upon the states, in connection with commerce, are, that they shall not emit bills of credit, make anything but gold and silver coin a tender in payment of debts, or pass any “law impairing the obligation of contracts.” These provisions, I think, accomplish the object intended, viz., the committing to Congress, the common representative and agent of all the people, the exclusive power to establish a uniform system of commerce throughout the United States. All these powers have a very important connection with and relation to commerce, over which the common government was to exercise great, if not exclusive, control for the common benefit of all the people of all the states.

Now what is commerce? I need not stop to look up and quote definitions. We know that it consists in the exchanging of property, or the buying and selling of commodities; the latter as generally understood. As so understood it cannot be carried on without money. In the absence of money it must substantially perish; something called money must exist. It is a necessity to commerce – an aid always attendant upon it; and the power that regulates commerce should, theoretically, be the exclusive power to create money, to say what shall be money, the representation of values, and it should have the power to regulate its quantity: not that such power, by way of changing the quantity, should be often or capriciously exerted. The language of the Constitution is, “to regulate commerce with foreign nations, and among the several States,” and “to make all laws which shall be necessary and proper for carrying into execution these powers.” It is argued that these powers are not broad enough to embrace the case we are considering: the power expressed is limited to regulating commerce, and this only, “with foreign nations and among the several States:” that Congress can only regulate, not create, and that it cannot even regulate commerce within the states. Commerce was never created by a mere act of legislation. It must have production to supply it with materials to be sold and bought. But legislation may protect the products of labor – may stimulate and encourage labor, and furnish money, making it easy to buy and sell property. It may, by many regulations of commerce, cause industry to take such direction as to produce the materials for commerce. Regulations of commerce with foreign nations may be productive of great individual, and consequently national, wealth or great poverty. And the same effects may follow regulations of commerce among the states. Money is necessary to commerce. And the kind of money, and the quantity, may be, indeed, are, direct regulators of commerce. Without money there would be no commerce; with certain kinds of money, such as Lycurgus established, iron, there would be little commerce. With convenient money, in suitable quantities, commerce may be active and profitable to the people and nation. But it is said that the power to make government promises a tender in payment of private debts has not been granted to

Congress, and this is so *eo nomine*; nor has the power, by name, been given to Congress to do very many things that it has done, some of which have been questioned, others not. Congress has established a military school; it has enacted criminal statutes touching a variety of subjects; it has chartered banks, &c., &c. If it be shown that money is a necessity to commerce, as well to regulate it as to invite its presence, it will follow that some power must exist somewhere to make money, or make something to perform the office of money. The states clearly have not the power. They cannot coin money and regulate its value. It has been sometimes argued, conceding that the power which regulates commerce should also regulate the money, and that it has, as a legitimate, if not necessary consequence, the right and power to do so, yet, as the Constitution had expressly conferred upon Congress the power to coin money and regulate its value, and the value of foreign coins, that it has no other power over or concerning money: that the maxim, *expressio unius exclusio alterius* applies. The power to coin money, &c., is not a limitation upon the power to regulate commerce. It may be one of the means, but not the only one. If it is, then, as I have already remarked, commerce can never be regulated by any other means, and in the absence of coined money, or a sufficient quantity of it to circulate the vendible commodities, a contingency quite likely to arise, commerce may languish, decline and possibly perish.

But it may be further objected that this power of regulating commerce is limited to foreign nations and to commerce among the states, that is, between the people of one state and another; and that therefore Congress cannot make any regulation touching the commerce in a state, that is, such as may be confined within the limits of a state; and cannot, therefore, do anything affecting such commerce. I apprehend that any attempt to distinguish, so far as commerce is to be affected by money, between commerce in a state, and commerce “among the several states,” will always prove a failure. The products of any state enter directly or indirectly into the commerce “among the states.” The manufactures of New England are consumed in all the states, and the grains and other productions of the western and middle states find a market in all the other states, and so also of the productions of the south. And it may be added, that this is mainly owing to the commercial provisions of the Constitution, and the wisdom of the government resulting from it. But it is only necessary to a proper relation between these commercial powers and the necessity and propriety of an act for carrying them into effect, that it appear that such act regulates commerce with foreign nations or among the states. Now, no one will question the position that that which will compulsorily discharge debts, that which in numerical quantities previously ascertained may be tendered in payment of debts of like numerical amount, will be a great and controlling regulator of commerce, and all the commerce of the country.

If the thing be inconvenient for circulation, it will embarrass and diminish commerce. Lycurgus understood this when he made iron the money of the Spartans for the purpose of

preventing commerce and turning the energies of the people into other pursuits.

If the thing be convenient it may greatly increase commerce by stimulating industry. The paper promises of governments or of banks have, in modern times, been regarded as the most convenient article for an additional circulation, and although these promises refer to some other standard, usually coined money, nevertheless they may perform the office of money, and the sovereign power may declare them money, and make them tenderable in payment of debts. It may be that a like numerical quantity will not purchase as much property as the coined money to which reference is made in the paper promises. And this will always be so when the promise to pay coined money is not at once performed upon demand; for such coined money, if of the precious metals, as is usual, has an intrinsic value as an article of commerce in all the markets of the world, and the paper promises have no such value. But the measure of depreciation, where they circulate, may be greatly affected by the question whether they may be tendered in payment of debts. If they may be, the depreciation will be far less. Hence, though there may be great danger of the issues of government paper, or irredeemable bank paper, in excess, thus widening the margin between them and coined money, the danger may be much less with government issues made tenderable in payment of debts, than in bank issues not so tenderable. And it is to be kept in mind, that the states can not make the issues of the banks established by them a lawful tender in payment of debts, whereas, as I insisted, Congress may do so, and thus provide a safer and better circulation than the states. The question of danger does not affect the question of power. If the power exists it may be carried into execution, however dangerous it may be. It may be very unwise under some circumstances to exercise the power, and very wise to exercise it under other circumstances – indeed, criminal not to do so. The salvation of the nation may depend upon its exercise, and when the further life and existence of the nation may depend upon the exercise of powers conferred upon Congress, that Congress that should refuse to exercise such power, would be justly chargeable, for all time to come, as participating in the crime of national slaughter, and would be as justly convicted of such crime, as was ever, by municipal law, a felon, of the crime of manslaughter.

This is not the place to justify or assail the expediency of the act of Congress authorizing the issue of treasury notes, and declaring them receivable in payment of taxes, interest, duties, debts and demands due to the United States, and declaring them to be lawful money and a legal tender in payment of all debts, public and private, within the United States. It is the question of power that we inquire about, and being of the opinion that the provisions in the act referred to, have a direct tendency to promote the circulation of the notes authorized to be issued, and preserve them in a degree from depreciation, as compared with coined money, and that they operate directly upon commerce and tend greatly to regulate it among the several states, and also with foreign nations, by stimulating greater

productions and facilitating the circulation and exportations of such products, I am quite clear that they are authorized by the provisions of the Constitution already brought under consideration.

Let us pursue the question further. It is a great question, affecting vitally the prosperity of the nation.

Considering the subject or object of these powers, and the circumstance, the most important, that the people, who were to create and carry on this commerce, were members of other bodies politic, possessing certain powers in common with all independent states, which powers, if exercised by them, would embarrass, derange, and might effectually destroy the common system established by the federal government, it was absolutely necessary to impose certain prohibitions upon these other bodies politic – the states. Among these prohibitions, I have always regarded, so far as commerce is concerned, and I may add, the peace of the states and the harmony of the systems, those which prohibit the states from making anything but gold and silver coin a tender in payment of debts, and from passing any law impairing the obligation of contracts. If these powers had been suffered to remain with the states, it is quite obvious that difficulties between the people of the different states would soon have arisen, endangering peace and harmony between them. Distrust would have existed, and there would have been an absence of that confidence necessary as a base for commerce between them. Independent nations may protect their merchants and citizens from the frauds of other nations, consequent upon a debasement of the coin or a change of the measures of value in which debts are to be paid, or for a neglect or refusal to pay, by a resort to war. But the states have no right or power to make war upon each other, and they are prohibited from doing certain things which might be a just cause of war, and the people have intrusted the regulation of commerce among them to a general common government. Notwithstanding the prohibition I am noticing, many of the states have, from time to time, for the relief and ease of their people, enacted stay laws, valuation laws, &c., &c., all of which, on being brought properly before a court, in which the judicial power of the United States is vested, have been set aside, and the creditor has had his remedies unimpaired, and peace and harmony between the people of the different states have been preserved.

I am dwelling upon these commercial powers and the system relating to commerce, inaugurated by the creation of the new government – the common umpire – because history in forms us that the difficulties which had arisen prior to the adoption of the Constitution, and which would inevitably arise, were a main cause of, and reason for, the establishment of a government that should be vested with the powers necessary for the protection of commerce, and all those engaged in it, and under which industry and enterprise could safely develop the dormant resources of the whole country, protected against the laws of

one state, invidiously discriminating in favor of its own citizens and against those of another or other states. (See the proceedings which led to the adoption of the Constitution. Elliot's Debates, v. 1, pp. 122 to 155.) They show the great defects in the articles of confederation, for the want of power to regulate commerce, and from it to derive revenues. Efforts were made to correct the evils arising from conflicting systems and supposed interests of the states. Virginia, January 21, 1786, appointed delegates to meet delegates of other states, "to take into consideration the trade of the United States; to examine the relative situations and trade of the said states; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony, and to report to the several states such an act relative to this great object, as when unanimously ratified by them, will enable the United States in Congress assembled, effectually to provide for the same." (Id., 149.) New York, New Jersey, Pennsylvania and Delaware, appointed delegates who met the delegates of Virginia at Annapolis, in September, 1786. This convention made a report recommending a convention of all the states, the powers of the deputies to be extended "to other objects than those of commerce." Congress concurred in the recommendation, and resolved that it was expedient that such convention be held, and appointed a time and place for holding it. It was held in 1787, and produced the Constitution of the United States. Thus it is seen that the difficulties arising from the conflicting commercial systems of the states, was the principal cause of the calling of the convention.

Now, although it was absolutely necessary for the success of this commercial system, that the states should not possess the power to pass laws impairing the obligation of contracts, or to make anything but gold and silver coin a tender in payment of debts, there was no necessity that the government, common to all, should be deprived of these powers, nor any reason why Congress should not possess them. On the contrary, there was every reason, in the nature of things, why such general government should possess these powers, and should fully exercise them for the common benefit of all the people – the nation, under circumstances that might arise; powers, as I have already said, possessed and exercised by all civilized independent nations, and, without which powers, a nation would be unable to protect itself from the greatest and most dangerous convulsions, and a large portion of its subjects from ruin. All independent governments have a vital interest in the prosperity of all their subjects, and in the increase of their wealth; and all wise governments are constantly vigilant in observing the operation of their laws of trade and commerce, changing, modifying and improving them, for the better protection of industry and the development and protection of wealth. The most favorable results, as experience has shown, generally follow from stability in the laws which have long established the relations between money and property, contracts or promises to pay money, and the money as it was when the promise was made. Hence, the depreciation of the coin, change in the mode of paying debts, and the thing in which the debt may be paid, have always been

regarded as evils, or as an evidence of great national embarrassment, a calamity. And such changes are, by the moral code, unjustifiable, except in great emergencies. But the power to make such changes is not, for these reasons impeached. On the contrary, occasions do arise, when there is a necessity for the exercise of the power, that commerce may not be destroyed; that the great mass of the people may not be ruined; that the resources of the nation may not waste away and perish. All the people interested in the government, and the government, have a common interest in the prosperity of the people and the resources of the nation.

In my opinion, the provision objected to in the act in question, has a direct, legitimate and pertinent relation to the powers vested in Congress over commerce. That the provision declaring the treasury notes authorized to be issued “lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid,” had, and has, a great effect upon the commerce of the country, no one will question. Indeed, the complaint is that its effect was to appreciate values, thus extinguishing the previous relation between commercial property and the precious metals. It is not denied that its effect has been to stimulate industry and thus increase production, and impart greater activity to commerce. And, I think, it cannot be successfully denied that in the absence of such a provision, under the circumstances then and now existing, the commerce of the country would have received a withering blow; industry and production, instead of being active, would have languished.

Creditors insisting upon the discharge of their debts in something that could not be procured from, or even by, the banks, universal insolvency must have ensued; and production, and therefore, commerce, must have been, to say the least, greatly diminished. Even danger of these consequences is sufficient for my argument. I am examining the question of the power of Congress, not whether the power was wisely exercised. It will not be denied, that in the absence of such provision, property would have greatly depreciated in value as compared with “gold and silver coin,” and that commerce would have been thereby greatly affected. Certainly such results might have been reasonably apprehended; and although Congress possessed the powers I have referred to, over commerce, it is claimed that it had no power to prevent such results, but that the previous law must have its course, whatever the consequences might be, though Congress was the author of such law, having provided coined money and regulated its value by declaring how much of the precious metals should constitute a dollar, and having regulated the value of foreign coins, taking the dollar as the standard, its powers are exhausted, and that its action was final. It is not, however, denied that Congress may reconstruct the dollar, and make it, though nominally the same, of far less value, as compared with a given quantity of the precious metals. The precious metals, it is said, possess a real, intrinsic value in the estimation of all civilized nations, and that they are generally used as the representative of values as

money. And all this is so. Still the precious metals are a mere article of commerce between nations and among the people or subjects of such nations, until the nation, by an act of legislation, gives to them a different character, by taking certain portions and impressing upon them the stamp of the government, and giving them names which the people may use in their contracts; and also declaring that the damages for the breach of all contracts shall be estimated in the stamped precious metals according to their denominations, and shall be satisfied by them. This system is very convenient and important. But does it, of necessity, supersede all other systems, though in truth, it may have been once established? Certainly not. Systems of money have been adopted by nations for the purpose of developing the industry of the people, and protecting the produce of such industry; for the purpose of creating and protecting commerce; as a means of producing national wealth and enabling the people to pay taxes in something called money, and which has a certain numerical, denominational value, aside from the general value of the metals comprising it as an article of commerce. The precious metals are made money for the convenience of, and as an aid to, commerce. Commerce is the principal thing on account of which money is created by any nation. A people or community, if such a case may be supposed, having no commerce, have no need of money. Now, although a nation has once established a system of money composed of the precious metals, as an aid to commerce, it does not follow that it may not change that system, or, indeed, wholly abrogate it, and substitute something else as the representative of values, classifying it by numerals, and giving them names. The nation may and ought to do so, if, in its judgment, it has discovered a better system for the development of its industry, and the encouragement and protection of commerce. Commerce is the subject, the object to be protected; the thing called money, the standard referred to in the making of contracts, is simply a means of creating, stimulating and protecting commerce.

Now the United States government possesses as full and ample powers touching commerce as any nation that ever existed – certainly as to regulating it with foreign nations and among the several States; and this power is sufficiently ample to justify Congress in declaring what shall be receivable in the payment and discharge of debts. This power exists nowhere else in this country. The power over commerce with other nations and among the States is confined to Congress. It, of necessity, includes the power to prescribe the thing which shall be the common representative of commercial values. It is its duty so to prescribe for the common benefit of all the people who produce the means of, or things used in, commerce, and who are engaged in it.

As to commerce, the people of the United States are substantially one nation. Their State governments have little or no jurisdiction over it. They must look to Congress for protection. They have agreed that Congress shall regulate their commerce with foreign nations and among the States, and they have prohibited the States from enacting certain

laws which would conflict with the fair and legitimate exercise of the power confided to Congress, the prohibition embracing all debts and all contracts.

The fact that Congress may establish “uniform laws on the subject of bankruptcies throughout the United States” supports, instead of detracting from, the argument. It is one of those powers directly connected with commerce, and it embraces all bankruptcies, whether arising from obligations entered into in foreign or domestic commerce; in short, all cases of bankruptcy. It excludes, necessarily, the States from the exercise of the power, or rather no State could have exercised the power “throughout the United States;” and our State insolvent laws are only operative upon contracts made after their enactment, upon the principle that such contract is made in reference to the existing law, which enters into and constitutes a part of the contract. A general bankrupt law, to operate upon existing contracts, passed by a State legislature, would infringe the provision prohibiting the passage of any law impairing the obligation of contracts. Congress may impair the contract and discharge the debtor. I refer to this as showing the ample powers that it was intended Congress should have over commerce “throughout the United States,” and not as a power, for the carrying into execution of which the legal tender provision in question was authorized. This power touching bankruptcies does not interfere with the power to declare in what debts may be paid, thus preserving commerce in full vigor and preventing bankruptcies.

As we have seen, there are some express limitations upon the powers of Congress; those relating to commerce are, that “no tax or duty shall be laid on articles exported from any State; no preference shall be given by any regulation of commerce, or revenue, to the ports of one State over those of another; nor shall vessels bound to and from one State, be obliged to enter, clear or pay duties in another.” These limitations do not affect the question we are considering. I conclude this view of the powers of Congress relating to commerce, by again referring to the rule in *McCulloch v. State of Maryland*, deduced from a consideration of the provision authorizing laws to be made to carry into execution the powers granted, viz., that the Constitution allows to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate – let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but are consistent with the letter and spirit of the Constitution, are constitutional. In my opinion, the measure adopted by Congress, in making treasury notes a legal tender in payment of debts, comes within the tests here laid down.

I have thus far considered the question under the commercial powers of Congress. I will

consider the question briefly under the power to borrow money on the credit of the United States. This power does not mean literally the borrowing and receiving the thing called money. It is not denied that Congress may issue treasury notes and compel their acceptance by the creditors of the government. Borrowing money means neither more nor less than raising supplies on the credit of the government. The issuing and paying out of treasury notes may be a forced loan to the government. But if they are issued and sold in the market, as stocks are, for the purpose of raising supplies, may not the government, in addition to its promise to pay them, give to them a character and qualities which will command for them a higher price in the market? As to stocks, it may increase the interest, prolong the time for payment or redemption, exempt them from taxation, by itself or the States, and all for the purpose of enhancing their value, and thus increasing the supplies.

And so, I apprehend, Congress may, for the like purpose, make the treasury notes receivable in payment of public dues and in payment of all debts, public or private. Such qualities will give them greatly increased value. They will impart to them negotiability, circulation. All persons, and especially those owing debts, will accept them for property which the government needs, because they can be used not only in purchasing property, but in payment of debts, whether contracted before or after the enactment of the law authorizing their issue. This quality of satisfying debts, undoubtedly imparts to them very great additional value, and without it they would, at once, depreciate greatly below their present value as compared with coin, and the government might be compelled to issue a far greater quantity of them, and thus increase the national debt to be hereafter paid by levying and collecting additional taxes.

Call the issuing of these treasury notes borrowing money or a forced loan, and the quality in them, making them receivable in payment of all debts, enhances their value and enables the government to realize from them a greater amount of supplies. The question is not, is this just or unjust to the people, or a certain class of the people. About this some may differ. The answer to such question is, the power being conceded, that it was submitted to Congress, and Congress decided it, and may reconsider it, and again decide. The courts only inquire and decide concerning the power.

Banks in this state are organized, and become incorporated under general laws, and the Constitution prohibits the legislature from passing any law sanctioning the suspension of specie payments by them. The legislature is empowered to require by law ample security for the redemption, in specie, of all bills or notes issued or put in circulation as money by such banks. The legislature had provided a system of security by deposits of bonds and mortgages, and State or United States stocks, with a superintendent of the banking department, and for the sale of such securities and the redemption of such bills and notes when payment is refused by the banks in the "lawful money of the United States." It is

argued that the system results in a trust, and the creation of a trust fund, for the benefit of the billholders – the *cestui que trusts*; and that Congress cannot interfere with such trusts and the rights of the beneficiaries under it. It may be conceded that Congress cannot interfere with trusts so as to deprive beneficiaries of the enjoyment of the property charged with the trust, except as the taxing power may reach it in common with all other property. I speak of trusts generally. But may there not be trusts which Congress may affect and make void by legislation? Suppose property is charged with a trust to be converted into specie, the precious metals, and then to be coined into money, and the money to be paid over to the beneficiaries. Such a trust would be void as to the coining. Suppose the trust to be valid when created, but it conflicts with a valid act of Congress subsequently created, will it not cease to be a valid trust? It will make no difference whether the trust had its origin in a State law or State Constitution, as the laws of Congress passed in pursuance of the United States, are the supreme law of the land.

Now, if I am right in the position that Congress could make the treasury notes in question a legal tender in payment of all debts, public and private, when a bank tenders such treasury notes in payment of its circulating notes, it at once discharges its debts, and there will be nothing for the trust to operate upon, or rather the power of the trustee to dispose of the trust property will be suspended.

Assume that the object of the securities is to secure the payment of the bank notes in specie, or rather in coined money (for this is the meaning of the word “specie,” as used in the Constitution), and the securities are brought to a public sale, and the purchaser bids a certain number of dollars, he will owe the superintendent that number of dollars, which debt may be discharged by a tender of treasury notes. It may be said that he will, as a trustee, only be authorized to make sale of the securities for specie dollars; that is, that he may exchange a certain amount of securities for a certain number of specie dollars. It must be literally an exchange, for if he takes the bid or promise to pay a certain number of dollars in specie, such promise may be satisfied by tendering a like number of dollars in treasury notes.

It is to be noticed, that the legislature does not grant charters in this State annexing conditions to the grant, but the banks are organized under general laws, containing certain requirements with which the banks in this case complied, thus giving them a corporate existence. They also complied with the requirement of the legislature to furnish security for the redemption of their bills and notes. But a failure to redeem such bills in specie is no where made a condition to their continued corporation existence. The law, however, provides what may be done in case of a failure to redeem such bills in “lawful money of the United States.” And the doing of what is prescribed, touching the securities, may not necessarily arrest the business of the bank. In short, its existence as a corporation does not

depend upon the performance of a condition to redeem its bills in specie. And, as Congress has provided that it may pay its debts in treasury notes, the law of Congress takes precedence of the State law requiring redemption in something else, if so construed, authorizing and directing the bank superintendent to convert the securities for the purpose of raising the means of paying the bills, which have been already paid. In other words, the debt being paid, the superintendent has no jurisdiction to proceed and convert the securities into money.

I concur in the opinions of my brethren, touching the power to borrow money upon the credit of the United States, and refer to their more full and complete arguments upon that power.

ROSEKRANS, J., concurred with the majority of the court, on the ground that the principle involved in the cases had been determined in favor of the validity of the act of Congress by the Supreme Court of the United States, in *McCulloch v. The State of Maryland* (4 Wheat., 316), and the late case of *The People, on the relation of the Bank of Commerce, v. The Commissioners of Taxes of the City of New York* (2 Black U. S., 620.)

DENIO, Ch. J. (dissenting.)

The subject of private contracts, embracing the manner in which they may be made, and in which they may be discharged, lies within the domain of State legislation. The States were distinct political communities at the formation of the Constitution, retaining, notwithstanding the confederation under which they associated during the revolutionary contest, nearly all the powers of municipal government and local administration. It was not the system of the Constitution to abolish or materially abridge these powers of the State governments, though they were subjected to some important restraints and qualifications, all of which, however, assume, so far as private contracts between citizen and citizen are concerned, the general jurisdiction of the States over the subject. Contracts when once made in conformity to the laws of the State, cannot, according to a provision of the Constitution of the United States, be impaired by state legislation. But it may be done by Congress incidentally. Under the power to establish a uniform system of bankruptcy, for example, debtors may be discharged from their obligations, through the agency of the general government. Nor is this all. Many express powers of great importance, and which were considered, and were in fact, necessary to the existence and perpetuation of the national government, were conferred upon Congress; which was, moreover, invested with the power to make all laws which should be necessary and proper for carrying these powers into execution. In exercising these federal powers, it has sometimes happened, and it may occur again in more ways than can be enumerated or anticipated, that the pecuniary and business arrangements of citizens may be interfered with, and their contracts, though

lawfully valid when made, may be annulled or modified. Under the power to regulate commerce, and to declare war, acts may become impossible or unlawful, which were before legitimate subjects of business stipulations, and in respect to which such stipulations had been actually entered into. These are the necessary results of another provision of the Constitution which declares, in effect, that itself, and the laws of the United States made in pursuance of it, and public treaties, shall be the supreme law of the land, and shall prevail against the State constitutions and laws, when in conflict with them. But with these qualifications the whole subject of private property, its acquisition and forfeiture, its mode of enjoyment and transmission between living persons, and its devolution by will and upon intestacy, and all executed and executory contracts respecting it, are to be regulated wholly by the laws of the respective states.

It seemed necessary to state these principles, for, although no question has been made respecting them, they have an important bearing upon the controversy which we are called upon to decide, and, indeed, form the basis of all just reasoning, upon the powers of the general government. The mortgage executed by Bowne and his wife to the defendant, the alleged payment of which was in question in this case, was a lawful contract, by which real estate in this State was conveyed to the latter to secure the payment of a certain amount of money. It is stated to be payable in lawful money of the United States of America, but I lay no stress upon that expression. It was a security for the payment of money, and that is all which seems to me important. The lands thus conveyed by way of mortgage have been transferred to the plaintiff subject to the lien; and he claims a right to pay the debt and redeem the incumbrance, by giving to the creditor, the defendant, an amount equal to the principal and interest, in the treasury notes of the United states, issued pursuant to the late act of Congress. The defendant refuses to accept these notes as payment, and the question is, whether he is compellable by law to do so. The contract was a valid one under the laws of this State, and it calls for the payment of a certain sum of money. The question as to what shall amount to payment or performance, is, *prima facie*, one which is to be determined by the State laws. The federal Constitution, which is a part of the law of the State, prohibits anything being made a tender in payment of debts, by State authority, but gold and silver coin. It is clear, therefore, that the offer of the treasury notes was not a lawful tender of payment, unless the act was a legitimate measure for the execution of one or more of the powers which the Constitution has conferred upon Congress. That act declares in express terms that the treasury notes of the class which were offered to the defendant, shall be lawful money and a legal tender for all debts, public and private, within the United States, except duties on imports and interest on government bonds and notes. (39th Cong., 2d Sess., ch. 33, § 1.) The single question in this case is, whether Congress had the constitutional right to enact this law; and that depends upon a comparison of its provisions with the powers with which the Constitution has clothed Congress. The problem to be determined is, whether the relation of means and end exists between them. I shall

confine myself to that feature of the law which provides for forced payment of private debts; for it is not doubted by any one that the government may declare its own obligations receivable in payment of debts due itself.

It has been argued that there is no warrant in the Constitution for the issue of federal securities for the purpose of being used as a currency, though unaccompanied with a provision making them a legal tender among individuals. If this position could be established, the notes which were tendered in this case being illegal, would be ineffectual for any purpose. In the view I have been compelled to take of the principal question, this subordinate one is not necessary to be considered. It is proper, however, to say that it could scarcely become a judicial question in any case. The right to issue the obligations of the government for money borrowed, or for property or services furnished for national purposes is not and cannot be questioned. The form and denomination of such securities are matters which belong to the discretion of the government making them; and if an issue could be raised upon the intent to have them circulate as the representative of money, I should still think that it would be legally unobjectionable to so accommodate them to the business wants of the community, as to make it the interest of successive holders to continue them in circulation, and thus benefit the treasury by deferring the time of their presentment for payment. It has been urged that such issues of paper would be an emission of bills of credit, as understood at the time the Constitution was framed, and that the making of them was expressly forbidden to the States, and not committed to Congress. In support of this view it is shown that an express authority to issue such paper was at one time inserted in the draft of the Constitution, in connection with the power to borrow money, but was stricken out on the motion of a deputy from New York. Upon an examination of the extract from the debates which was referred to in the argument, I am of opinion that it cannot be affirmed that this change was made from an intention positively to prohibit the issue of such obligations, but that it was done from the apprehension that if the power to make them was expressly conferred, the legislature might, under the idea of declaring their effect, have engrafted upon them the quality of a legal tender. If the authority was left as an incident to the power to borrow money, purchase property, or pay debts, no such consequence, it was thought, would follow. If it had been designed to prohibit their issue, under any circumstances, by the government of the Union as well as by the States, it is presumed that a similar prohibition would have been applied in terms. If the effect of this debate was different from what I conclude it to be, I should still hesitate to allow it any considerable weight in construing the Constitution. The only safe way, in my opinion, to deal with that instrument is to look at its language in connection with its contemporaneous history and the known circumstances of the times, and to attach such meaning to it as we conceive the people who adopted it would have given. I shall assume, therefore, that there does not exist any constitutional objection to the currency which was issued under the act of Congress, which we are considering; and that the only question

which we can entertain arises upon the mandate that the notes shall be a legal tender in the payment of private debts.

The express power committed to the general government “to coin money, regulate the value thereof, and of foreign coin,” and the denial of that power to the States, may be considered as a further qualification of the State jurisdiction over private contracts. Without these provisions the right to determine what should constitute money in transactions between citizens, would have remained, along with the mass of general legislation, in the several State governments. But the inconvenience which had arisen from the different denominations of money which were in use in the several States, and which had grown out of their separate existence as colonies, and the desire to establish a system of coined money upon the decimal principle, which should accurately represent the money of account, led to the vesting of the power over the subject of coined money in the new government.

I shall spend no time in proving that the coining power referred to relates, and is limited, to the fabrication and regulation of coins properly so called. I have carefully considered the ingenious argument on that subject, which has been submitted orally and in writing by one of the counsel who maintain the validity of the legal tender provision; but those suggestions have not created in my mind the slightest doubt that the language is to be understood in its most obvious and natural sense. Coins are, in our language, pieces of metallic money; and the coining of money is the formation of such pieces by such mechanical means as are appropriate to such an operation. There is not the smallest reason to suppose that the word was used in the Constitution in any non-natural, recondite or figurative sense.

The language is, to my mind, so distinct and precise as not to admit of reasoning. But if it were in any manner equivocal, the connection in which it is found in the several places where it is used in the Constitution would determine its meaning to be such as I have mentioned. In the principal clause the value of the coin to be made is to be regulated by Congress; but this could not be predicated of the obligations of individuals or of governments, the value of which is either the absolute amount stipulated to be paid, or their worth, arising out of the fluctuating considerations of the pecuniary means and ability of the promisors, and the interest to be paid, and the time of payment of the principal – the last of which circumstances must vary every day by the efflux of time. The value of foreign coin is also to be regulated, but it is impossible to suppose that this could refer to securities executed in foreign countries. Then in the clause referring to the punishment of counterfeiting, a sharp distinction is apparent between the public securities and the current coin of the United States; and in the clause prohibitory of the power of the States, it is forbidden to them to coin money and to emit bills of credit, which plainly shows that these

are separate and distinct acts; and in the same sentence, where the prohibition is inserted against making anything but the precious metals a tender, it is called gold and silver coin. If the determination of the case depended upon the meaning of the express power to coin money, I should not, as I have mentioned, be able to entertain the smallest doubt that it does not embrace the obligations of the general government in whatever form they may be issued.

Let us then consider whether the power to make these notes a legal tender results from any of the express powers conferred on Congress. Among the attributes expressly conferred is the very extensive power to regulate commerce; and the enactment of the legal tender provision has sometimes been referred to that clause. But it has no bearing upon the transactions of citizens, which are limited to a single State; the power relating only to commerce with foreign nations, and among the several States, and with the Indian tribes. This enactment does not propose to regulate foreign or inter-state commerce, or to be in any sense a regulation of that subject. It compels the citizens in all places, and at all times, and under all circumstances to receive the treasury notes in payment of debts, whether these debts had any connection with a commercial transaction, or were wholly foreign to and independent of it. Whether a law introducing the treasury notes into foreign and inter-state commerce, and compelling their reception as money when offered in connection with transactions of that nature, could be sustained, will perhaps depend upon some considerations, to which I shall presently advert.

It may be said that any measure which tends to promote internal traffic and facilitate domestic exchanges would incidentally influence foreign commerce. The same may be said respecting the whole subject of private exchanges and contracts. But to embrace all these subjects within the power to regulate commerce, would be to break down all distinctions between the national and state governments, and commit the whole subject of internal government to the discretion of Congress.

I concede that it is not incumbent upon those who argue for the validity of the legal tender clause to select any one express power and to maintain that the provision is a legitimate execution of that power. They may group together any number of these grants of legislative authority, and if the right to enact that provision is fairly deducible from any or all of them – their position is established. The power to raise money for raising and maintaining a public force by land and by sea, to pay the public debts, and indeed nearly all of the enumerated powers, require or at least suppose the necessity of the obtaining, possessing, managing and disbursing moneys to a large and indefinite amount. No idea can be formed of the government of a great country, though the power of legislation should be restricted to external affairs, which would not require such government to be an immense dealer in money and commodities of almost every kind. The strong public necessity for obtaining

pecuniary means to carry on the government and to effectuate the great purposes for which it was established, have not been and cannot be overstated, whether we advert to the imminent crisis which is this day upon us, or consider it in its usual condition of peace and tranquility. It was quite appropriate to advert to the present condition of the country to show that the necessity for obtaining funds may be so sudden, fluctuating and spasmodic that the public needs will not wait upon the regular receipts of revenue, but must sometimes be met by extraordinary exertions, and entail pecuniary sacrifices upon the public and individuals. Still the Constitution furnishes the measure of the national authority, in war as in peace; and, as judges, our duties are limited to the construction of that instrument, according to our best judgment of its actual meaning. The immediate question is, therefore, as has been stated, whether the various powers committed to Congress which require, in order to their due execution, the acquisition and use of large and often fluctuating amounts of money, empower the national government to annex to the notes, which I concede it has a right to issue, a quality which shall compel individuals to receive them in payment of debts against their will.

It is a circumstance connected with the inquiry, though not material to the view which I take, that by the arrangements of the act the notes are not payable in coin; for the quality which makes them receivable for all public and private debts, authorizes the government to redeem them in other notes of the same kind, so that they are to constitute a medium of payment and exchange which is to be quite distinct from gold and silver money and not convertible into it, and which, by the well known laws of currency, will displace the latter from circulation, and will cause it to depreciate, in comparison with that standard, in proportion to the amounts which may be issued. To force them upon the creditor as payment contrary to the general laws of the States, which do not authorize debtors thus to discharge their obligations, is to enter into the domain of the State legislature and to supersede, to that extent, the operation of the State laws. This is not necessarily a fatal objection, for if the provision annexing the quality of legal tender to the notes is a necessary and proper law for carrying into execution the powers expressly conferred upon Congress, and is not forbidden by any part of the Constitution, it changes or abrogates, by virtue of the pre-eminence attributed to federal legislation, when constitutional, all State laws and constitutions so far as the exigency of the case may require.

We are to consider, then, whether the provision in question is necessary and proper to the execution of the various enumerated powers which require the obtaining and disbursement of moneys for national purposes. And we observe, in the first place, that certain means are specifically provided by the Constitution for obtaining funds for public objects. Congress is empowered to levy and collect taxes, duties, imposts and excises, to an extent limited only by the public purposes to which moneys may be applied; and to borrow money to the like extent, on the credit of the United States. In addition to these means, it may dispose

of the territory and other property of the United States, and of course may receive the equivalent for such disposition in money. I do not, at this moment, inquire whether the controverted provision is within any of these last mentioned express powers, namely, those of taxation and borrowing, but whether, under the other delegations of authority which require for their execution the possession of pecuniary means, it was competent for the government to oblige the citizen to accept these notes as cash, for the purpose of gaining, by means of the circulation which such a quality would give them, additional pecuniary resources for the purposes of the government. I am of opinion, that this would be quite too far removed from the delegation of power to be considered an enactment framed for its execution. I think, moreover, that the Constitution did not contemplate and does not admit of the raising of moneys from the people, except by taxation and by borrowing, or by the sale of the public lands and property. Pecuniary means gained by the circulation of paper not bearing interest, are the profits which bankers acquire by their peculiar business. It is a well known pursuit in which individuals may engage, by government license when that is required by law, and without it when it is not exacted by some legal requirement. I think that so far as the immediate question is concerned, the government has an equal right to authorize the national treasury to embark in any other of the pursuits of business by which money is acquired, as in this of making profits by the forced circulation of its notes, under this legal tender clause. Hence I conclude, that the disputed measure cannot be justified as an execution of any of the powers requiring the possession and authorizing the expenditure of money.

Then as to the express power to borrow money on the credit of the United States, which is the delegation of authority principally relied on. The ordinary operation of effecting public loans is sufficiently simple and obvious, and I have already said that I perceive no valid objection to arranging the securities in such a form as that the lenders, and those who may take such securities by transfer, shall be willing to hold or circulate them, instead of immediately presenting them for redemption. The power to borrow money implies the giving of obligations for its repayment. The form of these is matter of convention between the parties to the loan, and is an incident of the principal power. To the extent which they will circulate upon the credit of the government, the incidental advantage is legitimately obtained.

But it is a step far beyond this to require that all persons shall receive them in payment of all manner of obligations. This has no natural relation to the contract of borrowing. The parties who are thus obliged to receive the borrower's obligations are not parties to the loan, and have no necessary connection with it. True, they are subjects, for some purposes, of the same political sovereignty which is the borrowing party, and if that sovereignty was universal in its objects, and was not restrained by constitutional limitations, the duty of receiving the obligations could be rightfully imposed like any other burden created by

legislative authority. But private contracts and the manner in which they are to be performed and discharged or enforced are, as has been stated, embraced in the reserved rights of the States, and Congress has no general legislative power over the subject. If they have any power whatever, it is not direct, but oblique or collateral. If, in the execution of the enumerated powers, it becomes necessary and proper to enter upon the domain of State legislation, the State laws must yield. This may be made more plain by cases which may be supposed. The States have the general right to regulate the interest upon money loaned. Suppose a State legislature to enact that none of its citizens should loan money to any party, private or public, at a rate of interest above five per cent, and that Congress, considering the rate too low, should provide by law that seven per cent might be lawfully required of any borrower by any lender. Such an act, of course, would be void, as an attempt to legislate upon a subject not committed to the general government, but reserved to the States. Yet there could be no objection to a statute of Congress which should authorize the borrowing of money upon the credit of the United States at any rate, however excessive, which it was thought expedient to allow and at which citizens might be willing to lend. This would necessarily change and modify the State law *pro tanto*, but it would be sustained, because it would be a law made to carry into effect a power expressly conferred upon Congress, namely, the power to borrow money, which would embrace all the usual incidents of loans. Then suppose, that with a view to facilitate federal loans, and to give the public bonds a ready reception, Congress should attempt to subject all individual borrowing in the States to a low rate of interest, while the federal treasury was allowed to contract at a higher rate. This would bear some resemblance to the law which is now questioned, and yet it would be preposterous to consider it a law passed in the execution of the power to borrow money on the credit of the United States.

The question how far an act of Congress could be considered to have been passed in the execution of an enumerated federal power has been discussed in a variety of forms as particular laws or projects of laws have come under consideration in the administrative, legislative and judicial branches of the government. The discussions most material to be considered, because they are absolutely authoritative with us, are the judgments of the Supreme Court of the United States. The debates in these cases have usually turned upon the words “necessary and proper,” as used in the Constitution. To a certain extent the necessity and propriety of an enactment must rest in the discretion of the legislature. But to hold that the exercise of that discretion is final and not subject to the examination of the judiciary would be to break down all limitations upon the power of the general government. Accordingly, I think that no judge has ever intimated the existence of any such extreme doctrine. On the other hand the question whether a given measure is the most suitable or efficient for the execution of an enumerated power must of course be left to the discretion of Congress, and that discretion cannot be reviewed by the courts. The difficulty lies in determining in a particular case whether the disputed enactment has such a relation

to the power which it is said to be passed to carry into execution, that it can be affirmed to be necessary and proper for that purpose. The most thorough examination of the subject was that which was had on the several occasions when the constitutionality of the Bank of the United States came before the Supreme Court. (*McCulloch v. The State of Maryland*, 4 Wheat., 316; *Osborn v. The United States Bank*, 9 Id., 738.) The act was sustained on the theory that it was a necessary arrangement for carrying on the financial operations of the government. It was not supposed to be absolutely necessary, but to be so in the sense of being appropriate and directly convenient and useful. That judgment is to be accepted by the state tribunals as a true exposition of the Constitution on this point; but the resemblance in principle between the legislation then in question and that which we are considering, is not so striking as to afford much aid in the present difficulty. The principles, however, announced by the eminent chief justice, seem to me to be irreconcilable with the validity of the legislation in question. It was conceded that the powers of the government were limited, and that those limits were not to be transcended; but it was maintained by a course of reasoning which cannot easily be controverted, that the national legislature possessed a discretion in the adoption of the means by which the powers conferred by the Constitution were to be carried out. It was conceded that the means must be such as were appropriate and were plainly adapted to the end authorized to be accomplished. In another part of the opinion it was intimated that the means, in order to be legitimate, and to fall within the qualifying words, necessary and proper, must be such as were either needful, requisite or conducive to the principal object embraced in the delegated power. Was it ever before supposed to be incident to the contract of loan, that the rights of other persons, strangers to the transaction, were to be controlled or affected? Either the borrower or the lender may insist upon any stipulation to which the other will consent, and when the former is a sovereign State it may agree to any concessions on its own part not inconsistent with its constitutional limitations, and insist upon imposing any terms upon the lender which it may be thought expedient to require and to which he will consent. The arrangement of these mutual stipulations embraces all which is material or which can be appropriately attached to the contract of loan. A provision which is to control other parties not connected with the transaction, to their loss though to the advantage of the lender, cannot be appropriate, for it is foreign to the nature of the transaction and has never before been employed in connection with such arrangements. A consolidated government might annex such terms to the contract, for it has plenary authority over all its citizens when not constitutionally restrained. As to being needful, requisite or essential, it is not so in any sense which would enable the government to impose on the citizens who should have business relations with the holders of the securities, conditions which would only conciliate such holders.

The power which the Constitution confers upon the government to affect loans, is not one to be exercised *in invitum*, like the taxing power. It requires only a party willing to advance

the funds upon the terms which may be offered, and it does not imply anything coercive as to any one. It requires a consenting party only; unlike the taxing power which implies legal coercion, and does not seek the consent of any other party.

But for a single authority, which I will now mention, I should think it very plain that the power to borrow money on the credit of the United States, did not authorize Congress to compel individuals to accept treasury notes in discharge of private debts payable in money.

In *Weston v. The City Council of Charleston* (2 Pet., 449), it was held that the power to borrow money on the credit of the United States contained in itself a prohibition to tax the securities given upon the loan by State authority. The tax, which was held illegal, was laid upon certain stock of the United States, *eo nomine*, and this court was of opinion that the case might have turned upon that circumstance, and that money invested by our citizens in federal loans was yet taxable along with the mass of the property of the citizens, under the laws of this State, which laws tax all property alike. (*The People v. The Commissioners of Taxes, &c.*, 23 N. Y., 192.) On a writ of error to the Supreme Court of the United States, our judgment was reversed, that court disallowing the distinction on which we proceeded, and holding that the federal bonds were exempt from taxation in any form under State authority. An act of Congress had been passed, declaring in terms that the scrip of the public debt of the United States should not be subject to taxation by the states. *A fortiori*, a State tax imposed upon stock issued since the declaratory act mentioned, cannot be sustained in the Supreme Court. The principle has some analogy to the one we are examining. The laws of the States, on the subject of taxation for State purposes, are as fully within the reserved rights of the States, as those which relate to private contracts and the payment of individual debts. The general government has no jurisdiction respecting the legal arrangements which the States may make on either of these subjects; and yet it has been held, that the power to borrow money alone confers upon the securities given for loans a quality which no other property has, by exempting them from taxation. I hope it will not be attributed to an unreasonable pride of opinion that I feel compelled to say, that I have not been able to appreciate the reasons upon which that conclusion was reached. I, however, fully acknowledge the duty of following the adjudication of the supreme tribunal; and, since the judgment referred to was pronounced, we have conformed our decisions in similar cases to the rule laid down, and shall continue to do so. I think the law exempting the federal bonds from State taxation was as foreign to and as unconnected with the power to effect federal loans, as that which declares the treasury notes a legal tender in the payment of debts, and I acknowledge the analogy which exists between the cases. But the judgments of the Supreme Court did not proceed upon reasons which would justify the legal tender clause. Those judgments, according to the published opinions, regarded the public bonds as instruments or means employed by Congress to carry out the power to make loans, and as of the same general nature as the Bank of the United States. It clothed

them with an immunity, but did not propose to render them instruments of coercion. Finding this distinction to exist, I do not think it proper to act upon the analogy which I have conceded. I am, therefore, of opinion, that the clause in the act making the notes a good tender in the payment of private debts, cannot be sustained under the power to borrow money, nor under any other of the express powers conferred upon Congress.

But I am of opinion that the legal tender clause is repugnant to express provisions of the Constitution. I refer to the prohibition imposed upon the States to make anything but gold and silver coin a tender in payment of debts, and to the provision which confers upon Congress the power to coin money and regulate the value thereof, and of foreign coin. These provisions are in *pari materia*, and must be considered in connection with each other, and I think the result of both is, that it was the settled determination of the convention, that compulsory payments should be made only in coin. This position is entirely distinct from the topic which I have thus far considered. If it were conceded that declaring the notes to be a legal tender was an allowable means for borrowing money upon them, still it could not be done if the fair result of other constitutional provisions were that coins of the precious metals were the only medium in which compulsory payments could be made. I have already considered the coining power in connection with the argument that it embraced in terms the power to fabricate money other than metallic coins, properly so called, and have nothing to add on that point. But it was the object of that provision to enable and to require the general government to cause coins to be manufactured which should be impressed with the stamp of the national authority, should be received throughout the Union as absolutely authentic, and which should be deemed and taken in all transactions whatever, as money of the precise value indicated by the stamp of the national mint; and that they should in like manner prescribe the value of such foreign coins as they should think proper to have circulated as money. This provision belongs to the class to which I have referred as to some extent militating against the general system, which left to the State governments the regulation of private pecuniary dealings and contracts. That system, if unqualified, would allow the States to exclude any medium of payment not established by their own authority; but they cannot, consistently with the provision, disallow the absolute authenticity of the federal coins. But the power to create money does not extend beyond the fabrication of coins.

Hence, I am unable to find the ground for further intrusion into the field of State legislation respecting the money to be used in private transactions. The federal legislation respecting coined money is absolutely binding upon all the people of the Union, and, in my opinion, it is exclusive of any power, residing anywhere, to make any other description of money. The subject with which the convention was dealing was that of money which was to be authentic and authoritative everywhere throughout the Union. It prescribed coins, to be made by federal authority as such money, and was silent respecting any and every other

kind of currency. The argument *expressio unius exclusio alterius* applies, and would be of great force if there were no other, but a reason equally strong to my mind is, that the convention was acting upon a subject belonging generally to State jurisdiction, and cannot, with propriety, be understood as going beyond the provision actually made. The prohibition upon the State governments to coin money affords an invincible inference that the coins to be struck under the authority of Congress, were to be the only authentic money to be used in the United States. Certainly there is an unavoidable implication, that nothing shall be done by any authority in the nation, which shall destroy the value and usefulness of this federal money. But can it be used for regulating exchanges and making payments, if another thing of less or even of different value is declared money? There cannot, in the nature of things, be two standards of value. If the treasury notes are of less value than the gold and silver coins, the latter will be superseded and become absolutely unavailable for all purposes for which money is required to be used; for no one will make use of a gold eagle, when with that coin he can purchase twelve or fifteen dollars, each of which will answer his purpose precisely as well as one-tenth of the eagle. The legal tender provision practically nullifies the coining power. For all practical purposes it converts the federal coins fabricated in obedience to the Constitution, into mere bullion. This appears to me plainly to conflict with the provision for the striking of such coins.

But the prohibition upon the States against making anything but gold and silver coin a tender in payment of debts, seems to me also conclusive upon the subject. The restraint, it must be remembered, is upon the sovereignty to whose jurisdiction this subject of debts and their payment belongs. The general government, as I have shown, had no power over that subject, except as it may be deduced incidentally from some express power. It should be further borne in mind, that the prohibitory mandate is not addressed to the State legislature alone, but to the judges as well. No authority of the States, legislative or judicial, can, by the terms of this clause, admit anything but coin fabricated from the precious metals to be a valid payment. It is to be observed also, that the inhibition is not limited to values created by State authority. That subject was provided against by the language forbidding the States to emit bills of credit. The word “anything” embraces all imaginable subjects of which payment might be predicated, irrespective of their material substance and of the authority by which they were created. To constitute payment there must be coins, that is, stamped pieces of metal, and they must be composed of the precious metals. When the State legislatures, which are to establish the legal principles respecting payments, and the courts which are judicially to determine what shall be payments in any given instance, are forbidden by paramount and supreme authority to make anything but coins struck from the precious metals a payment, the natural, and I think, the inevitable result is, that nothing except such coins can be adjudged to be payment in any case whatever. And when, in connection with such inhibition, we find ample provision made by the same supreme authority, for the supply of such coins by fabrication, and by the

adoption of those coming from abroad, I cannot doubt that it was the persistent design of the Constitution, which contains these mandates, to require as a fundamental policy the exclusion of everything else than the coins indicated from the attribute of compulsory payments. We are to-day asked, by our judgment, to make the treasury notes of the United States a payment of the debt owing to the defendant. Our answer ought, I think, to be that we are forbidden by the supreme law of the Union to do it. That law has no regard to the value of the thing offered as a substitute, or to the authority by which it was created. It is forbidden absolutely and under all circumstances.

An argument has been somewhat pressed upon us, arising out of the action of Congress upon the subject of legal tender. After providing for the establishing of the mint and regulating the amounts of pure gold and silver to be contained in, and the value of the various coins to be struck, the legislature has, at various times, from an early period of the government, declared those coins to be a legal tender for the payment of all debts and demands. The argument is, that there is nothing in the Constitution expressly enabling Congress to declare any thing to be a legal tender, and yet that body has, with universal public acquiescence, passed the several acts referred to. Hence it is insisted, that the power of establishing a legal tender has been universally conceded to exist, and if the power exist, it is within the legislative discretion to determine as to what shall be made such tender. In point of fact, the coins which have been declared a tender are such as were composed of gold and silver, with sufficient of alloy of baser metals to give them the requisite consistency for convenient use. My opinion upon this point is, that the power to coin money and regulate its value, is an authority to make money which shall be legally such in every part of the Union and for every purpose for which money shall be required or needed to be used. The coins to be struck are national coins and money, and so of those which are adopted, and the value of which is declared, and where any law, State or national, or any other lawful exigency calls for the payment of money as such, this national money is the thing indicated.

The word money, as used in the Constitution, *ex vi termini*, implies all that is expressed by the words legal tender, and without the use of these words in the acts of Congress, the coins struck at the national mint, and the foreign coins, the value of which has been regulated by Congress, could be used in forced payments in all cases. The express provisions respecting legal tender are employed for the purpose of explanation, and are only declaratory of the effect of the national currency when offered for the purpose of payment. In reference to what had been said respecting the ability of Congress to debase the national currency, I am of the opinion that the several clauses respecting coining and what may be made a legal tender by the States, together amount to a direction that the money to be created under the clause respecting coining, shall be composed of the precious metals, as a principal ingredient, and that coins not composed of these substances cannot

constitutionally be made national money or legal tender.

I have examined this question, and have come to a conclusion upon it, as though it involved no other consequences than the recovery or the failure to recover the small sum of money claimed by the defendant, and I do not know of any other method of considering a judicial question involving pecuniary considerations. The extended and very able discussion at the bar, in which considerations of a public character have been largely pressed upon us, have had the effect, to which they were certainly entitled, of inducing caution and very mature deliberation upon the legal points involved, but they cannot legitimately have any further influence.

I shall be well satisfied if a majority of my brethren, and the federal court in which our decision will ultimately be reviewed, can reconcile the legislation which the defendant challenges with a reasonable interpretation of the Constitution of the United States. It is not to be denied that it constitutes a part of a plan of public finance which, whether wisely organized or not, it is extremely important in the present crisis to maintain if it can properly be done. If my sense of duty would allow me to decide the case, as I should wish the law under the circumstances of this moment temporarily to be, I would unite in a judgment which should establish the validity of these legal tender notes; for the preservation of the federal Union, which is said to be involved, is the most ardent, I may say passionate desire of my heart; and no one, I think, can honestly pretend that this can be accomplished except by the vigorous employment of the armed force of the nation. To that purpose, the realization and expenditure of immense pecuniary resources are plainly indispensable. No man can have a stronger sense of the absolute causelessness, nay, the utter wickedness of the insurrection than that which I entertain – or of the duty of every citizen, whether in public office or a private station, to yield to the constituted authorities upon all questions of policy or expediency, not only implicit obedience, but a sincere and generous confidence and cooperation.

But we are placed here to determine the law as we understand it to be, in the controversies which are brought before us, and I should forfeit my own self-respect if I could unite in a judgment affirming the constitutional validity of the legislation in question, believing, as I must, that its provisions are repugnant to the letter and spirit of the Constitution.

SELDEN, J., concurred in the conclusions of DENIO, Ch. J.

Judgment affirmed in the first case, and reversed in the second.

***Thayer v. Hedges*, 22 Ind. 282 (1864).**

Supreme Court of Indiana.

THAYER

v.

HEDGES and Another.

May Term, 1864.

APPEAL from the Boone Circuit Court.

PERKINS, J.

This suit was instituted upon a promissory note of the following tenor:

“\$500. March 26, 1862.

Four months after date we promise to pay to Oel Thayer, or order, 500 dollars in gold, value received, without any relief whatever from valuation or appraisement laws.

JOHN W. HEDGES,
MARTIN C. KLEIGER.”

The plaintiff prayed for a special judgment for the gold or its equivalent.

The defendant answered, alleging a tender of the amount due, before suit commenced, &c., in legal tender treasury notes, at their face.

A demurrer was overruled to this answer.

The plaintiff then replied, showing the depreciation of treasury notes, and the insufficiency of the tender, in amount, on that ground, but the Court held the reply bad, on demurrer.

The Court rendered a general judgment for the plaintiff for the amount of the note, but rendered judgment against him for the costs of suit, on the ground that a valid tender, in treasury notes, had been made before suit commenced.

The plaintiff appealed to this Court.

The points upon the rulings below were properly saved by exceptions.

The tender of the paper in question, in discharge of an express contract to pay in gold, was made, and sustained by the Court below, under the first section of the act of Congress, of February 25, 1862, which declares that treasury notes issued pursuant to it, shall “be lawful money, and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid.” Acts of Cong. 1862, (L. & B.’s ed.) p. 345.

If this clause of the act mentioned is constitutional, the tender in question was valid. If not, it was not.

We thus arrive at one of the questions that may be decided.

In considering this question, it will be convenient to first ascertain the precise character and purpose of the treasury note law.

It will not be difficult to do this.

In 1857, an act was passed by Congress, providing for the issue of twenty millions of treasury notes, and empowering the Secretary of the Treasury, among other things, “to borrow, from time to time, such sums of money, upon the credit of such notes, as,” &c. Acts 1858, p. 257.

In July, 1861, another act was passed, entitled, “An act to authorize a national loan and for other purposes,” which authorized the Secretary of the Treasury to borrow 250,000,000 dollars, and to issue bonds and treasury notes therefor, &c.” Acts 1861, p. 259.

Again, in August, 1861, and again in February, 1862, acts were passed in relation to treasury notes as a means of obtaining loans, &c.; though no clause was inserted in any of these acts making the notes a legal tender.

But, on the 25th of February, 1862, another act was passed, authorizing a further issue of such notes, the act being one of the series upon this subject of treasury notes, it making reference to the previous acts, and treating the notes to be issued under it as a part of the government securities, but adding a provision additional to those in previous acts, making the notes issued under it a legal tender. Acts 1862, pp. 338, 345.

The purpose of the treasury notes, then, was to raise or supply money, and they pledge the government, upon their face, as security to the holder, to pay money for them. This is the form of the notes.

And the question is, could Congress compel creditors to receive paper in payment, generally, of debts due to them. We speak of the creditor and debtor portions of the mass of the people.

The Congress of the United States has, at different times, authorized the issue of three descriptions of paper, viz:

1. Paper by corporations, called banks.

The right to authorize this kind of paper does not come in question in the case at bar. It may, however, be observed in passing, that the Supreme Court of the United States has decided that if a bank of the United States, is a necessary and proper financial agent of the government, it is constitutional, if not, it is not. The experience of the last twenty odd years seems to establish the fact that it is not such an agent. *McCulloch v. Maryland*, 4 Cond. R. 466.

2. Bonds for money actually borrowed.

Of the right to issue this paper there is no doubt. The power to borrow money includes the power to execute a written acknowledgment of the debt created by the act of borrowing, and also a written promise to pay the debt.

3. Paper, in the similitude of bank notes, bills of credit, in fact, designed to circulate as money, as well as to accomplish a loan. See *Brisco v. The Bank, &c.*, 11 Pet. Rep. (U. S.) p. 257.

The right to issue such paper is not free from doubt. See *Reynolds v. The Bank*, 18 Ind. 457. It is held not to exist by Mr. Curtis in his History of the Constitution, vol. 2, p. 329. But the point need not be decided now. What we are at present considering is, can Congress proceed a step further and make paper issued under its authority, money, legal tender in payment of all debts? The answer to this question must be drawn from an examination of the Constitution of the United States.

And, first, let us ascertain what, exactly, is the operation of the act of Congress in question?

1. It makes an article other than coin, and an article as thus used, of no intrinsic value, legal tender money.
2. It thereby impairs the obligation of contracts by compelling creditors to receive, in discharge of them, less than half their value according to stipulation.
3. It operates as a fraud on the public creditors, and a hardship upon the honest public servants, by depreciating and debasing the currency.
4. In another aspect, it enables the government to make, by indirection, forced loans as actual if not as oppressive as those of Charles I, as they are made without interest, against the will of the lender, and without repayment of but a part of the principal; thus, in this case, as an example. The government desires Thayer to loan it 500 dollars. Thayer expresses his inability or unwillingness to spare the money. The government then goes to Hedges and Kleiger, and says to them, you owe Thayer 500 dollars, which you are about to pay him. The government wants that money, but he will not loan it. You pay it to the government, and it will give you a piece of paper which it will compel him to take of you, instead of the money contracted for, in payment of your debt.
5. It takes from the citizen his property against his consent and without just compensation.

Can the government constitutionally do these things, is the question?

This is a question of the gravest import. To arrive at a correct answer to it, it will be necessary to somewhat thoroughly analyze the legislative department of the Constitution of the United States. That analysis we shall attempt. We shall do it in no partizan spirit. All ought to desire to know aright our Constitution, and discussion and comparison of views are necessary to such knowledge. And especially, in times of difficulty, when the temptation to depart from it may be great, is the duty of watchfulness the more pressing, as the bad precedents of such times become the bad laws of times of tranquillity. Looking forward, as we hopefully do, to the complete suppression of the existing rebellion and the restoration of the Union under our revered Constitution, we are anxious that we may then find it in its integrity, unburdened by bad precedents, dangerous constructions and vicious interpretations.

We do not wish to be understood as intimating that the Constitution is beyond improvement; that progress will not render change necessary; but we do hold that such change, happily provided for in the Constitution itself, should be made in the mode therein prescribed. Ours is either a government of the Constitution, or it is not. If it is a government of the Constitution, then its execution, consistently with the laws made under

it, is all the Federal Government that is necessary and proper for the welfare of the nation, and all to which the States and people can be rightfully subjected.

The government of the United States is one whose sovereignty, limited territorially only by the boundaries of the nation, is yet circumscribed as to the objects upon which it can act. It is a government over specified subject matters. *Warren v. Paul* at this term and case cited, 22 Ind. 276. Most of the time since the settlement of this country by the whites, the people of the United States have lived under two governments acting upon them within the same territory. During our colonial State, we had the British for our general government, and the colonial, for our local governments. And it was one great source of controversy as to how far the British general government should have a right to exercise powers over the internal affairs of the Colonies, which were foreign and independent as to each other, but domestic and subject as to the British government. It was agreed that there were some matters pertaining to the general welfare of the Colonies as a whole, such as their foreign and inter-colonial trade, their common defence against the Indians and foreign enemies, which should fall within the power of the general government; but their internal, domestic affairs, the general welfare of the people of the several Colonies, and of the several Colonies themselves, in their domestic affairs, almost everything, indeed, except their common foreign relations, the colonists claimed should be left to the care and judgment of the people, and colonial governments, as the powers best calculated to manage them wisely and economically, and as the most safe to be trusted with them. The reader of history will not require citations of authorities to this point. One of the charges in the Declaration of Independence was that the King had assented to acts of Parliament for suspending our legislatures, and declaring that the Parliament had power to legislate for us in all cases whatsoever.

By the Declaration of Independence, the Colonies threw off the British general government, rather than to submit to its encroachments upon matters pertaining to their several domestic, instead of confining its action to their foreign aggregate general welfare.

It then became necessary for them to create a new general government to manage matters pertaining to their general welfare, which term they used during their colonial State, as applicable mostly to matters connected with their foreign and inter-State relations, which latter were really then foreign, as the States were separate sovereignties.

The new general government was created by the Articles of Confederation, in 1788. There was no general government of authority, force, power, succeeding the British, before these Articles.

The first of these articles was this:

“The style of this confederacy shall be, ‘The United States of America.’”

The third was as follows:

“The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.”

This was the second:

“Each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress assembled,” [or prohibited to the States.]

The part in brackets, which we have added, is necessary to the expression of the exact fact; for the articles not only granted powers to the general government, but also prohibited some to the States.

The Union and general government, then, were formed to provide for the general welfare of the United States, but what was embraced by the term, general welfare; what powers might Congress exercise, and over what, in promoting it; what subjects were considered as pertaining to the general welfare designated in the organic law of the government?

This question is answered by showing the subjects over which power was given to Congress.

The principal powers were granted by Art. 9, and were these, as far as need here be set forth:

“SEC. 1. The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article, of sending and receiving ambassadors; entering into treaties and alliances, provided that no treaty of commerce be made, whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; of establishing rules for deciding in all cases what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the

United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all cases of captures; *Provided*, that no member of Congress shall be appointed a judge of any of the said courts.

SEC. 4. The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States; fixing the standard of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians, not members of any of the States: *Provided*, that the legislative right of any State, within its own limits, be not infringed or violated; establishing and regulating post offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same, as may be requisite to defray the expenses of the said office; appointing all officers of the land forces in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States; making rules for the government and regulation of the said land and naval forces, and directing their operations.”

The prohibitions of power to the States were contained in art. 6, which we copy. The prohibitions related to general, mostly to foreign, affairs, as appears by the article, thus:

“ART. 6. – SEC. 1. No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty, with any king, prince, or State, nor shall any person, holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

SEC. 2. No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

SEC. 3. No State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.

SEC. 4. No vessels of war shall be kept up in time of peace by any State, except such number only as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State in time of peace, except such number only as, in the judgment of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.

SEC. 5. No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of delay till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or State, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.”

Thus was clearly specified the national matters included in the term, general welfare. It had acquired a tolerably definite meaning, and was applied to subjects pertaining to foreign and inter-State relations.

And by art. 8, it was ordained that:

“All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury,” &c.

But the Articles of Confederation were extremely defective as a frame of government, particularly in points specified below. They violated the first principles upon which free governments, as well as efficient ones, must be framed.

1. They did not divide the legislative power between two branches.
2. They did not properly separate the legislative, executive, and judicial functions, assigning each to a separate department, but left them, mainly, in one body.

3. They did not empower Congress to lay duties, imposts, &c., to supply the government with money wherewith to pay the debts and expenses of the government, and as a means of regulating commerce.
4. They did not empower the government to levy taxes upon, and, through its own instrumentalities, collect them of the people for the purpose of paying debts, &c.
5. Generally, the government, under them, operated, in executing the powers it possessed, upon States, not upon individuals, and hence had no coercive power upon the States; which power is possessed under the present Constitution, by operating directly on the people of a State.
6. We may remark as a fact, that they made no provision for the return of fugitives from labor, &c., though such provision it is not pretended was a necessary element in a government.

The most immediate and pressing embarrassment experienced by the government under the Confederation, sprung from its inability to raise money wherewith to pay the debts and provide for the common defence and general welfare of the United States. As soon as peace was established, says Mr. Curtis, (*Hist. Const.* vol. 1, p. 384,) it became apparent, that while the Confederation was a government with the power of contracting debts, it was without the power of paying them. *Id.* p. 173, et seq. But the Congress did not claim that, under the pressure of necessity, or a latitudinous construction of the general welfare clause of the Articles of Confederation, it could assume power to raise money. The written charter of powers specified what might be done to provide for the general welfare; it clearly indicated the scope and meaning of that term, and Congress, in its actions, conformed thereto. But efforts were immediately commenced to procure from the States a further grant of power, by way of amendment to the Articles of Confederation, to enable Congress to levy duties, &c., for the express purpose of paying the debts, &c. The efforts were unsuccessful, but they resulted in the call of a national convention to revise the Articles of Confederation; which convention formed our present Constitution. And one of the leading objects, expressed at the time of calling the convention, was to obtain a grant of power to Congress to lay duties and taxes for the purpose of, or in order to pay the debts, and provide for the general welfare, &c. Curtis, *supra*; 1 Kent, 216; 1 Story on Const. sec. 255.

The proposed convention met in Philadelphia in 1787, and, in its action, departing from the purpose of simply amending the articles of confederation, went upon the theory that the continuity of the government was to be broken, the old constitution to be abrogated, and the new one to become the government of those States only which should voluntarily adopt it. It was not to be imposed upon any State by coercion. This is manifest from the fact that the new Constitution provided that it should be the government of the States adopting it; art. 7; and the further fact that the first Congress, under the new Constitution, in its legislation, classed those States which had not adopted the Constitution as foreign

States. See 20 Ind. on p. 506. Hence, the correctness of the proposition of Webster, in his letter to William Hickey, Esq., on the 11th of December, 1850, that: "The Constitution of the United States is a written instrument; a recorded fundamental law; it is the bond, and the only bond, of the union of these States; it is all that gives us a national character." See the letter in the introduction to "The Constitution," by Hickey.

Hence, at the formation of the present Constitution, we may look upon the several States of the Union as remitted back to the possession, severally, of the entire sovereignty and independence of a nation; and as about, by the Constitution they were then forming, to severally voluntarily surrender a portion of that sovereignty to a new general government of their own creation; as about making a division of the sovereignty they then possessed with that government; giving it power over certain specified objects of a general nature, those pertaining to the general welfare of all the States in common; and, we may remark, it was one of the purposes of the Constitution mentioned to clearly define the subjects over which the proposed general government should have jurisdiction, to mark the boundary line of its authority, so that such controversies as had been had with the British General Government as to the extent of its rightful powers might be entirely avoided, and encroachments by the new general government prevented.

We look, then, to the letter of the Constitution to ascertain the powers, vested by its grants, in the general government, interpreting it in the light of its history where it may be ambiguous. And, we may add here, that war does not increase, nor peace diminish, the quantum of power actually granted to administration by the Constitution.

Indeed, it may not improperly be said that the Federal Constitution is the Government of the United States, though in common parlance we apply that term to administration. It was the Constitution that the convention formed, and the people ordained for their government. That Constitution provided for installing temporary administrations to administer, to execute the provisions of the Constitution, but it constituted no body of men as the government. It provided for placing men temporarily in office to execute the powers specified in the Constitution, and nothing more. The very preamble of the instrument declares this. It is:

"We, the people of the United States, 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."

This Constitution, then, is, in fact, the government, created by our fathers, and when it dies,

that government expires. And officers that carry on a government independent of a Constitution, constitute but a de facto government of assumed and unlimited powers. The Constitution is superior to administration, not administration to the Constitution.

Mr. Webster, in his great debate with Hayne on Foote's resolution, in 1830, expressly asserted that the Constitution was the Government of the United States. He said: "They [our fathers] ordained such a government; they gave it the name of a Constitution," &c.

And the government thus created, let it be remembered, is complete within itself. It contemplates every contingency, and makes provision for each and all, and indicates the powers, embracing all that are necessary and proper, that administration may exercise in each and all. To assume the contrary, would be against the fact, and an impeachment of the wisdom of the fathers who made the Constitution. It provides for the time of peace, and the powers of administration therein. It provides for the contingency of foreign war, and the powers of administration therein. It provides for the contingency of insurrection and rebellion, and specifies the powers, and all the powers, necessary and proper to be exercised by administration therein. And the country had had experience in all these exigencies when the Constitution was formed.

The importance, then, of carefully studying that Constitution, assuming it to be still a living instrument, is manifest. Let us examine it. It creates three departments, and prescribes the manner of filling them with officers, and the powers and duties of the officers occupying them. The Constitution commences by declaring that:

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. [But] The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Amendment 10.

This, then, locates all the governmental power in the United States that can be exercised by a legislature. A part of it is granted to the Federal Congress; and that part is all that it can exercise. All of the remainder, being that which is not extinguished by the prohibitions upon the States, is in the States and the people. The powers granted to Congress are these:

"Sec. 8. The Congress shall have power: To lay and collect taxes, duties, imposts and excises, [in order] 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 throughout the United States. [The words, "in order," are inserted to express plainly the real meaning as historically proved above, and upon the authority of

Walker's Am. Law, 4th ed., p. 125; 1 Story on Const. sec. 908, t seq.; 2 Curtis Hist. Const. p. 318, *et seq.*] To borrow money on the credit of the United States; to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States; 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; to establish post offices and post roads; 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; to constitute tribunals inferior to the Supreme Court; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress; to exercise exclusive legislation in all cases whatsoever, over such district, (not exceeding 10 miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings."

Where, among this list of granted powers, is that to make legal tender money of paper? It is certainly not found among these express grants. And it would seem that it can not be treated as incidental to any granted power. It would seem that the power to declare what shall be money must be, in itself, a substantive power of the highest character; it has been so regarded in the history of nations. The convention so treated it in framing our Constitution, and prohibited it to the States, and expressly granted it to Congress, and expressly defined out of what it might be made, thus excluding the idea of a power in Congress to make it of anything else.

And here we can not forbear to step aside a moment from the line of discussion, appropriate to the case at bar, to notice another question of public interest, viz: that of the power to authorize the issue and suspension of the writ of habeas corpus. The Constitution

places this power in Congress. It is contained in the clause, “to constitute tribunals inferior to the Supreme Court;” that is, to create Courts of original jurisdiction, and define their powers and regulate their practice. The habeas corpus is a judicial writ. It is issued at common law, or withheld only by Courts in given cases; and the power delegated to Congress to create and regulate Courts, is a power to that body, to grant to or withhold from Courts the right to issue or suspend judicial writs, among them that of habeas corpus. Hence, the propriety, necessity even, of the clause in section 9 of the Constitution, the whole of which is devoted to limitations on the legislative powers granted to Congress generally in section 8, above quoted, forbidding Congress, in legislating upon the Courts, to authorize them to suspend or withhold the writ, except when Congress might so provide in cases of rebellion or invasion. See the habeas corpus act of 1789, in *Brightly’s Dig.* p. 301; also *Griffin v. Wilcox*, 21 Ind. 370, and *Warren v. Paul*, 22 Ind. 276.

Returning from this digression to the point of departure, viz: that there was no express power granted to Congress to make paper a legal tender, we proceed to further illustrate that point. In doing so, we commence by laying down the following propositions:

1. At the adoption of the Constitution, all governmental power was in the States; and in the division of it, made by the adoption of the Constitution, the Federal Government received only what was granted to it, the States retaining the residuum, except so far as it was extinguished entirely by prohibitions upon the States.
2. That the prohibition of a power to the States did not of itself operate as a grant of the power to the Federal Government, but rather as an extinguishment of the power, as a governmental one, where a grant of it was not made in the Constitution to the Federal Government.
3. That the power to coin money is one power, and the power to declare anything a legal tender is another, and different power; that both were possessed by the States severally at the adoption of the Constitution; that by that adoption, the power to coin money was delegated to the Federal Government, while the power to declare a legal tender was not, but was retained by the States with a limitation, thus: “Congress should have power to coin money,” &c.; “no State shall coin money,” and “no State shall make anything but gold and silver coin a legal tender,” &c. States, then, though they can not coin money, can declare that gold or silver coin, or both, whether coined by the Federal, or the Spanish or the Mexican Government, shall be legal tender. And as Congress was authorized to make money only out of coin, and the States were forbidden to make anything but coin a legal tender, a specie currency was secured in both the Federal and State governments. There was thus no need of delegating to Congress the power of declaring a legal tender in transactions within the domain of Federal legislation. The money coined by it was the necessary medium.
4. That the words delegating to Congress power “to coin money,” regulate the value

thereof, and “of foreign coin,” do not include the right to make coined money out of paper. If they do, then the States have a right to make such money a legal tender. It does violence to the language to give it such a meaning.

We next proceed to inquire whether the power to declare paper a legal tender, on the supposition that such power could be an incidental one, is a necessary and proper incident to any granted power, as a means of carrying such power into effect; for the grant of a substantive power carries with it necessary and proper incidents where they are not expressly withheld. They were withheld in the articles of confederation, but were expressly restored in the Constitution, thus: immediately following the express delegation of powers is added, “and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.” And we lay down the proposition at the outset that no power, in itself a substantive one, can be exercised or contravened by action under an incidental power. And the further proposition that where a substantive power is granted in a given form and to an exactly defined extent, or is thus withheld, the grant or prohibition can not be exercised or contravened by a power claimed as incident to some other substantive power. Hence it would seem clear that the granted power to coin money out of coin, can not be enlarged as an incident to the grant of some other power, into a power to issue paper money.

Even the President of the United States, by virtue of his powers as commander-in-chief of the army and navy, can not by his orders protect his subordinate officers from liability to damages for illegal acts they may perform under such orders. At least, it was so decided by the United States Supreme Court in *Little v. Barreme*, 1 Cond. Rep. 378; see, also, *Griffin v. Wilcox*, 21 Ind. 310. There is a limit to incidental powers in all departments of the government. *Griffin v. Wilcox*, supra. Recurring, then, to the above grant of incidental powers, we are not aware of any one, among the “other powers vested by this Constitution,” &c., mentioned therein which would authorize this legal tender law; to which one of the grants, or to what combination of those quoted, is such a law a necessary incident? For Congress, as has been said, can not legislate upon the internal domestic affairs of the States and people, any further than the particular subjects confided to Congress reach, no further than is necessary to carry into effect the special powers granted. For example, Congress could not pass a law regulating, generally, evidence or practice in State Courts; registry of deeds, marriage contracts, limitation or usury laws, or contracts of renting, purchase and sale of property, &c., in Indiana, except where they were made with the general government, its officers, &c., or where the law was touching some matter, such as the post office, process in Courts of United States, &c., within the domain over which the Constitution grants power to Congress. *Griffin v. Wilcox*, supra. See the very able opinion of Judge Denio in the case of *Meyer v. Rosevelt*, in the N. Y. Court of

Appeals, September, 1863, in most of which this Court fully concurs. Particularly do we concur with him in the position that it does not follow, from the fact that Congress can prohibit the taxation of treasury notes by States, that it can also force one private citizen to take them of another for what they are not. The reasoning of those judges who thus hold is this: Congress can prohibit States from taxing government paper; therefore it can force a citizen to take it as gold. Congress can prohibit States from taxing government mules; therefore, if one citizen has a contract with another to furnish him a milking cow, Congress can compel him to take a mule as being a cow; Congress, in that case, having the power to make a mule a cow by enactment. But, says Lord Bacon, “gold hath these natures, greatness of weight, closeness of parts, fixation, plianthness or softness, immunity from rust, color or tincture of yellow; therefore, the sure way, though most about, to make gold, is to know the causes of the several natures before rehearsed, and the axioms concerning the same. For if a man can make a metal that hath all these properties, let them dispute whether it be gold or no.” Bacon’s Works, by Montague, vol. 2, p. 50.

Congress, as we have seen, takes no power under the general welfare clause, as that is not a grant of any power, but a mere expression of one of the ends to be accomplished by the exercise of the powers granted. And should Congress assume, upon its own ideas of general welfare, to exercise other powers than those granted, to carry them out, it would simply, to that extent, set up a despotism.

The legal tender law is not an incident of the power to borrow money, because that power does not, in any reasonable view of the subject, imply the power to make forced loans, to take the citizens property without his consent, and without just compensation. To borrow, is not generally understood as taking by force or fraud. We have seen that the legal tender paper clause is an authority to make, by indirection, forced loans. It is not an incident of the power to raise armies, because the Constitution has expressly provided the modes of raising money to pay them; hence, incidental modes are excluded, unless the incidental legislation be limited to operate upon the army itself. It is not an incident of the power to regulate commerce with foreign nations, between the States and with the Indian tribes. The legal tender law is not an attempt to regulate such commerce, except so far as it attempts to provide a medium of exchange of productions. But the Constitution has fixed that medium, viz: coined money; paper is not only not a “necessary and proper medium for such exchange;” it is not one of a class of means consistent with the Constitution; it is one which the commercial republic of the world actually rejects, and which the power of government can not compel it to accept. And whether it is of the class of proper means is a judicial question. 1 Kent 254. Gold and silver have been chosen by the commercial world as the medium of commercial exchanges and the measures of commercial values; chosen, not by the compulsion of governments, but voluntarily, from utility and convenience, and governments acquiesced in the choice and sanctioned it, and no power of government can

compel their abandonment. See Smith's *Wealth of Nations*, pp. 16, 176, 179. They became legal tender by the *lex mercatoria* of nations, and contracts, made without specifying a medium of payment, were understood, by the law of nations, to be payable in coin. The history of the world shows this. Say's *Pol. Economy*, p. 222; 2 Mill's *Pol. Economy*, p. 19; 18 Ind. 471. Coin was the sacred currency as well as profane, of the ancient world. Historically considered, we find that the Almighty, and his Prophets and Apostles, were for a specie basis; that gold and silver were the theme of their constant eulogy. Abraham, the patriarch, 1875 years before Christ, being about 3740 years ago, purchased of Ephron, among the sons of Heth, the field in which was the cave of Machpelah, shaded by a delightful grove, for the burial place of his dead; and he paid for it "400 sheckles of silver, current money with the merchant." Gen. 23, 16. So Solomon, the wisest of men, seems to have had a decided preference for a hard money currency. In 1st of Kings, chap. 9, verses 27, 28, for example, it is said: "And Hiram sent in the navy his servants, &c., and they came to Ophir, and fetched from thence gold 420 talents, and brought it to King Solomon." And in chap. 10, verses 14, 15 and 29: "Now the weight of gold that came to Solomon in one year was 666 talents, besides that he had of the merchant-men, and of the traffic of the spice merchants, &c.; and a chariot came up and went out of Egypt for 600 shekels of silver, and a horse for 150 shekels," &c. Again, the prophet Jeremiah, one of the "greater prophets," says, chap. 32, verses 9 and 10: "And I bought the field of Hanameel, my uncle's son, that was in Anothoth, and weighed him the money, even 17 shekels of silver, and I subscribed the evidence and sealed it, and took witnesses, and weighed the money in the balances." Walker, in his *Am. Law*, p. 145, declares it an act of despotic power to make paper a legal tender. The principal interference of government with the currency has been to debase it. Say gives an account of the acts of the French monarchs, of this character, in his *Political Economy*, book 1, chap. 21, § 5, and adds: "Let no government imagine that, to strip them of the power of defrauding their subjects, is to deprive them of a valuable privilege," &c. Says Mr. Gouge:

"No instance is on record of a nation's having arrived at great wealth without the use of gold and silver money. Nor is there, on the other hand, any instance of a nation's endeavoring to supplant this natural money, by the use of paper money, without involving itself in distress and embarrassment."

It was the intention, by the Federal Constitution, to withhold this power of supplanting natural money from the general government, and to strip the States of it, and thus extinguish it, and insure to the people and nation a sound currency forever. Of this we have not the slightest doubt. Money should be to values, what weights and measures are to quantities, the exact measure, and a uniform, stable one. The States were prohibited from making anything but gold and silver a tender for debts, and the general government was authorized, touching this subject, only "to coin money, regulate the value thereof, and of

foreign coin,” and to provide for punishing the counterfeiting of two things, viz: the “securities,” that is the bonds, &c., and the “current coin of the United States,” that is the circulating money, coined by authority of Congress. It will be observed that while the States are forbidden to make anything but gold and silver a tender, Congress is empowered to coin money, without being limited to the two kinds of coin to which the States are restricted. Hence, Congress has, for small change, coined copper; but that the term, “to coin money,” means to make money out of coin, and nothing else, the history of the Constitution, as well as the natural interpretation of the words, demonstrates. If the words “to coin money,” mean to coin it out of paper, then the words “foreign coin” include any paper money coined by any foreign government, and the clause in which they occur authorizes Congress to make such paper a legal tender among our people; for if paper can be coined, why, it is coin, after it has been coined. Hence we are clear that the paper legal tender law is not an incident of the power to coin money. It is not an incident to the treaty making power. Acquisition of territory, we admit to be a natural incident of that power. Boundaries between nations must be fixed by treaty, and the final possession of conquered territory at the end of a war must be determined by treaty; and pecuniary obligations may, also, be imposed upon the nation by such treaty arrangements. A treaty is a bargain which the Constitution authorizes the government to make, and it may relate to land or money, &c.; but the money to discharge the obligations thereby created must be raised in the modes prescribed by the Constitution.

It is not an incident of the power to collect the dues and pay the debts of the United States. That power, in connection with the constitutional provision, that the laws of the United States, made pursuant to the Constitution, shall be the supreme law, may well enough justify the act giving the United States priority of payment out of the effects of an insolvent debtor. See *Conrad v. The Atlantic, &c. Co.*, 1 Pet. U. S. Rep. 385.

It will be observed that we here say nothing about the necessity or propriety of authorizing, in any exigency, paper like bank paper, so secured as that it shall be voluntarily circulated as currency by the people; they receiving it, not by compulsion, but freely, through confidence that its final redemption is certain and near. That question is not before us. Treasury notes might thus circulate without legislative compulsion.

A further view of the question, in brief.

The Constitution declares that Congress shall have power “to coin money, regulate the value thereof, and of foreign coin;” and that “no State shall coin money, or make anything but gold and silver coin a tender in payment of debts.”

Now, the power is no where expressly given to Congress to make even coin a legal tender,

but the prohibition to the States to make anything but gold and silver such tender, goes upon the assumption that the power over the subject of legal tender is possessed by the States; see *Hopkins v. Jones*, post, p. 310; and the Constitution restricts them to two articles, either or both of which they may make thus; and the general government has not the power to make anything a legal tender except as an incident to the power to coin. It is, perhaps, a fair incident to the expressly delegated power to make money of coin, to make the thing coined as money a legal tender in transactions within the sphere of legislation by Congress, but certainly nothing beyond that thing; for that would be drawing a second incident from a first; hanging an incident upon an incident, which certainly, we think, could not be done. State the argument.

Congress has express power to make money out of coin. Incident, perhaps, thereto; to make such coin a legal tender. Can we now, with a show of reason, add that incident to the doubtful incident of making coin a legal tender, may be exercised the substantive power, not expressly granted, of making paper legal tender money?

But we will not pursue this discussion of the constitutional question. We feel entirely justified in calling attention to the subject to the extent of the remarks we have made, as pursuing one of the modes by which the memory of the Constitution may be kept alive, and interest in its preservation excited.

It is contended that we might decide this case on the ground that the suit is on a note payable in a specific article. That note is not payable, by its terms, “in specie,” nor “in coin,” nor in “gold and silver,” nor generally, but “in gold.” Now gold is used as an article of merchandise, of manufacture, & c., as well as for currency and a standard of value. And if a contract is made between two parties in which one gives to the other a consideration for his promise to deliver to him in the future a quantity of gold dust, bullion, coin, or simply of gold, why shall not such contract be enforced? Such the contract sued on must be taken to be. And if the defendants can, by virtue of the legal tender paper law, discharge their promise to pay gold, by paying paper at its face, which is less in value, by more than half, than the gold, then the obligation of the contract has been impaired and the plaintiff has been deprived of more than half of his property, in the given case, without compensation. Such is the incontrovertible fact. And is it possible that the Courts are without power to redress such wrongs? See art. 5, amendments to Const. U. S.

Courts may decree specific performance of contracts for personal property, or give equivalent damages, where it may be necessary to effectuate a just result between the parties. This is well settled. *Fry on Specific Performance*, Am. ed., side p. 13, top p. 55, notes; 2 *Story’s Eq.*, sec. 717, et seq.; *Chamberlain v. Blue et al.*, 6 Blackf. 491. Judge Story says: “Whenever, therefore, the party wants the thing in specie, and he can not be

otherwise fully compensated, Courts of equity will grant him a specific performance.” “And this constitutes the true and leading distinction,” &c.; “it does not proceed upon any distinction between real estate and personal estate.” “The truth is, that, upon the principles of natural justice, Courts of equity might proceed much farther, and might insist upon decreeing a specific performance of all *bona fide* contracts.” Story, *supra*.

The circumstances under which the note in question was given, might, perhaps, appear on a new trial. Law and equity are both administered under the code in one form of proceeding.

But a majority of the Court are not prepared to decide the case on this latter ground. If the legal tender notes are money, coin, they are the standard of value, they are the measure of all other values, and nobody can be compelled to pay more than the face value of the standard of value in money. This, in itself, shows the folly of attempting to declare that to be the standard of value which the commercial and financial republic of the world always has and always will reject as such.

Having fully presented the views of the Court on the constitutional question, in which we unanimously hold the legal tender provision void, we shall as we did in the case of *Reynolds v. The Bank of the State*, 18 Ind. 467, and for the reasons there given, *pro forma*, affirm the judgment below. We are advised that the question is before the Supreme Court of the United States, the ultimate tribunal to settle it, and a petition for rehearing may, if the party desires, keep open the question and save all rights as they may be finally settled by that tribunal.

Per Curiam.

The judgment below is affirmed, with costs, and 1/4 of 1 per cent. damages.

***Griswold v. Hepburn*, 63 Ky. 20 (1865).**

Court of Appeals of Kentucky.

Griswold

v.

Hepburn.

Jun. 17, 1865.

1. The distinctive difference between the question whether an act of Congress is in violation of the Federal Constitution, and whether an act of the State Legislature is in conflict with the State Constitution, is, that, in the former case, the power to enact the law in question must be shown to have been delegated; in the latter, it must be shown that its passage is prohibited.
2. Express power to attain a designated end, or fulfill a specific trust, necessarily implies the subsidiary power to employ the means necessary for effectuating the contemplated end, excepting only so far as a particular means may be inconsistent with the charter of authority.
3. The declaration that Congress shall have power “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers,” neither enlarges nor contracts the specific powers expressly granted, but only certifies and defines the natural and necessary sphere of implied powers, which are as much delegated as the express powers, to which they are subservient – as means to ends.
4. The word “*necessary*” is not equivalent to “*indispensable*,” but all means relating to the end of any express power, and conducive to the execution of it, are, in the constitutional sense, “*necessary means*.”
5. The true test of implied power is, whether a preferred means is adapted to the end of an express power, and is also unprohibited, or, in other words, is congenial with the spirit and purpose of the Constitution.
6. “To coin money,” means to mould into form a metallic substance of intrinsic value, and stamp on it its legal value, so as to encourage and facilitate its free circulation, and assure stability in the currency.

7. "Currency" is not necessarily money. Whatever circulates conventionally on its own credit, as a medium of exchange, whether it be bank notes, bills of exchange, or government securities, being thus, practically, current, is properly currency.
8. Congress and the States are alike prohibited from making anything but coined money a legal tender.
9. The power to borrow money was legally exercised by the issue of treasury notes.
10. To make treasury notes a legal tender in satisfaction of a contract for money, deriving its obligation from State laws, unconstitutionally impairs the obligation of the contract.
11. The law, under the sanction and faith of which a contract is made and to be performed, defines its obligation, and any legislative act that makes the right less valuable and available, impairs the obligation of the contract.
12. Congress has no power to pass laws impairing the obligation of contracts, beyond the expressly granted power over bankruptcy.
13. So much of the congressional statute of the 25th February, 1862, as declares United States treasury notes to be money, and a legal tender in payment of debts on private contract, is clearly unconstitutional.

APPEAL FROM LOUISVILLE CHANCERY COURT.

JUDGE ROBERTSON DELIVERED THE OPINION OF THE COURT— JUDGE WILLIAMS DISSENTING:

The only question involved in this appeal is the constitutional validity of so much of the congressional statute of the 25th of February, 1862, as enacted that "United States treasury notes (authorized by it) shall also be lawful money, and a legal tender in payment of all debts, public and private, in the United States."

A solution of the grave and apparently difficult problem now, for the first time, presented for the consideration of this court, has been attempted by several of the State tribunals, whose opinions have been various in reasons, and, to some extent, conflicting in conclusion. And, as the great controversy, thus far presenting such manifold phases, can be finally concluded only by the judicial organ of all the people of all the States, and as, therefore, no transient opinion of the appellate court of Kentucky can ultimately have any authoritative effect, we had hoped that we might be spared the peculiar responsibilities of

announcing our own judicial conclusion on a subject as important to constitutional liberty and union as any ever presented to the American judiciary. But neither duty nor propriety will permit evasion or longer delay. And now, in reluctantly approaching a question of so much magnitude in principle and so momentous in its bearing on the consistency, stability, and practical supremacy of the Federal Constitution, our only fear is, that we may not be able to divest our judicial minds of all extraneous influence, and, with perfect impartiality, looking to the Constitution and its historic interpretation alone, expound it truly for the welfare of the country and the security of posterity.

The political mechanism of the United States is a simple dualism, consisting of separate State governments for all local concerns, and a common government for all national affairs.

The Constitution of the United States defines the spheres of each of these forms of government; and, in it, the people of the States, who, as pre-existing sovereignties, made it, reserved to themselves all powers not transferred by it, and declared that, in the ultimate sense, it shall be the supreme law of the land. As thus defined, each State government possesses the inherent sovereignty of its local constituency, modified by the delegation of all national power to the general government, and by the limitations of their common Constitution. Our unique system – Federo-national – is, therefore, appropriately styled “Imperium in Imperio,” and theoretically resembles the simplicity and harmony of the solar system, whose separate planets revolve in their own distinct orbits around their own central sun.

This new and beautiful organism is yet in the course of practical development, which may soon prove whether its fundamental equilibrium of local and national power is in most danger of disturbance from the centrifugal tendencies of the States, or the centripetal attractions of the central government. To preserve the constitutional balance, hitherto deemed indispensable to union and security, each government must, as their organic law contemplates and enjoins, confine its action within its own allotted sphere, and never cross the boundary line of their respective powers. Their common judiciary is their organic guardian of that sacred line, and no human tribunal was ever endowed with a higher power, or intrusted with a more responsible duty. Tranquillity and fraternity demand that the general government especially should carefully abstain from the assumption of undelegated power, and the exercise of even a doubtful power which might jeopard the reserved rights of the States. And, consequently, as it is the duty of the Judiciary to pronounce the law in every judicial case, and as no act of Congress, not authorized by the Constitution, can be law, fidelity to official trust requires every court to adjudge any such act unconstitutional and void, and even to withhold its sanction and co-operation in every obscure case, unless it can see some satisfactory reason for admitting the constitutionality

of the questionable act. When twilight vexatiously obscures the boundary between national and State power, there may be imminent danger, and especially in seasons of tempting disturbances by war or otherwise, of encroachment on the reserved rights of the States, whereby our Federal system might be dislocated, and its harmony, so essential to union, might be destroyed. To prevent such a national catastrophe, the judiciary should be slow to enforce an adventurous act pregnant with so much peril, and of such doubtful authority. But the same reason being inapplicable to State legislation of doubtful compatibility with a State Constitution, proper deference to the legislative department should preponderate in favor of the constitutionality of its acts, and require the judicial department to recognize them as laws, unless it shall be clearly satisfied that they are not.

Whenever a jurist inquires whether a State statute is consistent with the State Constitution, he looks into that Constitution, not for a grant, but only for some limitation of the power inherent in the people's legislative organ so far as not forbidden by their organic law.

But, as Congress derives its power from grants by the people of pre-existent State sovereignties, an enlightened inquirer into the constitutionality of any of its acts, looks only for a delegation of power by the Federal Constitution; for that Constitution expressly declares that all power not delegated by it, is reserved to the States or to the people. In this class of cases, therefore, he who asserts the power holds the affirmative, and, unless he "maintains it," the controverted act should not be enforced as law by the judiciary. On the contrary, the party affirming that a legislative act of a State is prohibited by the State Constitution, must prove it, and, unless the proof be clear, the contested act must be admitted to be law. The distinctive difference between the two classes of cases is, that, in the former, the power must be shown to have been delegated; but, in the latter, it must appear to have been prohibited.

And, in this case, therefore, the power to pass the tender act must satisfactorily appear to have been delegated before the judiciary should recognize and enforce it.

But express power to attain a designated end or fulfill a specific trust, necessarily implies the subsidiary power to employ the means necessary for effectuating the contemplated end, excepting only so far as a particular mean may be inconsistent with the charter of authority. And this clear principle of philosophy – applicable to political as well as to personal trusts – is expressly recognized and confirmed by that provision of the Federal Constitution which, immediately succeeding the enumerated powers, declares that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing power."

To avoid controversy or doubt this clause was adopted, not as a grant, but only as an

authoritative recognition of the necessary existence and true range of incidental powers too numerous and various for specific enumeration; and, consequently, this fundamental declaration neither enlarges nor contracts the specific powers expressly granted, but only certifies and defines the natural and necessary sphere of implied powers, which are as much delegated as the express powers to which they are properly subservient – as means to ends. These means must be both “necessary and proper.” And what are such means may, in nearly all instances, be freed from rational doubt by a logical test consistently applied.

Indispensable is neither the popular nor the constitutional sense of the simple word “necessary.” No one mean can be indispensable if any other mean could attain the same end; and therefore there could be no implied power in any case if none but indispensable means were constitutional. But all means relating to the end of any express power, and conducive to the execution of it, are, in the constitutional sense, “necessary means.” And, among all such adaptable means, Congress may choose any one which, in the exercise of a sound discretion it may deem most befitting. Over that choice – whether wise or unwise, politic or unpolitic – the judiciary has no jurisdiction. Its revisory cognizance is confined to questions of power, and can never, without usurpation, be extended to questions of policy or expediency. And while, in this case, this court can not consider the expediency or in expediency of the tender act, it may and must decide whether it was an unprohibited mean adapted to the end of any express power.

“Proper” is neither synonymous with “necessary,” nor a superfluous addition to it, as it would be if it import merely fitting, or appropriate, or adaptable, which is the meaning of “necessary.” But, as a chosen mean may be prohibited by the letter or the spirit and aim of the Constitution, however adaptable, and, in that sense, “necessary,” it can not be “proper,” and, therefore, it must be adjudged unconstitutional, as being thus prohibited. The true test of implied power is, whether a preferred mean is adapted to the end of an express power, and is also unprohibited, or, in other words, is congenial with the spirit and purpose of the Constitution. This test constructively excludes from “necessary and proper means” all power that is intrinsically substantive and independent, the non-delegation of which implied that the States and people intended to reserve it to themselves, or, in any event, to withhold it from Congress.

The incorporation of the national bank of 1816 raised this very question, in the great case of *McCullough v. Maryland*, in which the supreme court of the United States decided that the bank incorporation was a necessary and proper mean to the end of safely keeping and transmitting the public money; and Chief Justice Marshall, considering the power to incorporate as not substantive and independent, but necessarily a mean only to the end of some such express powers, said: “The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or regulating

commerce, a great substantive and independent power, which can not be implied as incidental to other powers or used as means of executing them.” All such power is itself an end, and not a mean to the end of any express power, and therefore can not be implied.

And truly, had no express power been granted to declare war, levy taxes, and regulate commerce, there could have been no implied power to do either of those things, but each of these independent powers would have been undoubtedly retained by the States, and, impliedly, forbidden to Congress. And what can be more substantive and independent than the most vital of all commercial powers – the power to make and regulate a nation’s money? This power is everywhere treated as one of the highest and most essential attributes of national sovereignty, and could not be admitted as an implied power in Congress, any more than the power to declare war or regulate commerce could be so held to be in the absence of any express power. And the power over tender is equally substantive, for it may control and nullify the other.

The test of national power, as thus substantially defined, is established by reason, and still more authoritatively by the undeviating concurrence of the judiciary, both State and national; and it is the only safe or consistent criterion for an uniform and a stable construction of our national Constitution. Without its guide the charter of the Union, like a rudderless ship, would fluctuate between the *Scylla* of strict, and the *Charybdis* of latitudinarian, interpretation; and then, its essential end of certainty and uniformity being frustrated, it would become the victim of circumstances, and be often moulded by passion or policy. Expediency and power are too often confounded as synonymous. They are widely different. Expediency is uncertain – the Constitution certain. Expediency changes – the Constitution never. Expediency bends to circumstances – the Constitution, exalted high above them by the people, never bows to men or times.

Constitutional discretion can not do whatever may promote “the general welfare.” Express power to promote the general welfare has not, *eo nomine*, been given; such specific power would have devoured all the other powers and resolved the national government into despotic anarchy.

The declared object of the express power to levy taxes was “to provide for the common defense and general welfare,” which can only be done by the exercise of the delegated powers. The general welfare is not a power, but only the purpose of the constitutional exercise of the powers granted.

The fact that a measure may promote the general welfare neither proves, nor, *per se*, tends to prove, that Congress may enact it as law.

Uniformity in the law of wills, conveyances, and other contracts, in all the States, might, and probably would, tend to the general welfare; but the States chose to retain, each for herself, the power to regulate that matter in their own way. So, too, some of our wisest patriots think that the general welfare would be promoted by the abolishment of slavery; but surely Congress has no legislative power over that domestic institution in the States. Nor does the impolicy of a legislative act prove its unconstitutionality. Many enactments have been unwise, and nevertheless constitutional. Within the limits of the Constitution legislative discretion is law; but, beyond that conservative boundary, it is a lawless *brutum fulmen*, totally destitute of authority.

The people of the States adopted their federal charter as moulded in such form and animated with such a spirit as they thought best for securing their common liberty and progress, and for saving themselves and posterity from the anarchy of vagrant legislation on the capricious plea of mere expediency and the general welfare; and, to secure that great end, the test just indicated must, always, inflexibly guide legislators and judges as the best and only safe cynosure of constructive power. That pole star will never decoy nor deceive. Guided by the chaste light of that lone star, we will proceed to analyze the power assumed to pass the legal tender act of February, 1862.

As every contract and every judgment for money will be legally discharged by the payment of money, just as every contract and judgment for any other thing will be discharged by a delivery of the thing itself, therefore, *proprio vi*, money will necessarily be a lawful tender, without any legislative enactment for legalizing it as such; consequently, if the currency called “United States treasury notes” can be legally held to be “money,” as declared by the act of February, 1862, the further declaration, that it should be a legal tender in contracts and judgments for money, was an act of supererogation; for being money makes them a legal tender without the superfluous enactment to the same effect; and, unless they constitute money, they are not a legal tender for money due, and no act of Congress can make them so, without impairing the obligation of contracts, and otherwise assuming powers never delegated; and, seeming conscious that nothing but money could be made a tender for a debt due in money, Congress saw fit, as a necessary preliminary, to declare United States treasury notes “to be money.” Whether in the technical and constitutional sense of money that act made them money, is the radical question.

Money being the universal standard of value and measure of exchange, foreign and domestic, to make and regulate money is, as before suggested, one of the highest and most essential attributes of national sovereignty; and the harmony and prosperity of the United States especially require that the legal currency should be the same in all the States, and be made as uniform and stable as possible. Being, therefore, a national concern of vital interest, the national will should exclusively control the money of the United States. The

people of the old Confederate States, having learned this wholesome lesson by an afflictive experience, unanimously surrendered all State power over the currency, and magnanimously transferred it to the national Congress, to a prudently circumscribed extent, by the following provisions in the Federal Constitution they adopted: "Congress shall have power to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures." "No State shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts."

If, as some few persons have argued, "to coin money" is a *carte blanche* allowing Congress to make or to declare anything money it may choose for the national currency, then there is express power to issue treasury notes, and declare them to be money, and, as a necessary sequence, a lawful tender. But this comprehensive construction is, in our judgment, unauthorized by the letter, and irreconcilable with the motives and the purpose of the quoted clauses. "To coin money" clearly means to mould into form a metallic substance of intrinsic value, and stamp on it its legal value, so as to encourage and facilitate its free circulation and assure stability in the currency. The thing so coined is itself money, *ipse loquitur*; but a treasury note is only a promise to pay money, and, at the utmost, can only be, like a bank bill or a bill of exchange, a representative of money; and it is even less a representative of money than such bills; for, while these must be paid in money, the treasury notes are payable in other promises in the same form. This literal import of the words "to coin money" is persuasively fortified by the accompanying power to regulate the value "of foreign coin." When the Constitution was adopted, as even yet, all foreign money was metallic coin; and therefore the power to regulate such coin was constructively restricted to coined metal, and did not include notes on the Bank of England, or consols, or other government bonds or securities. The conclusion is plain, and apparently inevitable, that the power to coin money was intended to mean to coin metal as the money of the United States; and the curse of the paper currency of the revolution, the fiscal ruin of the confederation, and the history of the adoption of the Federal Constitution, conduce strongly to prove that, when the people who adopted it delegated to Congress exclusive power "to coin money," they intended that nothing else than metallic coin should be money, or be a legal tender, *in invitum*, as money; and it is almost certain that they did not intend to confer on Congress any more or other power to make money, or declare any thing else to be money, or compel the circulation of any thing else as money.

During the revolutionary war with England each State had its own peculiar currency, consisting chiefly of its own bills of credit, which depreciated so rapidly as soon to become worthless; and the currency of no one State would circulate in any other State or elsewhere. Continental bills, issued by the confederation, also became so valueless as to frustrate regular commerce, bankrupt citizens, and produce general embarrassment and universal vexation and distress in all the States.

This paper currency excluded from circulation all coined money, as such currency always has done and always will do. Gold and silver coin possesses an intrinsic value nearly equal to its denomination, and is uniform throughout the commercial world. To insure its universal circulation without discount, no tender law is ever necessary; and, not depending on the credit of corporations or governments, it is not subject to the injurious fluctuations of a paper medium of no intrinsic value, which, upheld only by an uncertain and vibrating public opinion, can not operate as a safe and uniform standard of value at home nor abroad. And Thiers, in the 2d vol. of his French Revolution, says this was so during the disturbing prevalence of Assignats and Mandats, which proved so destructive in France. Even England, with her strong backbone of financial credit burdened with the heavy pressure of the French revolution, which necessitated a compulsive suspension of specie payments by her great bank, never declared its notes to be money; and her omnipotent parliament, though unrestrained by the American check of fundamental law circumscribing its power, were too statesmanlike and self-denying to make them a legal tender; nor, under all its besetting temptations, did the Congress of the confederation, with express power to emit bills of credit, ever issue them as money or a legal tender. These, like multitudes of other historic examples, illustrate the great practical difference between coin and paper money and credit, as fully tested by the experience of mankind; and in no portion of the world or period of its history was this probation ever more conclusively effectual than in our own country for many years of sore trial preceding the adoption of the Federal Constitution. When this constitution was adopted, a large majority of the people were inflexibly opposed to all “paper money,” and looked to the precious metal as the only hope of an equable and universally accredited currency.

The debates in the convention echo that sentiment, and its offspring was coined money, as established by the Constitution. The articles of confederation gave to its Congress power “to coin money and emit bills of credit.” The same power was transcribed into a draft of the present Constitution; but, on the motion of Gouverneur Morris, the power to “emit bills of credit” was stricken out by a large majority, and the power “to coin money” was left, as it now stands, alone. The following extracts from the debate on that motion will show the motive for that decision: Mr. Morris said, that “if the United States had credit, such bills would be unnecessary; if they had not, unjust and useless.” Mr. Madison, afterwards President of the United States, said: “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. Gorham said he was “for striking out without any provision. If the words stand, they may lead to the measure.”

Mr. Mason, expressing doubts and unwillingness “to tie the hands of Congress,” said: “Congress (he thought) would not have the power unless it were expressed.”

Mr. Gorham again said: “The power (of emitting bills), so far as it will be necessary or safe, is involved in that of borrowing money;” that is, to issue Government notes, but not to force their circulation by declaring them money, nor making them a legal tender.

Mr. Ellsworth (afterwards Chief Justice of the United States) said he “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 on the public mind and had excited the disgust of all the respectable part of America. By withholding the power from the new government, more friends of influence would be gained to it than by almost anything else. Paper money can, in no case, be necessary. Give the government credit, and other resources will offer. The power may do harm – never good.”

Mr. Wilson, afterwards a judge of the supreme court of the United States, said that “the striking out would have a most salutary influence on the credit of the United States. The expedient will 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, suggesting that paper currency was not a legal tender anywhere in Europe, expressed anxiety for denying to Congress the power to declare it money, or make it a legal tender.

Mr. Read said: “Unless the power to emit bills for currency should be stricken out, it would be as alarming as the ‘Beast in Revelation.’”

Mr. Langdon declared that he would rather reject the whole plan than retain the three words, “and emit bills.”

On the sentiments, and for the purposes thus indicated, the proposed power to emit bills of credit was repudiated by the vote of nine States, against the vote of New Jersey and Maryland.

These contemporaneous facts are recorded in the 3d vol. of the Madison papers, pp. 1343-4-5-6; and the debate on both sides shows, that, while a minority of the convention were in favor of vesting Congress with the supplemental power to issue bills for conventional circulation merely, not a single member, except perhaps Mr. Mercer, seemed willing to intrust Congress with power to make that currency money, or a legal tender. And, in a note appended to the 1346th page, Mr. Madison said that he acquiesced in the vote of the majority, because he presumed that “withholding the express power ‘to emit bills of credit would not disable the Government from the use of public notes as far as they could be safe and proper, and would only cut off the pretext for a paper currency, and particularly for

making the bills a tender.”

“Currency” is not necessarily “money;” whatever circulates conventionally on its own credit as a medium of exchange, whether it be bank notes, bills of exchange, or government securities, being thus practically current, is properly “currency.” But such currency, merely spontaneous, is not “money,” which is the legal medium of exchange, and the only true standard of value. And this distinction between money and currency seems to have been understood by the whole convention which proposed the Constitution to the States for their ratification, the minority proposing to vest Congress with power to supply a paper currency only as a voluntary medium of exchange, leaving the constitutional coin as the only money, and only legal tender. And the ratifying State conventions seemed to contemplate the subject in the same light. The denial of the power to emit bills of credit does not appear to have been even objected to in any State convention. And history indicates that, had the Constitution granted that power, it would have been rejected by a majority of the States.

The inevitable conclusion from this extraneous but incidental and illustrative evidence is, that the people, in adopting the Constitution, intended, with singular unanimity, to withhold from Congress, as well as from their own State Legislatures, the power to issue “paper money,” or make anything else than coined money a legal tender. But the face of the Constitution drives inevitably to the same conclusion. The power to coin “money” is the only money-making power delegated to Congress. Without express grant, Congress could have had no power whatever over money. The only grant made is specific and well-defined, and beyond this Congress can have no express authority to go; and any attempt to go further would defeat the great purpose of defining and establishing coin as the money of the United States; and, therefore, and also because no such substantive power could be implied, Congress can have no implied power to make any thing else than coin money. Knowing that Congress could have no power over money except so far as delegated, the people chose, for national reasons, to delegate the single power “to coin money,” and there stopped. And anxious to maintain coin as the only money, they tied the hands of their own Legislatures, and not only abandoned all their inherent power over money, except a qualified power over the legal tender, expressly restricted to gold and silver, but, for the same immutable reason, withheld from Congress any power over tender. That renunciation of their absolute power and reservation of a qualified power over tender, is itself, and alone, sufficient proof of a constructive and purposed denial to Congress of any power over it; for, as such power in Congress would necessarily be exclusive and paramount, the exercise of it would supersede or control all State power over tender, and, therefore, the qualified prohibition against the States would have been superfluous, idle, and inconsistent. But that prohibition, as qualified, is an acknowledgment of the power of the States, and the only object of it was to limit that retained power so as to prevent any legislative interference with the only money permitted to be made a tender in the United

States. Consequently the people of the States, by retaining power over tender and granting none to Congress, constructively denied to Congress any implied power on that subject. And this conclusively fortifies the deduction from other reasons that they intended that nothing but coin should ever be made money, or a legal tender as such.

And if this be not true, why did they adopt the quoted prohibitions on their own power, and why grant the specific power only? If they intended that Congress should have any more power over money, why did they not make the grant more comprehensive? only and certainly because they intended that nothing but coin should ever be made legal money or tender either by their own Legislatures or by Congress. And, to prevent a frustration of their great purpose as to a uniform money standard of value, they intended that Congress should not, any more than their own Legislatures, have any implied power over money or tender for money.

The States abandoned their power to make any thing but gold and silver a tender in payment of debts contracted even under, and therefore regulated by, their own local laws, because the exercise of that abdicated power might defeat the national purpose of maintaining the currency and stability of the only legal money. And why should Congress claim such an undelegated and suicidal power? And whence does it derive it? Not from express grant, for that is constructively negated, nor from implication, for such control over money and contracts can never be implied, even if there be no constructive negative of it; and if it possesses any such power, its implied powers are unlimited by any constitutional test uniformly applicable. But it is said that Congress has more than once, with general approval and universal acquiescence, exercised that power by declaring that, when the intrinsic value of gold and silver coin had been slightly reduced, it should still, as before, be a tender for its stamped value. The Constitution having made such coin money, and thereby a tender by tale, without any aid from Congress, it must have continued a tender in the same mode. These unnecessary acts of Congress, were, therefore, only declaratory. They did not make the modified coin a tender; it was so independently of them, and would have been as much so without their sanction as with it; and were this not so, it would not even now be a legal tender. This sham precedent, therefore, is neither authoritative, nor in the slightest degree, even argumentative. The possibility of a debasement of coin is also urged to show that the uncertain fluctuations in the value of a paper currency will not justify the presumption that it should never be money as well as the coin, which is also subject to depreciation and occasional oscillation. As this assumption could not affect the construction of the Constitution, either on its history or its face, an answer is scarcely pertinent. But we will just say that a debasement of coin for the wanton purpose of degrading it, is a crime so rare and disgraceful as not to be apprehended in an age of Christian light and morality; and, moreover, that a prudent alloy, but slightly reducing the intrinsic value of coin, would scarcely, and but transiently, deteriorate it as

a standard of value, and would still leave it more equable and valuable than any other medium or standard.

Thus history of the Constitution itself sufficiently prove, that, when the people of the States transformed their confederation of independent States into one supreme nationality of delegated and defined powers, their great charter of Union not only transferred no more power over money than to coin it and regulate the value of coin, but, lest the purpose of that limited power might be defeated by their own conflicting legislation on the currency, they buried all their local power over money. And it seems to us that they contemplated gold and silver coin as the only constitutional money or legal tender – for the following reasons:

1st. When the Constitution was adopted, the precious metals constituted the money of the civilized world.

2d. No other material combines the same elements of value, durability, and convenience, all essential to an international currency and measure of value, to secure which from all disturbing interference was the object of granting to Congress the power to coin money, and of confining money to coin. And, 3d. The interdiction of State power to make anything but gold and silver a tender for debt, and the studied omission to give to Congress any power over the law of tender, clearly imply that gold and silver were intended to be the only money of the United States; for, if anything else should ever become money, it would thereby necessarily become a legal tender, and the States would be bound to declare it such, and make creditors take it as money.

Without the constitutional prohibition, the States might make anything else a tender as well as money, and thereby defeat the only purpose of giving to Congress the exclusive power to coin money alone. It was, therefore, unnecessary to confer on Congress power to make such money a tender – and it would have been inconsistent with the great popular purpose for the only power over money, to give to Congress the cormorant power to make bills of credit, or any paper effigies, a legal tender.

As some confirmation of our opinion on this subject, we presume to quote a concurrent opinion of an illustrious jurist, who, if not – as often styled – the defender of the Constitution, was unquestionably among its most enlightened interpreters and consistent champions:

“Currency, in a large and perhaps just sense, includes not only gold and silver and bank bills, but bills of exchange also. It may include all that adjusts exchanges and settles balances in the operations of trade and business. But, if we understand by currency the

legal money of the country, and that which constitutes a lawful tender for debts, and is the statute measure of value, then, undoubtedly, nothing is included but gold and silver. Most unquestionably there is no legal, and there can be no legal tender in this country, under the authority of this government or any other, but gold and silver, either the coinage of our own mints or foreign coins, at rates regulated by Congress. This is a constitutional principle, perfectly plain, and of the very highest importance. The States are expressly prohibited from making anything but gold and silver a tender in payment of debts; and, although no such express prohibition is applied to Congress, yet, as Congress has no power granted to it in this respect but to coin money, and regulate the value of foreign coins, it clearly has no power to substitute paper, or anything else, for coin as a tender in payment of debts and discharge of contracts.” “The legal tender, therefore, the constitutional standard of value, is established, and can not be overthrown. To overthrow it would shake the whole system.”

These are recorded sentiments of Daniel Webster.

And in the *United States vs. Marygold*, 9th Howard, 567, the supreme court, characterizing the money power of Congress as a great trust, said that it involves “the duty of creating and maintaining a pure and uniform metallic standard of value throughout the Union.” The trust could never be fulfilled if paper currency could ever be made a legal tender. But, in establishing, beyond legislative interference, gold and silver coin as the only legal money of the United States, the people did not contemplate the total exclusion of a paper currency, which they knew to be an useful and even a necessary auxiliary of commercial exchanges progressively multiplying and expanding. While, with a full perception of the essential difference between currency and money, they fixed gold and silver as the only money, still they expected, as both useful and inevitable, the spontaneous circulation of bills of exchange, government bills, and even bank bills. History attests this, and the debates in convention prove it. They also certify the decisive fact, that not one member, except perhaps one, intended or desired that Congress should have power to enforce such a circulation by declaring paper of any sort money, or making it a legal tender.

Banks, both national and local, may be constitutional. No power could be more conclusively settled by reason, authority, and time, than that of establishing a national bank. And, although no State has authority to “emit bills of credit” defined in *Craig vs. Missouri*, to be bills issued by a State on its own credit, for the purpose of circulating as money – yet any State may incorporate natural persons for banking purposes; for, as the only object of such a charter is to impart legal individuality to a multitude of natural persons, and limit their inherent right to loan their own money, and issue their own notes, therefore, the corporation does not derive, from its charter, the power to lend money and discount bills. And the bank notes are not interdicted “bills of credit.” Consequently, such

notes, though neither actually nor potentially money, may be as legal a currency as bills of exchange, and this, therefore, is prescriptively settled. So, too, Congress had authority to issue treasury notes on the national credit as “necessary and proper means” for fulfilling “the end of the express” power to borrow “money.” And, according to the government credit, they might lawfully circulate as voluntary currency, and, in that conventional character, might constitutionally pay duties, taxes, and all the public expenses, civil and military. But, apprehending a ruinous depreciation if left to depend on their own intrinsic credit, Congress, in the hope of elevating them to a higher and more uniform standard, thought fit to declare them money. Its power to do that is now the question. Some of the advocates of the power defend it by a vague and fervid declamation which the judiciary should never hear or heed. They appeal to the transcendental law of “necessity;” and assume that the act declaring treasury notes money, and making them a legal tender in payment of “private” debts for enforcing their circulation as money, was indispensable to the salvation of the life of the Union, and did, in fact, save it. This forlorn plea is not sustained by either reason or history.

Was the credit of the government, with all its manifold and immense resources, so low or sinking so fast as to require the prop of the tender act? No; the truth echoes, everywhere, No. Was unlimited taxation a barren or an unavailable power? And might not a judicious resort to that resource, aided by other ample means, have secured the credit of the government, and, more certainly than the tender act, have upheld its treasury notes? And would not such a draft on the property of the people in proportion to their means have been far more equally distributive of the common burthen than that which was imposed chiefly on one class?

With the full benefit of the tender screw, treasury notes sank below the alarming mark of more than two for one, and the heavy loss fell, not on the government only, but also on the laboring classes, and peculiarly and unequally on the creditor class. Had Congress instead of trying the tender expedient, the constitutional availability of which was generally distrusted, properly increased the taxes and pledged the public revenue and lands, in the security of which all would have trusted, treasury notes would have been much more accredited. Or, had it made those notes, like the “five-twenty” bonds, draw a moderate interest, this alone without increased taxation or coercive tender, would have prevented their depreciation to so low an ebb as that to which, with the tender prop, they were doomed to fall. This is well illustrated by the historic fact that interest-bearing bonds, which were never made a tender, always stood higher than the tender notes. But had augmented taxation and plighted revenue and lands, and interest-bearing notes, been combined, who could doubt that the notes would have maintained a much higher and more equable standard of value that they did?

Then, although the issue of treasury notes became necessary for the suppression of the rebellion, yet how, or in what degree did the legal tender quality become necessary to save the Union, or how, and in what degree, did it actually contribute to its salvation? The impartation of that quality may have promoted the circulation of the notes, and facilitated the payment of private debts. But how far the increased circulation and more easy payment of the people's debts aided the government, no one can tell. We can not see that it was necessary to save the Union, nor can we believe that without it, the rebellion – unsupported, as it was, by equal money or credit – could ever have succeeded. And we feel quite sure that it might have been more easily and economically suppressed, had the tender been omitted and other and better means, as just suggested, been employed.

But, even if that experimental expedient alone had been the most hopefully efficient, and had all the virtue which has been imputed to it, the concession of that fact would not prove the constitutionality of the tender act; for expediency is not power, nor is necessity a law to the judiciary.

The *salus populi* may excuse usurpation, but can never make it law in this country, where it is our birthright to claim and to enjoy the protection of a more supreme law, which recognizes no such plea as necessity, and where we all know that usurpation, for any cause, is insurrectionary in principle, and, if connived at by the judiciary, revolutionary in fact. "Military necessity," may, more than any other, command a temporary submission to usurped power. Yet the Constitution, recognizing no such law, should finally triumph through an independent judiciary, which will, sooner or later, right the wrong. And whatever may be occasionally said or thought to the contrary, it is a gospel truth that the ultimate welfare of our people depends on the integrity and practical supremacy of their fundamental law.

Then, having defined implied power, and shown, as we think truly, that all claim to such power must harmonize with the spirit and design of the Constitution, and having, also endeavored to prove that the history and context of that organic law constructively allow nothing to be made money except gold and silver coin, and forbid a compulsive tender of anything else than such money, we now, finally, inquire how, or whence, did Congress derive the power to make treasury notes money, or a lawful tender for money? This power is claimed as incidental to some one or all of the express powers – to declare war – to regulate commerce – and to borrow money.

Unless we are greatly mistaken in the foregoing outline, this power is not constitutionally incident to any of these express powers, nor to all of them together. It is not a "necessary and proper" means to the constitutional end of any one of them.

The power to regulate commerce does not extend to the internal commerce in a State, and, therefore, can not apply to contracts growing out of any such local intercommunication. Nor does it carry with it the power to create the medium of exchange, foreign or domestic. That is fixed by the Constitution; and, moreover, a fluctuating paper currency deranges and cripples commerce, instead of regulating it. War can not give to Congress any power not conferred by the Constitution. It may afford occasions for the exercise of some power dormant in peace, but it cannot give any power not delegated by the Constitution, nor, especially, any prohibited by its letter or its spirit, which are the same at all times, and theoretically, as supreme in war as in peace, and as much so over soldiers as citizens – over armies as Legislatures. If this be not true, the powers of war may become omnivorous.

In times of popular effervescence or the turbulence of war in any of its forms, and especially in that of civil strife, the liberty and security guaranteed by the Constitution are in much more danger than in the tranquil season of peaceful repose; and the practical supremacy of fundamental principles is far more needful when tumultuous passions agitate the popular mind than when its calm reason rules. And, therefore, the Constitution was made more for stormy than quiet times, and should as certainly and constantly operate supremely. The government, through its Congress or its army, has no more right, in war than in peace, to take private property without just compensation, which can be measured only by proof, to decide on which is a judicial function, wisely withheld from the legislative department, and the assumption of which by it would make this cherished guarantee a mockery, and frustrate its conservative aim.

If, therefore, Congress, in peace, can not make any other kind of money than gold and silver, or force anything else as a tender for money, no such attempts would be legalized by war. But war created the necessity, and furnished the occasion, for the exercise of the power to borrow money, which was lawfully done in the mode of issuing treasury notes. And, consequently, if there was implied power to declare those notes money and make them legal tender for money due on private contract, it must be incident to the borrowing power, and to no other express power. And if these treasury notes be money, to issue “money” “to borrow money” would be a strange solecism. But we can scarcely see that such an enactment was, in the constitutional sense, a “necessary” mean to the end of borrowing; for it does not certainly appear to have essentially facilitated that object, crippled, as it was, by the act which employed it as a mean – and it is quite evident that, abstractly, it might have had some such effect, it was more than neutralized, even to the great depression of the notes, by the provision in the same act, which, instead of requiring duties on imports to be paid on those notes, exacted gold and silver. But however this may be, we can not doubt that the expedient resorted to was not, in the constitutional sense, a “proper” mean. And this is already demonstrated, unless we are mistaken, in the foregoing principles and illustrations of the Constitution bearing on the term “proper,” or in the

conclusion that the provisions, spirit and history of the Constitution forbid anything but gold and silver as money or as a tender on contracts for money. And if we are right, as we feel well assured we are, no one can pretend that the power assumed is, or could be, implied, because it is an axiomatic truth, that nothing inconsistent with the Constitution can be implied as constitutional.

And had there been no other objection to the assumed implication in this case, it would be repelled by the fact that to make money and fix the law of tender are great substantive powers, recognized and disposed of by the Constitution, and, therefore, no power on that subject can be implied beyond or different from that expressed.

The intrusion on State jurisdiction over private contracts furnishes another kindred illustration, equally apparent and conclusive.

To make treasury notes a legal tender in satisfaction of a contract for money, deriving its obligation from State laws, unconstitutionally impairs the legal obligation of the contract.

The legal obligation of a contract arises from, and is moulded by, the civil remedy provided by law for upholding and enforcing it. The law obliges or coerces, by some remedial process alone; and without legal remedy there can be no legal obligation.

But whenever there is such remedy there is such obligation. Man's ingenuity can not show how legislation can destroy or impair the obligation of a contract otherwise than by operating on the remedy. Any legislative act that takes away all remedy, destroys the obligation; and any such act as impairs the remedy, thereby impairs the obligation. Right and remedy are different things; and, consequently, no retroactive change in the remedy existing under the *lex loci* at the date of a contract would impair its obligation, unless the substituted or modified remedy is less stringent, available, and effectual; but any change that makes the remedy less efficacious, to that extent unquestionably impairs it.

The law, under the sanction and faith of which a contract is made and to be performed, defines its obligation. And, therefore, any legislative act that makes the right less valuable and available, so far impairs the obligation of the contract. The contract in this case bound the debtor to pay the creditor a certain sum in money. The law of Kentucky, where the contract was made and to be performed, entitled the creditor to remedy to enforce the payment, in money, of the stipulated amount. And, of course, any legislation requiring him to take anything else, or of less value, would impair the legal obligation of his contract. Treasury notes are not money. Nor are \$100 of such paper equivalent to the same sum in money. To the extent of the difference, the two things are not commensurable in either kind of value; and, to the same extent, the creditor, if not permitted to recover his debt in

money, or, if compelled to take less than its value, is legislated out of it. The tender act of Congress, therefore, if enforced, impairs the obligation of the contract.

But the appellee insists that Congress had a Constitutional right thus to impair. And, in support of that assumption, his counsel argued, that, as the provision in the Constitution prohibiting all State legislation impairing the obligation of contracts does not apply to or restrain Congress, this pretermission implies a concession of that power to Congress. This presents an unsettled, difficult, and very important problem for judicial solution. On full consideration, our conclusion is, that Congress neither has, nor consistently or safely could have, any such power, except so far as it has been granted in the express power to establish an uniform system of bankrupt laws.

For the harmony of the Union, and the equality of commercial rights and intercourse between the people of the States, it was thought that bankrupt laws should be the same in all the States. And as that unity could be secured only by one will, the States delegated to Congress power to establish an uniform system of bankrupt laws, and reserved, each to herself, all other power over private contracts.

A bankrupt law imports, *ex vi termini*, a release of a debtor on prescribed conditions without paying the debt; and, therefore, this grant gave Congress the power, in that class of cases alone, to impair the obligation of contracts; and, by necessary implication, it could exercise no power over any other class of contracts, all of which according to the Federal theory, belong, and should belong, exclusively to the States, such private contracts being more local than national in character and interest. And knowing that Congress could rightfully exercise no power over contracts beyond what they granted, and having granted a limited power, the people, however tenacious of their local power, did not find that it was either fitting or consistent to insert an express prohibition against the exercise by Congress of power not granted to impair the obligation of contracts. The simple fact that they granted only a limited power, implies that they intended that Congress should not exercise an unlimited power or one less restricted. And that implication is made unquestionable by the proceedings of the convention, and by the fact, also, that the motives which dictated the prohibition of the States applied, to a great extent, and in a controlling degree, to Congress as well as to State Legislatures. To concede to Congress power over the obligation of all private contracts made under State laws, would change the theory of national and local power, alter the established and only safe or consistent test of power, and dangerously tend to too much centralism. This alone would be sufficient to repel all implication of power to make paper a lawful tender. We are therefore of the opinion that Congress has no constitutional power to impair the obligation of contracts beyond its express power over bankruptcy.

The case of *Weston vs. The City of Charleston* is, however, cited to show, that, as the express power to borrow money gave to Congress the incidental means to borrow on the best terms, any adaptable means may be chosen and maintained, even though it may intrude on State rights.

But the principle of that case is not applicable to this.

In that case, the supreme court decided only, that, though a State had a general right to tax all property within its local jurisdiction, yet it could not tax the bank of the United States, because that institution had been constitutionally established by Congress, and there could be no antagonistic power in a State to destroy it, as might be done by indefinite taxation. But in this case the question is one of power in Congress to make treasury notes a tender; and in deciding whether there was implied power to make them a tender, its inconsistency with the Constitution and its interference with rights reserved by the States and intentionally withheld from Congress, is not only admissible, but conclusive to show that such a mean is not “proper,” and that, therefore, there could be no such implied power. The power to establish the bank had been adjudged as implied, and it could never have been decided to be constitutional had it been deemed inconsistent with the Constitution, or with State rights, which would have negatived the implication. And that is the question in this case. Had the tender act, like the bank charter, been adjudged constitutional, and then had a State attempted to resist the tender because it interfered with its own power over contracts, the case cited would have been analogous in principle. But the two cases are, in fact, antipodal in principal, and the cited case does not touch the case in hand. Without further elaboration, we are content with the conviction that the following conclusions are inevitable—:

1st. The people, in adopting their national Constitution, with signal emphasis and impressive forethought, established gold and silver coin as the money, and the only legal money, of the United States.

2d. To secure their well-considered object, they determined that no legislation, State or national, should ever make anything else a legal tender for money demandable on any contract made between citizens under the sanction of State laws.

3d. That they experimentally understood the radical difference between constitutional money and a mere paper “currency;” and intended that no such mere currency should ever supplant the use or shake the stability of gold and silver as the true standard of value for money and for property.

The necessary corollary is, that all power not expressly delegated over money is

constructively forbidden. And if this be true, there can be no implied power to make treasury notes a legal tender in private contracts. And this ultimate conclusion is illustrated by the significant fact, that, for more than seventy years succeeding the inauguration of the Union, Congress, in no financial pressure or vicissitude of fortune, ever, until February, 1862, attempted to make treasury notes or any other paper credit, a tender for individual debt. To declare what shall be money and what a legal tender is a substantive power, fully executed by the Constitution itself, and not left to ordinary legislation; and even otherwise, could not be implied as “necessary and proper” means subservient to the end of the express powers.

For the foregoing reasons, we not only see no plausible ground for the constitutional foundation of so much of the act of February, 1862, as declares United States treasury notes to be money, and a legal tender in payment of debts on private contract, but we think that it is destitute of any such support, and is clearly unconstitutional, and, therefore, should not be enforced as law.

Wherefore a majority of the Court – Judge Williams dissenting – adjudge that the chancellor erred in requiring the appellant to accept treasury notes in discharge of his contract for money.

In coming to this conclusion, we have looked only to the clear and safe horizon of power defined by the Constitution, and illustrated by such jurists and publicists as Hamilton and Madison and Marshall and Webster, all of whom were sufficiently latitudinarian. That line, consecrated by both authority and time, we have long regarded as the true boundary of constitutional liberty and union. Beyond this there is no boundary line either defined or definable. To pass or obscure it, would change the equipoise of our correlative governments, and open a wide door to anarchy and despotism. And such an adventurous experiment would be pregnant with peril to our institutions.

To avoid it, and realize the hopes of our fathers, we must stand where they stood— *super antiquas vias*.

We apprehend that the tender enactment passed the true conservative line; and we do fear, that, if that leap be finally sanctioned, the power of Congress may soon become practically unlimited and illimitable, except by discretion and policy; we can see no other limit – none other has been defined in this case.

Persuaded that we are right, no apprehension of inconvenient consequences merely fiscal, nor of human responsibility, could excuse the announcement of any opinion which is not conscientiously our own. To guard the Constitution is the highest trust of the judiciary.

And thinking as we do, were we to bow to any other power than the law, as we understand it, we should feel guilty of a criminal breach of trust and a shameful desertion of our post. Looking neither to the right nor to the left, we must know nothing but the law, and shall quietly pursue its straight and luminous pathway just as our own eyes see it. And we feel assured, that, whatever popular apprehension might be hastily awakened by an authoritative affirmance of our decision, it would soon be found to have been chimerical, and would be more than compensated by the assured fact that the Constitution, thus rescued from a labyrinth of arbitrary construction without any certain and assuring clue, would be hallowed by restored confidence and by revived hopes of its longevity and beneficence. Public necessity is an arbitrary and unsafe dictator; and to save, while salvable, from its lawless dominion, an upright judiciary should now, if ever, self-sacrificingly if need be, illustrate the righteous maxim of Christian patriotism— “ *Fiat justitia ruat celum.*”

Wherefore, the judgment of the chancellor is reversed, and the cause remanded with instructions to render, in appellant’s favor, a judgment conformable with the principles of this opinion.

JUDGE WILLIAMS, DISSENTING FROM THE MAJORITY OF THE COURT,
DELIVERED THE FOLLOWING OPINION:

Congress, by an act approved February 25th, 1862, authorized the issual of treasury notes of the United States, and enacted that they should be a legal tender in the payment of all private and certain public debts. The sole question in this case is as to the constitutionality of said act.

Has the United States Constitution declared what shall be a legal tender? seems to be naturally the first question to solve; for if so, no act of Congress could alter it, and it would not be an open question for judicial investigation and determination.

Previous to the formation of the national Constitution, the colonies, and then the States, in the exercise of sovereign power, had frequently, each for itself, within its own jurisdiction and for its own citizens, declared what should be a legal tender, not always restricting this to either metallic or paper money, but sometimes declaring tobacco and other commodities a legal tender.

By section 4, article 9, of the Articles of Confederation, it was provided “that the United States in Congress assembled shall also have the sole exclusive right and power of regulating the alloy and value of coin struck by their own authority or by that of the respective States.”

In the formation of a national, sovereign, supreme government, it was deemed proper that the States should surrender all their sovereign power over this vast and important subject, save alone the right to declare gold and silver coin a legal tender which might be made, and the value regulated by Congress; or, if foreign coin, its value so regulated. Hence by paragraph 1, section 10, article 1, United States Constitution, it is provided –

“That no State shall coin money, or make anything but gold and silver coin a tender in the payment of debts.” And by clause 5, section 8, same article, Congress is given the power “to coin money, regulate the value thereof, and of foreign coin.”

But nowhere does the Constitution declare what shall be a legal tender; on the contrary, the language of the Constitution, the history of the convention, the legislative history of the government under the Constitution, all conspire to the inevitable conclusion that it was not intended to fix the legal tender in the Constitution, but to leave it among the numerous subjects of legislation.

“No State shall make anything but gold and silver coin a tender in the payment of debts,” leaves the unquestionable right and power in the States to make such coins a legal tender, and how can they so make them but by enactment? If the Constitution has provided that such coin shall be a legal tender, why leave the power still with the States to enact what the Constitution had already ordained? This would be a folly not justly imputable to a body of such wise and patriotic men as framed the Constitution.

Had the Constitution declared what should be a legal tender, this would have necessarily withdrawn it from the subjects of legislation. The power to coin money and regulate its value is not restricted to gold and silver, even if, as contended by some, it only authorizes the coinage of metals.

Congress has already coined copper and nickel, and should it deem the coinage of brass or zinc, or other metals politic, it is not perceived by what clause of the Constitution the general and unlimited power to coin money is to be restricted so as not to authorize this; and if all these coins of cheap and base metal become lawful money, and a legal tender by virtue of constitutional provision, Congress has placed it in the power of perverse debtors most effectually to destroy their creditors' debt by paying large amounts of these almost valueless coins, notwithstanding Congress has declared that these should not be a legal tender.

But to escape the unfortunate consequences of this logical corollary, it is asserted that the clause prohibiting the States from making anything but gold and silver coin a legal tender,

restricts the grant to Congress “to coin money,” and limits this general power, given in general terms, to the specific power to coin gold and silver. It is believed that, in all the history of our jurisprudence, no rule of construction can be found which applies a prohibition on State legislation as a restriction on an express power granted in general terms to Congress.

Such a rule of construction is deemed new, illegal, illogical, and totally unsupported by judicial authority.

Neither can the logic of facts and figures, and the import of general but plain terms, be met by the most beautiful similitudes, elegant amplitudes, dazzling drapery of sophistry, nor rhetorical sentences.

Had the convention intended that Congress should coin gold and silver alone, it would have said so; as it did say the States should make nothing but gold and silver coin a legal tender. To coin money and regulate its value is a very large and general power. To make gold and silver coin alone a legal tender is a very restricted and specific power. It is utterly impossible that the convention could have used these terms as synonymous. They are not so, nor did the convention so use them.

Nor did the convention intend to perpetrate the folly and absurdity of making every coin which convenience and policy might dictate that Congress should authorize, a legal tender; but having wisely invested Congress with the unlimited power to coin money, intended, also, to leave with them the right to declare what should and what should not be a legal tender; subject alone to the qualification that the States might enact that the gold and silver coins authorized, and value regulated by Congress, should be a legal tender.

August 6th, 1787, the committee of detail presented the Constitution as it had been previously agreed upon in convention. The thirteenth article provided that “no State, without the consent of the Legislature of the United States, should make anything but specie a tender in the payment of debts.” If the convention had understood that nothing but gold and silver were to be a legal tender, surely they would not have proposed to leave with the States the power to make something else such by the consent of Congress; besides, this is a clear indication that the convention understood that the subject of legal tender was to be controlled by Congress.

This view is strongly fortified by the discussion on clause 2, section 8, article 1, which, as originally reported, gave to Congress the power “to borrow money and emit bills on the credit of the United States.”

Gouverneur Morris moved to strike out the words “and emit bills on the credit of the United States,” remarking that it would be unnecessary if the United States had credit; useless and unjust if they had not.

Mr. Madison inquired – “Will it not be sufficient to prohibit the making them a tender?”

This, said he, will remove the temptation to emit them with unjust views. And promissory notes, in that shape, may, in some emergencies, be best.

Mr. Morris replied, that striking out the words will leave room still for notes of a responsible minister, which will do all the good without the mischief.

Mr. Gorham was for striking out without inserting any prohibition. Said he, the power, as far as it will be safe or necessary, is involved in that of borrowing money.

Mr. Mercer was a friend to paper money, and was consequently opposed to a prohibition altogether. He said: “It would stamp suspicion on the government to deny it a discretion on this point.”

The clause was stricken out, but no prohibition inserted. (See Madison Papers, 3d vol., page 1343, and subsequent pages.)

It is remarkable that in this discussion Mr. Madison stood alone for prohibiting Congress from making these treasury notes, or bills of credit, a legal tender. All conceded that the power to issue such was included in that of borrowing money, and neither Mr. Madison nor any other single one suggested that the Constitution had or would fix gold and silver as the legal tender, nor that to make such bills of credit a legal tender would conflict with any other clause of the Constitution.

Although the 13th article, as reported, was altered by striking out the words “without the consent of the Legislature of the United States,” and the words “gold and silver coin,” were inserted in the stead of “specie,” leaving the Constitution in its present language, that “no State shall make anything but gold and silver coin a tender in the payment of debts,” yet this in nowise indicates that it was intended to restrict the powers of Congress, but rather the contrary; nor can this language be rationally construed as restrictive of any of the express grants or necessarily implied powers, from such grants of the Constitution.

Having conferred upon Congress the power to coin money, and regulate its value, and of foreign coin, it was deemed entirely safe to leave with the several States so much of their original sovereign power, on this subject, as to declare such coin a legal tender; but it was

regarded as essential they should surrender all other power over this entire subject; this and nothing more, was intended by this language.

The convention well knew that this subject of legal tender had been a fruitful source of discordant legislation by the several States. In the making a supreme, sovereign, perpetual, national government, what could have been more appropriate and necessary than to give it supreme control over the national currency, by which uniformity of kind and value might be produced among the several States? And although the power to declare gold and silver coin a legal tender was still left with the States, and they could so enact in the absence and perhaps in defiance of any act of Congress, yet this power must be exercised in subordination to the power of Congress to coin the money, and regulate its value, and of foreign coin.

In pursuance of this seeming understanding and intent of the convention, and meaning of the Constitution, Congress, from its earliest existence, has claimed the right to legislate on this subject.

By an act of April 2, 1792, establishing “the mint for striking and coining gold and silver coins,” Congress, after prescribing the weight, quality and value of the coins to be struck, declared “that all the coins which shall be issued from said mint shall be a lawful tender in all payments whatsoever.”

By an act of February 9, 1793, Congress provided that after the first of the following July, that “the gold and silver coins of England and Portugal, France and Spain, should pass current as money within the United States, and be a legal tender for the payment of all debts.” This act repealed the act of August 4, 1790, which, among other things, prescribed that certain foreign coins therein enumerated should be received for duties at prescribed rates, but did not make them a legal tender for any other purpose.

Congress had, from time to time, enacted other laws changing the value of certain foreign coins, and making them a legal tender, sometimes for limited and specified purposes, then, again, for all purposes; now by weight, then by tale. Such were the several acts of April 10, 1806, and March 3, 1823, making them receivable for public lands, and the acts of June 25, 1834, and March 3, 1834, declaring the legal value of certain silver coins, and that they should pass as money within the United States by tale for the payment of all debts.

By an act of June 28, 1834, it was directed that foreign gold coins should pass current as money within the United States, and be received in all payments – weight according to the fineness and rates therein specified.

By an act of January 28, 1837, it was provided that the standard for both gold and silver coins should thereafter be of one thousand parts by weight, nine hundred should be of pure metal, and one hundred of alloy, and that the alloy of silver coins should be of copper, and the alloy of gold coins should be of copper and silver; but that not over one-half of such alloy should be silver, and the weight and value of each were prescribed and declared to be a legal tender according to their nominal value; and that the gold and silver coin previously issued should continue to be a legal tender at their nominal value as though of the coinage of said act.

By an act of February 27th, 1853, the weight of the silver half dollar was reduced from 206 1/4 to 192 grains, and the lesser silver coins proportionately, and these were made legal tender only in payment of debts for all sums not exceeding five dollars.

Thus it is seen that Congress has claimed and exercised unlimited power over the legal tender, declaring what coins shall be received in payment of debts, and withholding the legal tender quality from others, though coined, and the value regulated by its own authority, sometimes impressing them with the legal tender quality for specified purposes and to limited amounts; at others, declaring them a tender for all purposes and amounts.

This assertion of power by Congress, and the seeming acquiescence, without challenge, by all the departments of the Government, the profession, and people, from the earliest history of the Constitution down to this enactment of February 25th, 1862, is a strong proof of its existence; and this rule of construction has been so often recognized by the supreme court of the United States and the several States, as hardly to need a recital of authority; still, see *Martin v. Hunter*, 1 Wheaton, 421; *Cohens v. Virginia*, 6 Wheaton, 421; *Briscoe v. Bank of Kentucky*, 11 Peters, 257; *Moore v. City of Reading*, 21 Penn., 188; *Norris v. Clymer*, 2 Penn., 277; *People v. Green*, 2 Wend., 274; *People v. Constant*, 11 Wend., 511.

Another rule of construction has been followed ever since the leading and exhaustive opinion of the supreme court of the United States in *McCullough v. Maryland* (4 Wheaton, 316), by Chief Justice Marshall. Said the court: "Let the end be legitimate – let it be within the scope of the Constitution, and all means which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." * * * * "When 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 necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative grounds."

If this power to enact paper money to be a legal tender is not prohibited, but is an appropriate mean of executing any of the powers granted by the Constitution, it is not a

reserved power to the States or the people thereof, and does not come within the prohibitions of the tenth amendment to the Constitution, that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

But it is urged that under the Articles of Confederation Congress did not presume to enact that paper money, or the bills of credit authorized to be issued by said articles, should be a legal tender, and this is true; but it is also true whilst they did not, because they could not, enact these to be a legal tender, they did recommend to the States to enact such bills to be a legal tender, which the States, at the instance of Congress, did do, and this, too, notwithstanding to Congress was given the express, sole, and exclusive power of regulating the value of the coin struck by its own authority and that of the respective States. Hence no force is perceived in such argument; nor is the expression of a fugitive opinion by way of incidental argument on a pending bill, in no way involving the question of legal tender, by even Mr. Webster, deemed entitled to much consideration.

The Constitution has not, then, declared what shall be a legal tender – not even that gold and silver coin shall so be – nor has it conferred, in direct terms, the power on Congress to so declare. It has, however, left it as a subject of legislation; and this power to declare anything a legal tender, whenever and wherever found, will be ascertained among the incidental powers, but still as much sovereign as if expressly granted. Is there any inhibition upon the power of Congress to declare paper money a legal tender anywhere to be found in the Constitution, seems to be the next natural and logical question?

The States are prohibited from coining money, making anything but gold and silver coin a legal tender, and enacting any law impairing the obligation of contracts; but no such prohibitions are imposed upon Congress; and it is a most significant fact, that, whilst several other prohibitions are imposed upon the States, Congress is only prohibited from three things, to-wit: passing bills of attainder, *ex post facto* laws, and granting titles of nobility; and, as these inhibitions as to Congress are found in the next preceding section to those imposed upon the States, together with the historical facts mentioned, render it impossible to conceive that this most important subject of legal tender could have escaped the attention of the convention.

Had any inhibition been intended, but left out by causality, it would have been found among the amendments to the Constitution, most of which were adopted at the suggestion of the several States made at the time of their ratification, and when the utmost vigilance and jealousy had been excited by the earnest opposition to its adoption, made by the States’ rights party, and some of which amendments have been adopted since Congress has asserted its right over the subject by legislating thereon.

The Constitution was silent as to what should constitute a legal tender; the States might not declare even gold and silver coin to be such; it was a subject of vast importance; a common and general government was being made, which was intended to be national and supreme over the American people and their States, invested also with sovereignty and perpetuity, and to it was intended to be given the necessary powers to protect this sovereignty, supremacy, and perpetuity, and to enable it to accomplish the great object of its creation, in conducting their foreign relations and controlling their national affairs.

Among the powers conferred to accomplish these great objects, were the regulations of commerce among the States, to coin money and regulate its value, and of foreign coin, to borrow money, to raise and support an army, provide and maintain a navy, and to call out the militia to repel invasion and suppress insurrection. To inhibit Congress from declaring the legal tender, or enacting that anything but gold and silver should be such, might seriously impair the efficiency of these great powers intended to be conferred without limit, and produce serious and calamitous embarrassment in times of great national peril.

The national debt was then large, and must be provided for; so scrupulous were our fathers on this subject, that they provided by clause 1, article 6, of the Constitution, that “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.”

Had the Constitution fixed gold and silver as the legal tender, or had inhibited Congress from making anything else such, the principal and interest of the national debt would have to be discharged in such coins, which was then literally impossible, as the entire gold and silver circulation of the American people was little more than adequate to one year’s interest on the national debt.

The total amount of specie received by the United States treasury for the years 1778 and 1779, whilst engaged in the revolutionary struggle, and when much needed, and the authorities exerting every energy to get it, amounted to only \$151,666.

After the adoption of the national Constitution, we learn from the reports of Mr. Hamilton, the first Secretary of the Treasury, that the national debt amounted to \$94,000,000, bearing an annual interest of more than \$5,000,000, when high authority has fixed the entire gold and silver circulation of the people at this time at not exceeding this latter sum.

The scarcity of the precious metals at this period may be somewhat appreciated from the official returns of the operation of the mint established by the act of 1792. From 1793 to 1800, inclusive, a period of eight years, the entire coinage of the government was, of gold, \$1,014,290; silver, \$1,440,455; total, \$2,454,745, or an annual average of something over

three hundred thousand dollars. History has well attested that the great financial embarrassments of the United States government, under the Articles of Confederation of the several States, and the people at large, were among the prominent causes which led to the formation of the national Constitution.

It is almost past comprehension that a body of such wise and patriotic men as the American people have been taught to regard the convention, and which have been unanimously accorded them by posterity, could have added to those embarrassments by the adoption of such a provision in the Constitution as was then literally impossible for the government or people, or both combined, to comply with. The total gold and silver of the country, being inadequate to the payment of the annual interest on the public debt, would have left the people without a constitutional currency to discharge their private obligations. Such a state of affairs must have resulted extremely disastrous to both the government and people, and is a pregnant fact conducive to the belief that the convention did not intend to fix the legal tender in the Constitution, or to inhibit Congress from the largest jurisdiction over the subject. The situation of the government, the people, and the currency, rendered it impossible for the convention, with any degree of certainty or safety, to fix what should be a constitutional currency alone; but stern, unrelenting necessity demanded that they should leave it a subject of legislation, trusting to the patriotism and wisdom of the people, and their Congress, and the then unseen developments of the future, to carry them safely through those difficult embarrassments.

The unseen but almost magic increase of the precious metals and wealth of the people, the progress in the powers of the nation, and the many perils by which the government has been environed, the most imminent of which it has just safely emerged from, as the flattering indications assure us, all attest the great wisdom of the Constitution in leaving this subject of legal tender unrestricted with the law-enacting department of the government.

As the Constitution has not ordained what shall be a legal tender, nor has it prohibited Congress from so ordaining, we come to the question whether this power has been conferred upon Congress as a necessary and proper means of executing other powers expressly granted? Among the express powers conferred upon Congress by section 8, article 1, United States Constitution, are:

To pay the debts and provide for the common defense and general welfare of the United States.

To regulate commerce among the several States and with the Indian tribes.

To coin money, regulate the value thereof, and of foreign coin.

To declare war.

To raise and support an army.

To provide and maintain a navy.

To provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and quell invasion.

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States or in any department or officer thereof.

As was said by Chief Justice Denio, of the appellate court of New York, in his dissenting opinion adverse to the constitutionality of said act of Congress of February 25th, 1862, in the case of *Meyer v. Roosevelt*, September term, 1863 (13 Smith's N. Y. R.): "It is not incumbent upon those who argue for the validity of the legal-tender clause to select any one express power. They may group together any number of these grants of legislative authority, and if the right to enact that provision is fairly deducible from any or all of them, their position is established."

If the power to declare what may be a legal tender does exist, though belonging to that class known as implied powers, it is a sovereign power, and Congress has as much right to enact laws for carrying it into execution as though granted in direct terms.

If this be a proper and necessary mean of executing any one or more of the express powers, it is not only an implied power, incidental to such express power, but, by virtue of clause 18, section 8, article 1, of the United States Constitution, Congress "may make all laws which shall be necessary and proper for carrying it into execution"—or, in other words, may make all necessary and proper laws to execute—all the express and implied powers found in the Constitution.

For an elaborate discussion of these sovereign powers, see *Norris v. Doniphon* (4 Met. Ky. R., 386, and Judge Williams's separate opinion, 403). I also quote from the very able opinion of the appellate court of New York, by Judge Daviess, in the case of *Meyer v. Roosevelt*, before recited, sustaining the legal-tender clause:

"Every form of government unavoidably includes a grant of some discretionary powers. It would be wholly imbecile without them. It is impossible to foresee all the exigencies which may arise in the progress of events, connected with the rights, duties, and operations of the government. If they could be foreseen, it would be impossible, *ab initio*, to provide for them. The means must be subject to perpetual modification and change; they must be adapted to the existing manners, habits, and institutions of society, which are never stationary; to the pressure of dangers or necessities; to the ends in view; to general and

permanent operations, as well as to fugitive and extraordinary emergencies. In short, if the whole society is not revolutionized in every critical period, and remodeled in every generation, there must be left to those who administer the government a large mass of discretionary powers capable of greater or actual expansion, according to circumstances, and sufficiently flexible not to involve the nation in utter destruction from the rigid limitations imposed upon it by an improvident jealousy. Every power, however limited, as well as broad, is in its own nature susceptible of abuse. No constitution can provide perfect guards against it. Confidence must be reposed somewhere; and in free governments, the ordinary securities against abuse are found in the responsibility of rulers to the people, and in the just exercise of the elective franchise, and ultimately in the sovereign power of change belonging to them, in cases requiring extraordinary remedies.”

In *Anderson v. Duncan* (6 Wheaton, page 204), the court said: “The idea is Utopian that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest upon responsibility, and stated appeals to public approbation. Where all power is derived from the people, and public functionaries at short intervals deposit it at the feet of the people, to be resumed again only at their own wills, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger.”

The power to declare the legal tender is not substantive, but incidental to several substantive powers; to coin money and regulate its value is substantive, and to declare such coin a legal tender incidental thereto; to borrow money is substantive, and to use such means as may be necessary to execute it are incidental; to declare war is substantive, to make a blockade and other things may be incidental thereto; to raise and support an army, provide and maintain a navy, are substantive, to arm, equip, and transport the same, are incidental.

But for the use of gold and silver as a circulating medium by the civilized nations, these would have but comparatively little intrinsic value; they are not intrinsically money; they may be better adapted to that use than other commodities, but who can tell in the progress of science and chemical, geological, and mineralogical developments, that some other metal as well or better adapted to such use may not be discovered?

The Earl of Liverpool, in his *Treatise on the Coins of the Realm* (p. 8, London, 1805), said: “Money is a standard measure by which the value of all things are regulated and ascertained, and is itself, at the same time, the value or equivalent for which goods are delivered.” Eckfield and Dubois, in their *Manual of Coins and Bullion*, and supplement thereto, down to 1851 (chapter 24, No. 642, L. Congressional Library, page 6, which is an official report to Congress on our coins), says: “This is a standard definition given by all

the authorities from Aristotle down to the present time.”

“The commodity which has thus, by the uniform but silent, unconcerted operation of human motives and action, become the common medium of exchange and general measure of value, constitutes the money of the community, and in this character it acquires an additional value.

Various articles in different countries and in different stages of society, have, in this way, acquired the property of money. * * * * Tobacco was also used as a universal equivalent in Maryland and Virginia.” (Tucker on Money and Banking, pp. 4 and 5.)

In Virginia and this State are to be found statutes giving so many pounds of tobacco as costs by the judgment of court, which were, after many years had elapsed, changed by enacting so that each pound of tobacco should be regarded as of given value, and the costs should be collected in money at such rates. Gold and silver being coined, and the value regulated, and declared to be a legal tender by authority of Congress, became, indeed, “precious metals.”

By impressing this legal tender quality on the government’s own promises to pay, they too become of “precious value.” In what consists the difference of constitutional power in the impressing with a new and valuable, but not intrinsic quality, metals or paper? The greater value of neither is intrinsic, but derived from the omnipotent fiat of Congress in ordaining them to be a legal tender, and making them the legal standard by which the value of all commodities, the discharge of all private liabilities, and the commerce of the country shall be regulated, and by infusing into these inanimate and almost valueless things the vitality of a circulating medium, vesting them with a magic and almost incalculable value.

If the making these treasury notes a legal tender does invest them with this new, inestimable, and magic value, who can say it is not a necessary and proper mean of borrowing money? The power of the government to issue its securities for what it may need, as compensation for either services or commodities, has been so often exercised, so universally acquiesced in, and for so long a period, and sustained in every instance in which the question in any of its phases has come before the courts, as no longer to be considered an open question for further controversy; and having this unquestioned right, it may issue just such securities as Congress may direct, either as interest-bearing coupon bonds, designed for permanent investments, or stocks, or treasury notes, designed for circulation as a medium. The latter class obtained so early as Mr. Madison’s administration, and has been often issued since, with the concurrence of our ablest statesmen and jurists, even embracing those of the most rigid construction and extremest States’ rights schools. Even Mr. Calhoun, in the United States Senate, January 16th, 1840,

said: "Paper has to a certain extent, a decided advantage over gold and silver. It is preferable in large and distant transactions, and can not, in a country like ours, be dispensed with in the fiscal transactions of the government, without much unnecessary expense and inconvenience, the truth of which would soon be manifest if the government should consent to dispense with the use of treasury drafts. But this is not the only form in which it may be necessary or convenient for it to use its own credit. * * * I am decidedly opposed to government loans. I believe them to be, in reality, little better than a fraud on the community, if made in bank notes, and highly injurious if made in large amounts in specie. * * * It may be laid down as a maxim, that without banks and bank notes, large government loans are impracticable, and without some substitute, such loans, in the event of a war, will be unavoidable. The only substitute will be found to be in the direct use by the government of its own credit. * * I also regard the use by the government of its own credit in the form of treasury notes, or some other better form, as indispensable to the permanent success of the policy of this bill." (Sub-treasury bill.)

On a bill authorizing the issual of treasury notes, he, on September 19, 1837, said: "Believing that there might be a sound and safe paper currency founded on the credit of the government exclusively, I was desirous that those who were responsible, and have the power, should have availed themselves of the opportunity of the temporary deficit in the treasury."

In a rebellion of such gigantic proportions and vast magnitude, requiring an army of a million of soldiers and sailors to suppress it, involving the government in a daily outlay of say two millions of dollars, or of an annual expenditure of say seven hundred and thirty millions of dollars, could this vast army have been "raised and supported," and this immense navy "provided and maintained" on the circulating medium of the loyal States, including the specie and paper currency, and that which belonged to individuals and corporations? The precise amount can not be ascertained; but we have sufficiently accurate data to direct with almost absolute certainty to a correct determination. By reference to United States Bankers' Magazine (vol. 12, p. 341-2), it will be ascertained that the specie in the banks of the loyal States, at the breaking out of the war, amounted to \$76,314,712, and the circulation of said banks to \$139,577,439; total, \$215,892,151; thus the entire capacity of all the banks of the loyal States was something less than adequate to one hundred and twenty days' expenditure. But it would have been wholly impracticable, yea impossible, for the banks to have collected from their customers this circulating medium, and any attempt to do so would but have intensified the financial panic of the first few months of the war, and produced general bankruptcy upon the people and disaster to the government.

What the amount of specie in individual hands was can not be ascertained with any

satisfactory degree of certainty, nor is it important to do so, for whether large or small, it was soon hoarded and secreted, and of but little more use to the government than if it had not existed.

The dangers attendant upon war, even with foreign nations, have always caused the hoarding and secreting of the precious metals. No government, however energetic and despotic, can prevent this; private cupidity, stimulated by alarm, has ever been, and will ever prove, too active, sagacious, and efficient for the strongest and most vigilant government.

This cupidity, sagacity, and energy are greatly enhanced by the perils of a civil commotion endangering the existence of the government, unsettling private rights, making uncertain private property, and jeopardizing personal liberty; whilst in a government mild and liberal, and beneficent in its provisions and action, scarcely any restraint is found over this controlling passion of the human heart to provide against these perils and calamities. The inevitable consequence of this rebellion, as in all past times, was to create alarm and distrust; each man became a vigilant guard for his own interest and that of his family; the creditor desired to realize his debt, and that, too, in specie, so far as at all practicable; the holders of bank notes desired them redeemed in gold. In this active state of alarm and vigilant caring for private interest, the banks were soon driven to a suspension of specie payments, the gold and silver coins sought the places of safety, secrecy, and darkness. No longer did these perform the functions of a “circulating medium,” and he that sought for these could most truthfully return “*non est inventus*.”

A financial and commercial panic seized upon the country. The treasury of the government was empty, its necessities numerous and most pressing; it wanted to borrow large sums, but where were the lenders? The banks might be depended on to supply the first needs, but these would soon become exhausted, because so greatly inadequate.

If the government would preserve its own national existence it must “raise and support” immense armies, “provide and maintain” vast navies. To do this required more money annually than the entire circulation of the banks, and the gold and silver coins of the banks and the people of the loyal States.

With a strong, not to say unfriendly, disposition on the part of the governments and people of the two leading maritime, manufacturing, commercial, and wealthy nations of Europe, to exaggerate the dangers and weakness of the government, and magnify the strength and certainty of success of the rebellion, hopes of a foreign loan could not be reasonably entertained.

Besides, the government must encounter all the moral influence and financial power of the disloyal at home, who, not content with abstracting the gold and silver coins from the use of the government, but were constantly, with an energetic vigilance, decrying the government credit and securities, using their financial talents to create and spread distrust and alarm, and their financial and money power to sink the government credit to the lowest grade.

In this transition state from peace to war, revolution in the habits of our people and the commerce of the country, surrounded by disloyalty, distrust, and alarm, the government must provide for these new exigencies, unforeseen, consequently unprovided for, but still imperious in their necessities, else its armies could not be “raised and supported,” its navies could not be “provided and maintained,” and, without these, it could not perpetuate its national existence, but must vanish from the world as a thing of the past, and with its downfall must go the last brightest evidence of man’s capability for self-government. If, then, to issue its own “promises to pay,” in convenient form and amounts for circulation, and to impress these with a new and magic quality and value, and thereby provide for this overruling necessity, and at once place the government in possession of the necessary means to “raise and support” its army and “provide and maintain” its navy, how shall it be said this was not a necessary and proper law for executing these powers?

And if it was a proper and necessary mean of executing any of the enumerated powers, it was not only incidental to such powers, but expressly authorized by clause 18, section 8, article 1, of the Constitution.

But it is said that had Congress increased the taxes, and pledged the public revenue and lands, or had it made treasury notes interest-bearing, it would have much more sustained the credit of the government and these notes, than to make them a legal tender.

Now, it so happened, that at the very session that enacted this legal tender, immense taxes were laid, the revenue pledged, two years’ five per cent. semi-annual coupon legal tender treasury notes were also authorized and issued, and, notwithstanding the legal tender quality was imparted, with all the other props suggested, the credit of these treasury notes, of all classes, continued to sink, until they would not command in market forty per cent. of their par value in gold and silver, and is but another evidence of the impracticability and unreliability and very insignificant value of speculative theories.

It is again said the five-twenty bonds were more valuable than these treasury notes. The history of the gambling markets of New York would show they varied from a few cents below to a few cents above their par value, in these treasury notes, perhaps a larger part of the time above par; but when it is remembered that these bonds were to be paid at maturity

in gold, and the interest was to be paid semi-annually in gold, this fact affords neither argument nor inference.

If this power does exist, its existence is contemporaneous with the Constitution, although the occasion for its exercise may not have occurred until long since.

There are powers which were conferred by, and exist contemporaneous with, the Constitution, which were not intended nor expected to be exercised in times of peace. Then whether the power to make these treasury notes a legal tender to be alone included in the power to coin money and regulate its value, and of foreign coins, or to borrow money, or to regulate commerce among the States, or to raise and support an army, and to provide and maintain a navy, or to provide for calling forth the militia to suppress insurrection and enforce the laws of the Union, or whether it is a proper and necessary mean of executing any one or more of these powers, it is equally authorized by the Constitution, and obligatory as law.

These express, sovereign, and unlimited powers were conferred upon the national Government for the transcendent purpose of perpetuating its existence, and thereby securing the liberty and nationality of the American people to the latest generation; and then, lest there should be some infirmity in the language conferring the powers, clause 18, section 8, article 1, gave to Congress in the broadest language the most plenary power “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or any department or officer thereof.”

As it was intended by this clause to perfect all the vested powers in their fullest significance and amplitude, Congress must, to a great extent, be left to judge what laws should be necessary and proper for the execution of the vested powers; and in a government deriving its powers from the people, being made to promote their general welfare, and to secure the blessings of liberty to them and their posterity, its laws designed to be the embodiment of public sentiment, subject to be changed and modified by this potent agency, as is also the Constitution itself, where could discretion be more safely or properly lodged than in the representatives of the people and their States? And before courts will unsettle the decrees of this, a co-ordinate department with their own, vested with the high powers of enactment presumed to represent and respond to that public sentiment which was designed to be uncontrolled and omnipotent within the sphere and allowances of the Constitution, they must be satisfied fully and clearly that the enactment is without the authority of the Constitution, and every rational presumption in favor of its validity is to be indulged.

Having shown, as is trusted, with reasonable certainty, that the Constitution does not declare what shall be a legal tender nor has it restricted the legal tender to any kind of metals, coins, or money, and the power to declare these treasury notes a legal tender is not a substantive but derivative power, and was a necessary and proper execution of several vested powers, it remains to vindicate the justice and legality of making them such in the discharge of pre-existing debts, and that neither law, Constitution, nor good conscience demand that any more than the nominal amount should be required in the discharge of such debts.

This power to declare what shall be a legal tender existed from the adoption of the Constitution, to be exercised in such manner, and under such modifications, as circumstances might require, and the exigencies of the government might demand, and the general welfare of the people might indicate; and its exercise being of mutual hazard to the creditor and debtor, and whether the one or the other class might be the more seriously affected, would be equally just, as its exercise must be presumed to be for the “greatest good to the greatest number,” and not to foster or inflict private interest, hence individual interest should yield to the public welfare and necessity.

It has been already remarked, that whilst the States were prohibited from enacting laws impairing the obligation of contracts, none was imposed on Congress, but, on the contrary, Congress is authorized to “establish uniform laws on the subject of bankruptcies throughout the United States.” (Clause 4, sec. 8, art. 1, Constitution.) It is true that this language does not in terms apply to pre-existing debts, yet the courts have unanimously upheld the constitutionality of bankrupt laws, by which the debtors in pre-existing liabilities have been released on their own voluntary application, and such laws have been adjudicated to be constitutional by that august and supreme tribunal, which the people and States have selected as the final arbiter in all questions of “law and equity arising under this Constitution and the laws of the United States,” &c., to-wit: the supreme court of the United States.

These bankrupt laws have been sustained when applying to pre-existing debts, on this principle; that this was a sovereign power vested by the Constitution in Congress, and liable to be exercised by them at any time; hence that each contract was made with the legal implication that the obligation should exist until discharged by the obligor, unless Congress should, in the meantime, provide for the obligor’s release by a bankrupt law. Precisely so as to legal tender – this power to declare the legal tender is sovereign, though belonging to the class of implied powers: when Congress enacted that gold and silver coins should be a legal tender, every contract to pay dollars was a contract to pay that many dollars of the gold and silver coins so declared to be a legal tender, with the further legal implication that if Congress, in the meantime, should enact that something else should be

a legal tender, that the debtor might discharge, and the creditor would receive, in this new legal tender money or currency, the exact amount of dollars named in the obligation; and this implied condition is as much a part of the legal contract as its express conditions.

Congress has in various ways affected the obligation of contracts, sometimes in favor of the creditor, then in favor of the debtor. Such has been the effect of making gold and silver coins a legal tender when, previously, Continental and other paper money and commodities had been a legal tender. War has always seriously affected contracts and often annihilated the rights of the creditor. Embargoes and blockades have had a similar effect, and the bankrupt laws annihilated the obligatory force of the contract; yet all these have been upheld by the highest judicial authority.

The gold coins by the act 1834 had been so debased that ninety-four eagles of the previous coinage contained as much gold as one hundred under this act; yet it took as many of the old eagles to discharge a debt as of the new eagles, although the old had a greater market value than the new; yet these were of equal value in the eyes of the law, because both were a legal tender, so declared by Congress for their nominal value or amount, and not for their marketable value.

This change of the legal tender is no new principle either in English or American legislation. In *Poug vs. De Lindsay et. al* (Dyer, 82 A.), in debt on bond for payment of £24 sterling, plea of tender, that at the time of payment of said sum of money, certain money was current in England in the place of sterlings called pollards, held, that if, at the time appointed for payment, a base money is current in lieu of sterling, tender at the time and place of that base money is good, and the creditor can recover no other.

Where the obligation was to pay on a given day five quarters of wheat, which were worth fifty pounds on the day of the contract, but only five pounds on the day of payment, the judgment was for the five quarters of wheat or five pounds, is recited from the year books II H. VII., 36.

Queen Elizabeth, by proclamation of May 24th, in the 43d year of her reign, declared and established as lawful and current money of Ireland a certain mixed money, which she had caused to be coined in the tower of London, to pay the royal army, and carry on the war in the rebellion of Tyrone.

Brett, a merchant of Drogheda, bought goods of Gilbert in London, and became bound to him for £100 – previous to said proclamation. Brett made a tender of the £100 in this mixed money – this was held a good tender. (Davies R., 28. In *Barrington v. Potter*, Dyer, 816, fol. 67). After the fall and debasement of money in 5 Edw. VI., debt was brought on

lease for two years' rent in arrears, which fell due at Mich. Term, 2 Edw. VI. The lease was dated November 21; 31 year Henry VIII. At the time the rent fell due the shillings were current at 12 pence, which were decried to 6 pence at the time of bringing the action. The defendant pleaded tender on days of payment in *peciis monete anglie vocat* shillings, and averred that each shilling was payable at 12 pence when tendered, the plaintiff received the money after demurring. "If foreign coin be made current at a higher rate than its intrinsic value by proclamation, a tender in such money is good in Great Britain." (Bacon's Ab. Tender, b. 2, vol. 7, p. 325.) The same principles have been upheld by the American courts. In *Faw vs. Marteller* (2 Cranch, 20). In the year 1779, when Virginia currency consisted of paper money, Faw, obligated himself to pay as yearly rent twenty-six pounds Virginia currency; but paper currency, which was lawful money at that date, had been withdrawn by a law of 1781, the defendant insisted he could only be compelled to pay in 1782 what this Virginia currency was worth at the time of the contract; that he had not contracted to pay specie, which was the legal currency at the time of the judgment; but the court by Chief Justice Marshall held: "This can only mean money current at the time the rents shall become payable. * * * The position that the value of the money at the time when the consideration for which it was to be paid was received is the standard by which the contract is to be measured, is not a correct one."

The case of *Dowmans vs. Dowmans' exr.* (1 Wash. Virg. R., 26), was a suit on bond for £53 payable in Virginia currency; the court held that there was no paper circulation held as current money in April, 1790; that the tender must be money current at the time of the tender, else it is not a legal tender; and that the currency named in the bond having ceased to be current money, would not do to tender; that the legal effect of the bond was to pay £53 in such currency as was current at the time of payment.

In *United States vs. Robertson* (5 Peters, 644), the supreme court of the United States, by Chief Justice Marshall, said: "An obligation to payment generally is discharged by a payment in legal currency."

It will be perceived that the debtors derived the benefit from the alteration of the currency in the recited English cases, whilst the creditors derived the benefit in the American cases.

In the debasement of the gold coins by Congress, the debtors derived a great benefit; but these benefits to private parties were not the moving motive of either England or America, are merely incidental to a great public policy, adopted to meet the exigencies of the times, protect the public, and perpetuate the government.

Private interest, including gains and losses, must be secondary and subsidiary to the great public policy so essential to the protection and preservation of the government. An

overruling necessity has required of Congress another change in the lawful current money of the country; the private interest of the debtor class is benefitted by this change, and the creditor class may be injured; but why should the creditor, any more than the debtor, be permitted to obtrude his private interest to thwart an essential public policy?

These powers were given for wise and beneficent purposes. It was not to be presumed that Congress would lightly trifle with the great interest of the community, work a revolution in the currency and commerce of the country, without the most urgent necessity.

The necessity for these changes can not be foreseen and provided for, but must be acted on when presented. The hazards of such changes are mutual; no man can, therefore, rightfully complain of the injustice of his government when these changes are so cautiously made, and for such weighty reasons. The love of gain may not be gratified, and private cupidity may be disappointed, but the patriotic will find ample compensation for his incidental losses in the welcome reflection that his government has been rescued from ruin, its free institutions perpetuated, his private fortune secured from wreck and ruin, and his individual liberty and the liberty of his posterity guaranteed by the preservation of the Government, and that this legal-tender act has contributed much to this preservation.

Now that many hundreds of millions of dollars of this currency has found its way into circulation, the commerce of the country has been adapted to this new medium. Millions upon millions of both public and private liabilities, entered into upon the faith that it was a legal tender; hundreds of banks organized upon this basis, with many millions of circulation; the soldiers and sailors been paid with it for their perilous and meritorious services, neither justice nor sound policy requires that this new state of affairs should be unsettled, another commercial and financial revolution produced, private fortunes wrecked, private rights disturbed, and the great interest of society wantonly tampered with.

Before courts should be expected to pronounce judgments thus unsettling acts of Congress, the great business of communities, and producing such momentous and sad results, a stern, unrelenting necessity to preserve the Constitution should be clearly demonstrated.

There is but one legal standard by which to measure the payment of debts, and that is to require the debtor to pay the number of legal dollars which may be called for by the contract and adjudged against him.

The law does not admit of any difference in the value of dollars of its legal currency, however the market value of the one or the other currency may differ or vary. The gold dollar declared to be a legal tender will discharge precisely a dollar, nothing more; the treasury note dollar declared to be a legal tender will discharge precisely a dollar, nothing

less.

This rule of the law is plain, easy, and simple, and harmonious in all its workings. Depart from it, and confusion and embarrassment meet us everywhere.

The discharge of debts is rendered complicated and uncertain. If a debtor can not pay a thousand dollars of his indebtedness with a thousand dollars of any currency, made a legal tender by law, what amount of such currency will discharge it? Who is to ascertain the amount which will be required? And by what means is it to be ascertained? By what market or standard can it be ascertained? Is the court pronouncing the judgment to say it may be discharged by the payment of one amount of one kind of legal currency, and by a different amount of another kind of legal currency? What law authorizes any such judgment? If the court is not to do it, is the collecting officer to determine this? And, if so, is he to hear the conflicting evidence of witnesses and be governed by the conflicting values of different markets; or how is he to arrive at just and certain conclusions? And is he to judge at his peril, or is he to be wholly irresponsible? Is his judgment to be final, or subject to revision? And if subject to revision, by what mode of operation and by what forum?

These questions are suggestive of the absurdity of departing from the harmonious, simple, and uniform rule of the Constitution and the laws, to regard dollars, declared by law to be a legal tender, of the same exact value, whether of coin or paper, regardless of the market value of either or both. With this rule the duties of courts and collecting officers are simple, first for the courts to ascertain how many dollars are to be paid, and then for the collecting officer to ascertain whether the currency offered is of either kind made by law a legal tender.

Much light has been shed upon this subject by the able opinions of Judges Daviess, Balcom, Wright, Emmott, and Marvin, of the appellate court of New York, in the case of *Meyer v. Roosevelt*, and other cases tried at the same time; and by the United States court of claims, opinion by Chief Justice Casey, in *Latham v. United States*, March 6, 1865.

Respect for the legal learning and integrity of my two colleagues, Peters and Robertson, would have made it agreeable to concur with them, but for my own conscientious convictions that this act was but the exercise of constitutional power by Congress. The disagreeable necessity of dissenting from their opinion is, however, to some extent, relieved, when I reflect that the constitutionality of this act was upheld by the experienced and able circuit judge who presides over the 13th district, in one case, and by that learned jurist, the venerable chancellor of the Louisville chancery court, in two other cases now before this court.

***Shollenberger v. Brinton*, 52 Pa.St. 9 (1866).**

Supreme Court of Pennsylvania.

Shollenberger

v.

Brinton.

Mervine

v.

Sailor et al.

Davis et al.

v.

Burton et al.

Kroener

v.

Colhoun.

Sandford et al.

v.

Hays.

Graham

v.

Marshall et al.

Laughlin et al.

v.

Harvey.

1866.

1. Congress has constitutional power to issue treasury notes of the United States and make them lawful money and a legal tender for the payment of debts.

2. The Act of Congress, of February 25th 1862, authorizing the issue of such notes, is constitutional.

3. The principal sum which redeems a ground-rent, is a debt within the meaning of the act.
4. A ground-rent, payable in “* * *dollars, lawful silver money of the United States of America,” is redeemable by such notes. *Shollenberger v. Brinton*.
5. So the half-yearly instalment of a ground-rent, payable in “* * dollars, lawful silver money of the United States, each dollar weighing 16 pwt. 6 gr. *at least*.” *Mervine v. Sailor*.
6. So a ground-rent payable in “lawful money.” *Davis v. Burton*.
7. So a ground-rent payable in “lawful money of the United States.” *Kroener v. Colhoun*.
8. So a certificate of deposit of “gold, payable * * * in like funds with interest.” *Sandford v. Hays*.
9. So a note for a sum of money marked in margin “\$14,145 specie,” which by bankers’ rules meant gold or silver coin. *Graham v. Marshall*.
10. So a note for “* * * dollars in gold.” *Laughlin v. Harvey*.
11. Where the errors assigned are not sustained by a majority of the Supreme Court, the judgment of the court below is affirmed.

The principal question in all these cases being the effect of the Acts of Congress making treasury notes a legal tender in payment of debts, they were considered and decided together.

SHOLLENBERGER *versus* BRINTON.

CERTIFICATE from *Nisi Prius*.

This was a bill by William Shollenberger against Mary M. Brinton. Mary M. Brinton conveyed a lot of ground in Philadelphia to John McDowell, Jr., reserving a yearly ground-rent of \$211.50, *lawful silver money of the United States of America*. The ground-rent deed contained also the proviso, “That if the said John McDowell, Jr., his heirs or assigns, shall and do at any time hereafter pay or cause to be paid to the said Mary M. Brinton, her heirs or assigns, the sum of *three thousand five hundred and twenty-five dollars, lawful money as aforesaid*, and the arrearages of the said yearly rent to the time of such payment, then the same shall for ever thereafter cease and be extinguished, and the covenant for payment thereof shall become void.”

John McDowell, Jr., subsequently conveyed the ground to William Shollenberger, the complainant, who, on the 28th day of January 1863, tendered to the said Mary M. Brinton \$3525, in the legal tender notes of the United States (commonly called greenbacks), and a deed of release prepared at the cost of the complainant, and demanded that she execute the extinguishment of said ground-rent, which she declined to do.

The bill prayed that the said Mary M. Brinton be decreed specifically to perform the conditions in said deed, and that she be decreed to extinguish, release and for ever quit claim to such ground-rent, upon complainant paying to her the sum of \$3525, and such arrearages of rent as were due upon the same at the time of the tender.

The defendant demurred to the bill for the following cause:—

That the deed recited said ground-rent as reserved and payable *in lawful silver money of the United States of America*, and the redemption *in like lawful silver money*, and that it nowhere appeared in said bill that the complainant had tendered to pay the sums named in lawful *silver* money of the United States of America.

It was agreed, in a case stated for the opinion of the court, that the tender was made in the notes of the United States of America, issued under the authority of the Act of Congress of February 25th 1862, commonly called “legal-tender notes,” and in no other kind of money.

The demurrer was argued before Agnew, J., who delivered the following opinion, overruling the demurrer:—

“This is a demurrer to the complainant’s bill, brought for specific performance, to compel the defendant to execute a release and extinguishment of a ground-rent.

The defendant sold to John McDowell, whose title complainant owns, a lot in Philadelphia upon a ground-rent of \$211.50, payable half-yearly in ‘lawful *silver* money of the United States of America.’ The deed contains the following clause of redemption:

‘Provided always, nevertheless, that if the said John McDowell, or his heirs or assigns, shall and do at any time hereafter pay or cause to be paid unto the said Mary M. Brinton, her heirs or assigns, the sum of \$3525, *lawful money as aforesaid*, and the arrearages of said yearly rent to the time of such payment, then the same shall for ever thereafter cease and be extinguished, and the covenant for the payment thereof shall become void, and thereupon the said Mary M. Brinton, her heirs and assigns, shall and will, at the proper

costs and charges in the law of the said grantee, his heirs or assigns, seal and execute a sufficient release and discharge of the said yearly rent, hereby reserved, to the said John McDowell and his heirs and assigns for ever, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.'

The complainant tendered to the defendant the sum required to extinguish the ground-rent in *legal-tender* notes of the United States, which the defendant declined to accept, and the point raised by the demurrer is, that the tender was insufficient, because not made in current silver money of the United States.

The question of the constitutionality of the Legal Tender Act was not raised in the argument, and the case rested on the grounds that the subject of payment was not a *debt*, but an *estate* subject to redemption only on stipulated terms, and that the owner of the rent only bargained that the owner of the land *might buy it off* upon fixed terms.

I think neither of these positions is correct. The sum which was agreed to be paid in extinguishment of the rent is not an estate, when the owner of the land elects to pay it. The mistake is in confounding the value of the interest or estate which the owner of the ground-rent has in the ground-rent, with the price or sum to be paid to extinguish it. Unquestionably the interest of the ground-rent owner is really subject to descent, to execution and to alienation as real estate. But the money which the purchaser of the land agreed to pay, is the price or consideration of the estate of the ground-rent owner paid to extinguish it.

What was the transaction? The ground-rent owner was the owner of the land. He agreed to sell it to the purchaser for an alternative consideration, to wit:— The interest of the price, \$211.50, payable annually for ever if the purchaser choose so to pay; or when he elects, the price itself, \$3525. The consideration is therefore \$211.50 annually, or \$3525 when the purchaser chooses so to pay it. When the deed was made the case then stood thus;— The grantee became vested with a freehold of inheritance in the land, and the grantor with an incorporeal hereditament in the rent, subject by the terms of the conveyance itself (not a new bargain) to be divested by the payment of the price in the alternative form after election.

Thus a simple analysis of the transaction shows that the purchaser, when he elects to pay the principal, does no more than pay the price set upon the property by the terms of the original bargain, and that at the moment when he makes his election to cease paying the annual price and pay the principal, he has made it a debt, that is, a specific sum of money, which, by the deed, he owes and agrees to pay when he elects to do so.

What he pays is not an estate, but it is that which he pays for the estate. It is money, it is specific and certain, and it is that which he has agreed by express terms to pay to extinguish the estate of the ground-rent owner. What is this but a debt? In what does it differ from any other contract where an option or election is given to the payer? Suppose the subject of sale to be a chattel instead of land, and the purchaser agrees to pay the annual interest of the price for ever, or, at his option, to pay the principal. Does the want of power in the vendor to compel him to make his election to pay the principal change the character of the principal as a debt when he does elect to pay it? How is this case any different? If the ground-rent owner cannot enforce payment of the principal, it is not because the money when offered to be paid is not of the nature of a debt, but because he has given his grantee an option to pay in either way. It is his deed or contract which prevents the exaction, not the nature of the sum to be paid. It is a sum of money arising in contract, it is the price of an estate, it is paid to extinguish it, and it is certain and fixed. If this be not a debt, what is?

The other objection is not more sound, that the owner of the ground-rent only bargained that he would sell on stipulated terms. The idea, as I understand it, is this:— That by the terms of this clause the owner of the ground-rent offers to sell the ground-rent to the grantee upon his paying to the former so many dollars in silver money, and that until the grantee comes to his terms he is not bound by the offer; but it is an unaccepted proposition until the grantee comes up to his terms of silver money. This is fallacious. The redemption clause is not a contract for a future sale of the ground-rent, but is a provision for the cessation and extinguishment of the ground-rent when the stipulated price, the sum already agreed upon for the purchase, shall be paid. It is a proviso that when the sum is paid, with arrears of the yearly rent, “then the same (to wit, yearly rent) shall for ever thereafter cease and be extinguished, and the covenant for the payment thereof shall become void.’ It was, therefore, not an offer to sell, but the sale had been made, the deed was its execution, and the clauses merely provided for the alternative mode of payment. This will be the more manifest from the nature of the deed. It conveys the land for the nominal consideration of one dollar, a present valuable consideration introduced to give the deed the legal effect of a feoffment or deed with livery of seisin. But the real consideration is the covenant of the grantee to pay the annual interest or rent; or, when he so elects, the stipulated price in full; and the grantor presently covenants in the deed that the payment when made shall extinguish the covenant to pay rent. The instrument is operative at the time of its date, and needs no new act of the grantor to give it effect.

It is because the grantee so provided and covenanted in the deed itself that extinguishment takes place. It is true, the deed provides for a release and discharge of the yearly rent; but this, it is manifest, was but to preserve the evidence, and provide for a clean record, so that the registry which shows the charge should also show the discharge. The operative act is

the payment. There can be no doubt that payment in itself discharges the rent, and if the ground-rent owner should die the next moment, the evidence of the payment would be all-sufficient for the owner of the land; and the reason is, that this is the provision of the deed itself. On payment being made, the language is: ‘Then the same (rent) shall for ever thereafter cease and become extinguished.’

It follows from these considerations that the demurrer is not well taken. It must be overruled, and the defendant is ordered to answer the bill within thirty days from the filing of the order.”

A decree was accordingly entered on the case stated in favour of complainant; the defendant appealed, and the case was certified to the Supreme Court in banc.

The following assignment of errors was filed:—

The court erred:

1. In not entering judgment in favour of the defendant upon the special demurrer filed by her.
2. In holding that the complainant was not obliged to aver or prove the payment or tender of lawful silver money of the United States to entitle him to a release and extinguishment of the ground-rent.
3. In holding that under the terms and conditions of the ground rent deed the complainant was entitled to a release and extinguishment of said rent upon payment or tender of the amount of the principal and arrears of the ground-rent in notes of the United States, of the character and description set out in the case stated filed.
4. In making a final decree in favour of the complainant, and in not making a decree therein in favour of the defendant, dismissing complainant’s bill with costs.

Joseph B. Townsend and Meredith, for appellant (waiving an argument on the question of the constitutional right of Congress to issue the notes directed by the Act of the 25th of February 1862, upon the terms and with the effect stated in that act), contended that the nature of the estate of the defendant in the ground-rent and of the plaintiff in the land out of which it is reserved and of the contract or covenants between them, as contained in the ground-rent deed, was of that character that the defendant was entitled to have the specific consideration or equivalent called for by the deed before she could be compelled to part with her inheritance in the ground-rent, and, if these notes be legal tender for any purpose, they are not for the purpose of paying off this ground-rent. It is a cardinal rule in all proceedings in equity to compel specific performance of a contract, that the complainant must specifically fulfil or tender to fulfil all his part of the contract: *Brightly’s Equity*, pp.

187, 188, 189; *Fisher v. Worrall*, 5 W. & S. 485; *Benedict v. Lynch*, 1 Johns. Chan. Rep. 364; *Greenlee v. Greenlee*, 10 Harris 235; *Chess's Appeal*, 4 Barr 52.

A specific performance is of grace and not of right; and unless when controlled by arbitrary enactment, a chancellor never decrees specific performance of a contract, except one which is a source of mutual obligation and mutual remedy: *Wilson v. Clarke*, 1 W. & S. 555; *Bodine v. Glading*, 9 Harris 53.

Even though the writing or contract be clear, if any circumstances be shown outside of the contract making it inequitable to interpose, a court of equity will not interfere. In all cases of doubt the court will withhold its aid, for it requires much less strength of case on the part of the defendant to resist than, on the part of the plaintiff, to maintain a bill to enforce specific performance: *Dalzell v. Crawford*, 1 Parsons 45; *Farley v. Stokes*, Id. 429; *Hawk v. Greensweig*, 2 Barr 298; *Brawdy v. Brawdy*, 7 Id. 158.

The contract in this case lacks mutuality. It is never in the power of the owner of the ground-rent to compel the owner of the land to redeem it; the right of redemption is wholly optional with the owner of the land, and to be exercised at his volition only, provided he will strictly comply with the conditions upon which the deed stipulates that he shall be entitled to it.

The rent, until actual redemption, remains realty, susceptible of devise, partition, encumbrance and alienation, as other real estate: *Ingersoll v. Sergeant*, 1 Whart. 337; *Franciscus v. Reigart*, 4 Watts 98; *Kenege v. Elliott*, 9 Id. 262; *Skerrett v. Burd*, 1 Whart. 246; *Bosler v. Kuhn*, 8 W. & S. 183; *Irwin v. Bank of United States*, 1 Barr 353; *Juvenal v. Patterson*, 10 Id. 282; *Mullock v. Souder*, 5 W. & S. 198.

If there be any difference in the actual value between the kind of money stipulated for in the deed and the kind tendered, it cannot be inequitable for the appellant to decline receiving it.

The lawful silver dollars of the United States, stipulated for in the deed, are the coined metallic money of the weight and standard established by the Acts of Congress.

The Act of Congress makes these notes legal tender in payment of debts, but the principal sum for which a ground-rent can be redeemed is not a debt in any aspect. Payment can never be enforced by the owner of the rent. The rent as reserved is in perpetuity and so remains for ever, unless the tenant choose to avail himself of the privilege of buying it off.

Congress did not assume to fulfil impossibilities or to declare that the paper was actual

coined dollars, or in other words, the very thing which on its face it promises the government shall pay to the holder.

F. Carroll Brewster, for appellee.— The Act of Congress February 25th 1862 is constitutional. The power is expressly conferred on Congress by the Constitution “to raise and support armies,” and “to provide for and maintain a navy.” To accomplish these ends, money would be absolutely essential.

Congress has authority to make all laws which shall be necessary and proper for “carrying into execution the foregoing powers.”

In *McCullough v. Maryland*, 4 Wheat. 316, and other cases, it was settled that with Congress is “the choice of means,” and all the “discretion with respect to the means.”

The sixth enumeration of the powers of Congress confers authority “to coin money.”

The word “coin” is not confined in its application to the stamping of pieces of metal.

History tells us of the coining of leather in the days of Seneca. The expression in Seneca is “*corium formâ publica percussum*.” The test is the thing done, not the substance on which it is done.

This ground-rent can be extinguished other than by payment or tender of *silver* dollars. In *Meyer v. Roosevelt*, Leg. Int. Oct. 16th 1863, Judge Wright says, “A treasury-note of the denomination of ten dollars is *legally as valuable, for the purposes of money*, as a coined eagle.”

The case of *The Metropolitan Bank and Shoe and Leather Bank, Respondents, v. Henry H. Vandyke, Appellant, Lewis H. Meyer, Appellant, v. James J. Roosevelt, Respondent*, Leg. Int. Nov. 27th 1863, per Mr. Justice Davies, is also to the same point.

C. J. Marshall, in *Faw v. Marsteller*, 2 Cranch 20, said, “The position, then, that the value of the money at the time when the consideration for which it was to be paid was received is the standard by which the contract is to be measured, is not a correct one.” In *Pong v. De Linsey et al.*, 1 Dyer 82 a, “certain money was current in England in the place of sterlings, called pollards,” viz., two pollards for one sterling, and defendant tendered a moiety of a debt on a bond for £24 sterling, and the tender was held good. He relied also on a case in Davies’s Reports, p. 28, as analogous to this. Queen Elizabeth, in order to pay the royal army for suppressing the rebellion of Tyrone, caused a great quantity of mixed money to be coined. Before this proclamation was issued, when the pure coin of England

was current in the kingdom, one Brett became bound to pay one Gilbert “£ 100 *sterling, current and lawful* money of England.” At the appointed time he made a tender of £100 in this mixed money. It was held that the “mixed money, being established in this kingdom before the day of payment, may well be tendered in discharge of the said obligation, and the obligee is bound to accept it,” and “it is sufficient if he be always ready to pay the mixed money according to the rate for which they were *current at the time of the tender*.”

If the covenantor complied with the covenants of his deed, he is entitled to specific performance. The tender of the principal sum named in the deed, with arrearages, was made in the legal-tender notes of the United States. Was the tender good? The question is therefore reduced to two points:—

1. Whether the word “silver” in the covenant is a mere superfluous designation.
2. Whether a ground-rent is a debt within the meaning of the Act of Congress creating the legal-tender notes.

The appellant bases her argument on wrong premises. She starts out with the idea that this is a covenant to pay this rent and extinguish the same in silver dollars of the United States, whilst the covenant for the rent is “the sum of two hundred and eleven dollars and fifty cents, lawful silver money of the United States.”

All money of the United States government is lawful money. These notes are a legal tender in lieu of silver and gold, and made equal to specie by the sovereign power of the land.

The contract is not for so much metal. “Lawful silver money” is only a designation; “dollars of money” is the condition.

The appellant cannot claim that her rent is \$211.50, and then say because a silver dollar is worth two dollars of any other article or commodity, that therefore she is to receive \$423 for her rent. Her rent must be a certainty. It cannot depend on any subsequent valuation to settle it. If it lose its certainty the rent is gone, and the contract changed. If appellant is entitled to a greater amount of lawful money than \$3525 for her principal, then her rent would increase in the same proportion.

2. Is this principal sum a debt within the meaning of the Act of Congress?

“A payment cannot be made of any thing before it is a debt.” Evans’s Pothier on Obligations, Art. 4, p. 510.

A debt in its unlimited sense signifies any performance or payment which one can

rightfully claim from another, be it money, services or things. It is not a contract, but the result of a contract: Mackeldey's Roman Law, vol. 2, p. 121; Stephen's Commentaries 187; 3 Metcalf's Rep. 522; 1 Burrill 450.

But it is said that this is an estate; and so it is, but with a defeasance. The extinguishment is not a separate contract from the creation of the rent. It is the same contract with the defeasance. The argument of the appellant that there is no mutuality is not sustained, for a defeasance cannot be without mutuality.

It is said that these notes are mere promises to pay; that is true. It is not designed to give any forced or unnatural construction to these notes, nor to transmute them to silver, but Congress has made them a legal tender in payment of debts, and it is submitted that this whole contract or covenant is within the meaning and intent of the Act of Congress: Meyer v. Roosevelt, Leg. Int. Oct. 16th 1863; Dowmans v. Dowmans, 1 Wash. Virg. Rep. 26; Pough v. De Linsey, 1 Dyer 82 A; Year Books, 2 Hen. VII., p. 56; Barrington v. Potter, Dyer 81; Bac. Abr., Tender, B 2, Vol. 7, 325; U. S. v. Robertson, 5 Peters 644; James v. Steele, 9 Bart. 482; Conkey v. Hart, 3 Kern 22; Mason v. Hull, 12 Wheat. 370; People v. Supervisors of Orange, 17 N. Y. 235; Faw v. Marsteller, 2 Cranch 20.

The appellee therefore submitted:—

1. That the law favours the unfettering of estates. That it is the policy of the law to render them as easy of transmission and sale, and as free from encumbrance, as possible.
2. That it is the right of every landowner to free his estate by the tender of the amount of the encumbrance in "lawful money," and that no construction of the deed is to be favoured which throws impediments in his way.
3. That it is the constitutional right of Congress "to coin money and regulate the value thereof." That, having acted upon this grant, there is no limitation to their power, and they can raise or lower its standard at pleasure. That at all times their constitutional acts should be carried into effect as the "supreme law of the land," and that especially in times like the present, no construction of the law should be favoured which is calculated to embarrass the government or depreciate its currency.
4. That Congress having declared that the notes tendered by the complainant are "lawful money," neither the defendant nor the court can say that the tender was not in "lawful money." And if "lawful money," then it fulfilled all the requirements of the law and of this deed, which could never exact more than \$3525 in "lawful money."
5. That the addition of the word "silver" is a mere description of the lawful money, and binds neither party. It means simply a kind of lawful money in which the tender *may* be made, not a prohibition of other forms of money; not a law that there shall be *no other* kind of lawful money for the purposes of this deed. If it means that — then,

1. It is absolutely void, for no party can exact and no party can consent to a stipulation impugning the power of the law-making branch of the government.
2. It would lead us, as already demonstrated, to most absurd results.
 - (A.) If silver should appreciate 200 per cent., the tenant would be ruined.
 - (B.) If silver dollars should be called in and cease to exist, the landlord could never be paid, and if there were no right of re-entry, would lose his estate.

MERVINE *versus* SAILOR *et al.*
ERROR to the District Court of Philadelphia.

This was an action of covenant by Thomas Mervine against Henry Sailor, John F. Trout and Edwin Greble.

The plaintiff declared on a ground-rent deed dated March 27th 1839, conveying a lot of ground on James street, Philadelphia, to the defendants, they “yielding and paying therefor and thereout the yearly rent of \$570, lawful silver money of the United States, each dollar weighing seventeen pennyweights and six grains at least, in half-yearly payments;” and averred, that the defendants covenanted to pay the rent as aforesaid, and, by virtue of the deeds, entered upon said lot: that on the 1st of April 1863, the sum of \$285 in the above-mentioned silver money, each dollar weighing, &c., with interest, was due and unpaid, &c.

The defendants pleaded that on the 3d day of April 1863, they tendered the half-year’s ground-rent, with interest, “in the *lawful money* of the United States,” which the plaintiff refused; that they have always been ready to pay the said sum, and “now bring the same here into court,” &c.

The plaintiff replied, that the defendants did not tender the rent “in lawful silver money,” &c., but “in promissory notes, or paper money, of the United States, issued under the Acts of Congress of February 25th and July 11th 1862, to the nominal amount on their face of the said sum of \$285 – the same not being of equal exchangeable value with the silver dollars aforesaid,” &c.

To the replication the defendants demurred, showing for cause of demurrer, “that the said notes issued under the said Acts of Congress aforesaid * * * were lawful money, and a legal tender in payment of the said debt.”

The court gave judgment for the defendants on the demurrer: the plaintiff removed the case by writ of error.

The errors assigned were:—

1. Entering judgment for the defendants on the demurrer to the replication of the plaintiff.
2. Not entering judgment on the demurrer in favour of the plaintiff.

G. M. Wharton, for plaintiff in error.— The contract was an unqualified engagement, and imported that the payment was to be in standard silver money, of a given weight, of the specified standard of fineness. It was for the payment of a certain weight of standard silver in the shape of dollars. The defendants assumed the risk of their ability to perform this contract: *Sjoerds v. Luscombe*, 16 East 201; *Hills v. Sughrue*, 15 M. & W. 261. If the dollars could not be procured, the requisite weight of silver of the standard fineness, or any other kind of money of like exchangeable value with the dollars, would have been a sufficient tender: but not paper money of an exchangeable value not equal to dollars. The measure of damages for breach of a contract such as this, is the value of the money contracted to be paid: *Foutsell v. Burrows*, Carthew 255; *Hixon v. Hixon*, 7 Humphrey 33. The several Acts of Congress, viz., April 10th 1806, April 2d 1792, January 18th 1837, June 28th 1834, March 3d 1843, show that the *weight* of the standard metal was an essential element in its quality as a lawful tender; and fixing a minimum *weight* in this deed, proves that the parties intended that the landlord should be sure to receive for his rent a determinate weight of silver. When, therefore, the defendants tendered something of less value, they must show that this, by some constitutional law, is made an equivalent substitute for the silver money contracted to be paid.

Then, it is contended that,

1. Congress cannot issue paper money; but
2. If they can, they cannot make it a legal tender.
3. If they can do so in regard to contracts made after the passage of the act, they cannot do so with regard to those made before.
4. Congress has no power to alter or nullify contracts made in a state by the citizens thereof.
5. If a contract made in a state by its citizens requires payment in a particular kind of money, Congress cannot compel the creditors to receive less than the market value of the money called for by the contract.

In this case the contract required the rent to be paid in silver dollars of the weight specified: the tender was in paper money of less value, and, therefore, the defendants failed to comply with their contract.

1 and 2. Congress has no powers except those expressly granted or necessarily implied: 1 Kent's Com. 243, 313; 1 Story on Const. 382-442. Article I. § 8 of the Constitution contains an enumeration of the powers of Congress. The only power given as to the

subject-matter, is to “coin money, regulate the value thereof and of foreign coin.” “To coin” refers to metallic money. “To regulate the value,” refers to the money coined, both from the position of the words and from the subsequent expression, “foreign *coin*.” United States v. Marigold, 9 How. 560; Fox v. Ohio, 5 Id. 432; Ogden v. Saunders, 12 Wheat. 213. No power can necessarily be inferred to be granted to Congress, because prohibited to the states. Congress has express power to *coin* money. Coin, therefore, was the only thing which the States could make a legal tender. As the money coined by authority of Congress furnishes the means by which debts can be compulsorily paid, there is no need to infer a power to make other money. Congress can make laws necessary to carry into execution the granted powers. Although this does not mean laws absolutely necessary: Commonwealth v. Lewis, 6 Binn. 270; McCullough v. Maryland, 4 Wheat. 413; yet it does not refer to the powers themselves, but to the means of carrying them out.

The power to tax, to pay debts, and to borrow money, has no natural reference to making money. The power to regulate commerce relates to superintending the interchange of commodities, &c., not to creating a medium of exchange. The issuing of paper money as an evidence of indebtedness, and as embraced under a liberal signification of the power to borrow money, has no connection with the power to make that money a legal tender. The power assumed to make paper money a tender, implies a power to make anything a tender irrespective of the terms of private contracts.

3, 4 and 5. It is a dangerous doctrine, that Congress may modify or annul private contracts. A contract to pay silver is essentially modified, if not annulled, where a party is compelled to accept something else. The dictum of Judge Washington in Evans v. Peters, Peters C. C. Rep. 337, that the Constitution does not forbid Congress to pass laws violating the obligation of a contract, has not been affirmed by any decision of the Supreme Court. There may be a difference between the constitutionality of a law which Congress has a clear power to pass, and of a law which impairs the obligation of a contract relating to a matter not clearly within its power: Ex parte Klein, 1 How. 277 in note. The obligation of a contract is impaired, if it cannot be enforced by virtue of some legislative enactment: McCracken v. Hayward, 2 How. 608.

It is an unwarrantable stretch of language to assert that the legal tender clause of the Act of Congress makes a paper dollar equal to the silver dollar of this deed. Congress has sanctioned by enactment a difference between paper and silver money; paper cannot be offered for duties. Interest on some loans is payable in gold – on others in paper. The United States buys and sells gold in exchange for paper, and pays and receives the proportionate difference.

G. Bleight Browne, for defendants in error.— The words “lawful silver money, each

weighing,” &c., are only descriptive and surplusage. All debts then were demandable in silver or gold. This could have been paid in gold, although “silver” is in the covenant. The weight in the covenant is more than the full weight of silver dollars at its date. The weight has been changed by various Acts of Congress, and was considerably reduced by the Act of January 18th 1837. It cannot be doubted that a dollar of this reduced weight would be a legal tender for a debt due before the reduction: yet, in fact, the creditor received less than he contracted for.

Ground-rent is not a debt till due, and is payable in whatever is then lawful money. The notes represent gold and silver, as the government is bound to pay them eventually in gold and silver, for which they are but a temporary substitute.

DAVIS *et al. versus* BURTON *et al.*
CERTIFICATE from Nisi Prius.

This was a bill by Amos Burton and Elizabeth his wife against Amelia Davis, George Williams, and Amos Ellis, executors and trustees, &c., of Benjamin Davis, deceased.

The bill sets forth that Benjamin Davis, March 8th 1853, conveyed to John Davy in fee a lot of ground on Thirteenth street, Philadelphia, reserving a yearly ground-rent of \$72, payable in *lawful money*, with the proviso that upon the payment of \$1200 and the arrearages of rent, the rent should cease and the grantor would release the ground-rent; that Elizabeth Burton, one of the defendants, now the owner of the lot, on the 1st day of July 1864, tendered to the defendant \$1200, the arrearages of rent and costs of the release, in the lawful money of the United States, which were refused; and praying that the defendant might be required to release said ground-rent on payment of said \$1200, &c.

The answer, admitting the allegations generally, avers that the complainants did not make the tender in *gold or silver money of the United States*, but offered to pay in the notes of the United States, called “*Greenbacks*,” deny their obligation to receive such money, and declare their willingness to execute a release of the ground-rent upon its payment in lawful gold or silver money of the United States.

The case was heard on bill and answer, it being admitted that the tender was made in the legal-tender notes issued under the Act of Congress of February 25th 1862.

Thompson, J., delivered the following opinion:

“The main question presented here was heard and decided by my brother Agnew, in *Shollenberger v. Brinton*, on demurrer to that bill. At present I will follow that ruling,

reserving to myself entire freedom of thought and action on the main question, when it comes before this court, in that case and in this.

That question regards the constitutionality of the legal-tender notes authorized by Congress to be issued by the treasury department of the United States, under the Act of 25th February 1862.

A decree *pro formâ* in favour of the plaintiff in this bill is ordered to be entered, as this is in accordance with the decision alluded to, as made in the case of Shollenberger v. Brinton.”

A decree was entered accordingly and the defendants appealed, assigning for error:

1. Entering a decree for the complainants.
2. Decreeing that the ground-rent was a debt within the meaning of the Act of Congress of February 25th 1862.
3. Decreeing that the tender of United States treasury notes to the defendants was a sufficient tender.
4. Deciding that the Act of Congress of February 25th 1862, was constitutional.

Thorn, for appellants.— Is a ground-rent such as this, a debt within the Act of Congress? for the notes issued by virtue of it are made a legal tender for all debts except duties and interest. A *debt* is always a sum of money which, at some time or other, the person to whom it may be due or who is entitled to its payment, may recover by action if it is withheld, and the person by whom it is to be paid may, at some time or other, require to be taken by the creditor.

The principal of a ground-rent does not come within any meaning usually applied to “debt.” The grantor cannot constrain the grantee to pay the money or buy the land. A *ground-rent* is real estate: *debts* are *personalty*.

In the Circuit Court of the United States, Judge Grier held that a ground-rent is not a debt which can be discharged by legal-tender notes: *Reading Railroad v. Morrison*. Judge Allison, in the Common Pleas of Philadelphia, held the same opinion: *Patterson v. Blight*.

Is the Act of Congress constitutional? This question has not been decided by any court of superior jurisdiction; but Judge Cadwalader, in *Reading Railroad v. Morrison*, in the Circuit Court of the United States, and Judge Sharswood in *Borie v. Troth*, in the District Court of Philadelphia, in able and elaborate opinions, held that the act is unconstitutional. These opinions are referred to as the argument on that question.

John A. Burton, for appellees.

1. Is a sum of money paid which extinguishes a ground-rent, the discharge of a debt against the grantee or the land?

A ground-rent is a rent service; an incorporeal inheritance in fee, and reserved out of the land to secure the performance of a collateral act: *Ingersoll v. Sergeant*, 1 Wh. 345; *Bosler v. Kuhn*, 8 W. & S. 183. As a fee, it has incidents belonging to realty; as incorporeal; it issues out of something corporeal; as collateral security, it relates to something outside of itself. The payment is the collateral thing to be done. The estate of the ground-landlord is in the right both to the yearly rent and the principal; which is reserved as security for the performance of the agreement in the deed. The agreement is “yielding and paying therefor,” &c. Paying for what? for the land conveyed. The price of the land is the principal sum fixed by the original contract for its purchase. He may elect to pay a yearly sum for ever or the gross sum agreed upon; when he elects it becomes a debt; it is due on a certain contract. The grantor has agreed that there may be an election, and that when made he will receive the money. If the grantee owes nothing after an election, how can he compel the grantor to receive any money?

This is a bill for specific performance to compel the landlord to execute a release, which he agreed to do, not on tender of gold and silver, but of “lawful money,” which means money lawful when the tender is made: 7 Bacon’s Abridgment, *Tender*, B. 2, 325; *United States v. Robertson*, 5 Pet. 644. If lawful money be tendered, how can it affect the case whether a ground-rent be a debt or an estate?

2. Is the act constitutional? The Constitution granted to Congress implied powers with means to carry them into effect. Amongst these are power “to carry on war, maintain a navy, borrow money and regulate commerce,” and in war, paper money is necessary as a means. The Constitution does not say what shall be a legal tender or who shall declare it, but they prohibit States from making anything but gold and silver a legal tender; as the States are prohibited, it must by necessary implication belong to the United States. If paper money as a legal tender be necessary, Congress can issue it. If the measure be appropriate to the end, the degree of necessity is exclusively for Congress: *United States v. Fisher*, 2 Cranch 358. The government must be enabled to draw on the resources of the nation to the extent of her emergencies, which can be done only through paper money. For a war, money is the prime necessity, and Congress was bound to raise it: *United States v. Marigold*, 9 How. 560.

KROENER *versus* COLHOUN.

APPEAL from the Court of Common Pleas of Philadelphia. In equity.

This was a bill by John Kroener against William Colhoun.

The bill set forth that the defendant, by indenture dated the 6th of August 1862, conveyed to the complainant, in fee, a lot of ground on Franklin avenue, Philadelphia, reserving a yearly ground-rent of \$78.75, *lawful money of the United States*; that by the indenture it was provided that if the grantee should at any time thereafter pay to the grantor \$1312.50, *lawful money aforesaid*, in one payment, and the arrearages of rent, the yearly rent should be extinguished, and the grantor would, at the cost of the grantee, by a proper deed, release the rent; that the complainant has tendered to the defendant the sum of money required for extinguishing the rent, in “lawful money of the United States, being the legal-tender notes thereof,” but that the defendant refused to receive them, and to execute a release, &c.; and praying that the defendant might be compelled to execute a release, &c.

The defendant demurred to the bill, and alleged the following causes of demurrer:—

1. That the complainant has not stated such a case as ought, in equity, to entitle him to any such relief as is thereby sought against the defendant.
2. That he tendered no deed of release to the defendant, for execution by the latter.
3. That there is no mutuality in the contract for release or extinguishment of the ground-rent, as set forth by the complainant.
4. That the principal sum of said ground-rent, professed to be tendered by the complainant, constituted no debt from complainant to the defendant, for payment of which the notes aforesaid were to be a legal tender.
5. That the ground-rent represented by the said principal sum was an estate, and not a debt.
6. That the notes tendered by the complainant were not a constitutional currency, nor lawful money of the United States.

The court below (Allison, J.) dismissed the bill; which was assigned for error.

W. L. Hirst, for appellant.— Whether legal-tender notes are a lawful tender to extinguish a ground-rent is the question in this case. The grantee literally complied with the contract. If the rent is not a debt but an estate, it is subject to the right of the grantee to purchase it for a certain price, at a time fixed by his option, in currency then legal. When the option is exercised, the price becomes a debt. If the covenant itself had fixed the day of payment, at that day it would have become a debt; the circumstances of this case produced the same result.

G. M. Wharton, for appellee, waived for the present argument the discussion of the power

of Congress to issue paper money. A ground-rent is not a debt within the Act of Congress, even after the grantee has elected to redeem. A debt is a sum of money due by certain and express agreement: 3 Bl. Com. 154. Unless it be demandable, no claim can be maintained for it: *Broomfield v. Smith*, 1 M. & W. 542; 1 Chitty's Pl. 121, 123, 129; *Butcher v. Andrews*, 1 Salk. 23. Payment is matter in discharge of an action, and pleading it supersedes the production of proof of the cause of action: 1 Chitty's Pl. 512, 515; *Gilinger v. Kulp*, 5 W. & S. 264.

Ground-rents, in Pennsylvania, are not annuities, but ordinary rent-service: *Ingersoll v. Sergeant*, 1 Wh. 337; *Franciscus v. Reigart*, 4 Watts 98; *Kenege v. Elliott*, 9 Id. 262; *Juvenal v. Patterson*, 10 Barr 282. A rent-service is not a debt: *Bosler v. Kuhn*, 8 W. & S. 186; *Irwin v. Bank of United States*, 1 Barr 349-353; *McQuig v. Morton*, 3 Wright 31; *Cobb v. Biddle*, 2 Harris 445.

The Acts of Congress in question should be strictly construed, because they vary the standard of value and should at most be applied only to contracts made after their passage. Paper money is money only by usage: *Miller v. Race*, 1 Barr 452; *Reading Railroad Company v. Morrison*, in Cir. Ct. of U. S., E. Dist. of Penna., per Grier, J.

In order to compel specific performance, it is a fundamental principle that each party shall have such a right. There must be mutuality between the parties. Where one of the parties to a contract has but an option and the other no right at all, a bill will not lie at the instance of the party having the option: *Lawrenson v. Butler*, 1 Sch. & Lef. 18; *Hill v. Crolls*, 2 Ph. 60; *Flight v. Bolland*, 4 Russ. 298; *Rolfe v. Rolfe*, 15 Sim. 88; *Bodine v. Glading*, 9 Harris 50.

SANDFORD *et al. versus* HAYS.

ERROR to the Court of Common Pleas of Erie county.

This case came before the court below on case stated in an action by Caroline A. Hays against M. Sandford and H. Spencer, trading as M. Sandford & Co.

It was in substance this:— On the 1st of May 1862 the plaintiff deposited with the defendants, who were bankers, \$625 in gold, and received a certificate as follows:—

“Certificate of deposit.”

“Banking and Exchange Office of M. Sandford & Co.,
Erie, Pa., May 1st 1862.

Mrs. Caroline A. Hays has deposited in this office six hundred and twenty-five dollars, gold. Payable to the order of herself, on surrender of this certificate, in like funds, with interest.

\$625. M. SANDFORD & Co.”

On the 31st of January 1863 the plaintiff demanded payment of the certificate in gold with interest, which the defendants refused to pay, but offered to pay in United States legal-tender notes, which the plaintiff refused.

“If the court be of opinion that the plaintiff was entitled to demand gold, or its market value in United States legal-tender notes, in payment of said certificate, then judgment to be entered for plaintiff for \$625 and interest from May 1st 1862, with 50 per cent. premium added, with costs. If the court be of opinion that plaintiff was not entitled to demand gold, or its market value in United States legal-tender notes, in payment of said certificate, then judgment to be entered for \$625, with interest from May 1st 1862 added, without costs.”

The court below decided that the claim of the plaintiff was payable in gold, and entered judgment accordingly. The defendants took a writ of error.

Spencer & Marvine, for plaintiffs in error.— The word “gold” is the only one in the instrument describing a chattel or commodity. “Dollars” is used as describing *money*. The thing deposited and the terms of deposit are to be gathered from other words. Here it means money. The agreement was not to repay the very thing, but “like funds” with “interest,” which is the sum “allowed for the loan or use of some other sum:” Whart. Dict. The agreement to pay interest manifests the nature of the transaction. Upon its delivery to the defendants it became their property. Their act had no reference to the legal-tender laws. The defendants have borrowed \$625 in gold to be paid in gold; they have refused to pay. What is the amount of damages? the amount of debt and interest, for which alone the court can give judgment; and that is to be paid in the *lawful money* of the United States: *Borie v. Troth*, per Hare, J., 21 Leg. Int. No. 9.

Congress cannot in general vary a contract so as to make an agreement for paying in one thing, payable in another. But when the payment is to be in money, Congress may say how and at what rate the payment is to be made. A payment to be made in money, therefore, is to be taken to mean *lawful money*, and if agreed to be paid in silver dollars, it may be paid in gold coin, or other money made *lawful* by Congress. The power of the government over money is sovereign: Pardessus, *Cours de Droit Com.*, No. 285; Troplong, *Traité de la Vente*, No. 163; Pothier *Fr. du Cont. de Vente*, No. 416; *Case of Mixed Money*, J. Davies R. 48; *Shoenberger v. Watts*, 1 Law Reg. N. S. 553. Congress has reduced the value of

both the gold eagle and silver dollar.

These conclusions are drawn from the argument:—

1. What the law properly makes money is money, and the law neither makes nor allows to be made any distinction in the value of its various creations of the same nominal value.
2. The contract of the defendants was to be performed by the payment of \$625 and interest, in gold coin, lawful money of the United States, upon demand.
3. The transaction between the parties was a loan of money for a time specified, with interest to pay for its use.
4. The loan, although by its terms limited to be paid in a particular description of lawful money, could be paid at the option of the defendants in any other description of lawful money.
5. The defendants having properly tendered their debt, with interest, in lawful money, have fully met the conditions of their contract.

Gunnison & McCreary, for defendants in error.— Gold was deposited by the plaintiff with a promise to return it; without such promise it would not have been left. The defendants do not allege that they then intended to refuse to return like funds; both parties intended that it should be paid in gold. If the defendants can now pay in legal-tender notes, they could have done so immediately after the deposit, and thus take the amount of the premium from the plaintiff the moment the deposit was made.

“Debt” and “deposit” are not synonymous. To say a deposit of a chattel made it a debt, would be a misuse of terms.

The Act of Congress being a restraint of the natural right of parties to contract, should be strictly construed. A contract to pay in wheat at a specified price, could not be discharged by tender of the sum in money: Meason v. Phillips, Add. Rep. 346. The parties waived the Act of Congress, which they might do: Bowman v. Smiley, 7 Casey 225.

GRAHAM, for the use of MEHN, *versus* MARSHALL *et al.*, trading as “THE
MERCHANTS’ AND FARMERS’ BANK.”

ERROR to the Court of Common Pleas of Allegheny county.

This was an action of *assumpsit* by James Graham, for the use of Thomas Mehn, against James Marshall, John Brown, John Dean, A. M. Marshall and William Walker, who, with Robert McPherson, not summoned, composed “The Merchants’ and Farmers’ Bank.”

The suit was on the following instrument:

Six months after date The Merchants' and Farmers' Bank will pay James Graham, Esq., Fourteen Thousand One Hundred and Forty-Five Dollars with interest till due at the rate of five per cent. per annum.

If not presented at maturity, it will be continued as a renewal.

\$14.145, specie. J. C. PORTER, Cashier.

The pleas were *non assumpserunt* and tender.

It was admitted that the consideration of the certificate was \$11,000 in gold and \$3145 in New York exchange, which at the date of the certificate was equivalent to gold. It was also proved that "specie," on the margin of the certificate, meant, that it was payable "in coin – gold or silver."

The plaintiff, with a notary, on the 27th of March 1863, demanded payment of the amount and interest in specie, which was refused by the cashier, who offered "to pay it in legal-tender notes." The certificate was then protested.

The court (Stowe, J.) charged, as stated in the assignments of error.

The jury found accordingly, and the plaintiff took a writ of error.

The errors assigned were, that the court charged:–

"1. That it is immaterial whether there was a special agreement to pay in specie or not: or, whether the agreement or contract was made before the passage of the Act of Congress [of February 25th 1862], or afterwards – the agreement is simply void.

2. You will return a verdict simply for the amount of the certificate of deposit with interest at 5 per cent., till demand, 27th March 1863, adding interest from bringing of suit to the present time."

A. H. Miller and James Veech, for plaintiff in error.– The late Acts of Congress made treasury notes a legal tender, but the laws making gold and silver coins a legal tender have not been repealed. There being two kinds of *lawful* money at the date of the certificate, the parties might elect either; they chose "specie," or the *kind* of money left with the defendants. The case of Mixed Money, Davies Rep. 48, stated in Story on Prom. Notes, § 390, n. 2, is disapproved in Story's Confl. of Laws, § 313, n. 2.

In *Searight v. Calbraith*, 4 Dall. 325, where the payment was to be made in Paris, the court

left it to the jury to find whether assignats or specie was intended.

If the offer to the notary to pay in “legal-tender notes” was a tender (which it was not), the tender should have been kept up, and the money should have been in court at the trial: *Sheredine v. Gaul*, 2 Dall. 190; *Williams v. Bentley*, 3 Casey 294. The plaintiff’s demand for *gold* did not dispense with this duty. The plaintiff is entitled to interest between the time of the demand and bringing the suit.

Hamilton & Acheson and Marshall & Brown, for defendants in error.— The instrument is a non-negotiable promissory note for the payment of money generally, unless the words “specie” in the margin is made part of it. The note having all words necessary to make a complete contract, there is no need for additional words. The words in the body of a writing, are the substance whereunto special regard is to be had: *Marins*, 4th ed., p. 83. “Specie” is no part of the note: *Payne v. Clark*, 19 Miss. 152; *Mears v. Graham*, 8 Blackf. 144; *Smith v. Smith*, 1 R. I. 398; *Norwich Bank v. Hyde*, 13 Conn. 279. Marginal memoranda may be referred to when the body of the note is obscure: *Riley v. Dickens*, 19 Ill. 29; *Saunderson v. Piper*, 5 Bing. N. C. 425 (35 E. C. L. R.); 2 Green. Ev. § 251.

The consideration of the note being in specie does not imply a promise to pay in specie. The legal effect of the undertaking was to pay in money generally, and there was no waiver of the right of defendants to pay in legal-tender notes. The act makes these notes a legal tender in payment of all private debts. The design was to create a national currency to be an equivalent to coin. Courts then cannot declare otherwise, nor render judgments recognising a difference, when the law says there shall be none. A dollar by law is a dollar, whether represented by coin or *lawful* notes.

This currency was created for the public convenience, and individual rights must yield to the public interest when there is a conflict.

A tender does not extinguish the debt, but bars a claim for interest. The failure to plead the tender in time, and bring the money into court, only subjects the defendants to costs and interest from the issuing of the writ.

LAUGHLIN *et al. versus* HARVEY.
ERROR to the Court of Common Pleas of Allegheny county.

This was an action of *assumpsit* by John Harvey against James Laughlin, Richard S. Hayes and Henry Laughlin, partners as Laughlin & Co.

The suit was on this note:—

\$4160. Pittsburgh, July 26th 1861.

One year after date we promise to pay to the order of John Harvey, at the Pittsburgh Trust Company, forty-one hundred and sixty dollars, in gold, without defalcation, for value received.

(Signed) LAUGHLIN & CO.”

The plaintiff averred that on the 18th of December 1862, and at other times after the maturity of the note, he demanded payment of the note in gold, or if the defendants had not the gold, that he would accept United States legal-tender notes, adding the premium on gold, which was then 33 per cent.

The defendants, by their affidavit of defence, averred that upon the demand of the plaintiff they tendered him the amount of the note and interest in legal-tender notes, which he refused, and that they have always and now are ready and willing to pay him in the same manner; that at the maturity of the note, and at the first demand, the premium on gold was 14 1/2 per cent., and at the second demand it was 30 per cent.; that the consideration for the note was notes of banks which had suspended specie payment.

The court entered judgment, for want of a sufficient affidavit of defence, for \$5002.15, the amount of the note and interest, adding 14 1/2 per cent. for premium on gold. This was assigned for error.

Hamilton & Acheson, for plaintiffs in error.— This note was made before the Legal-Tender Act of Congress. The word “gold” expressed no more than the law would have then implied; it was the legal medium of paying pecuniary contracts. The law, as it then stood, was a part of the contract as if it had been expressed in it. What therefore was the legal standard of value cannot be treated as a commodity: *Shoenberger v. Watts*, in Dist. Ct. of Phila.

Kirkpatrick & Mellon, and J. H. Hampton, for defendant in error, submitted the argument of Denio, C. J., in New York, in *Meyer v. Roosevelt*.

They argued that the failure to keep up the tender and bring the money into court rendered defendants liable for interest from the maturity of the note, and costs: *Sheredine v. Gaul*, 2 Dallas 190; *Seibert v. Kline*, 1 Barr 38; *Harvey v. Hackley*, 6 Wright 264; *Pennypacker v. Umberger*, 10 Harris 495; *Henry v. Raiman*, 1 Casey 361; *Williams v. Bentley*, 3 Id. 302; *Heaward v. Hopkins*, Doug. 431; *Rawson v. Johnson*, 1 East 203; *Peters v. Opie*, 2

Saund. 352, n. 3; 1 Chitty's Pl. 315.

Each of the judges delivered an opinion on the 24th of May 1865, at Harrisburg.

WOODWARD, C. J.

Daniel Webster expressed the universal thought of the country when, in his speech in the Senate on the specie circular in 1836, he held the following emphatic language: "Most unquestionably there is no legal tender, and there can be no legal tender in this country, under the authority of this government or any other, but gold and silver— either the coinage of our own mints, or foreign coin at rates regulated by Congress. This is a constitutional principle perfectly plain, and of the very highest importance. The States are prohibited from making anything but gold and silver a tender in payment of debts; and, although no such express prohibition is applied to Congress, *yet, as Congress has no power granted to it in this respect but to coin money and regulate the value of foreign coin*, it clearly has no power to substitute paper or anything else for coin as a tender in payment of debts and in discharge of contracts:" Webster's Works, vol. 4, p. 271.

If any mind, long accustomed to setting up personal or partisan conceits above the plain letter of the Constitution, had affected to find in the enumerated grants the power of Congress to make paper money a legal tender in the future dealings of men, even such latitudinarian constructionists would not have pretended to apply the power to *existing* debts and contracts, for they would have recalled the fact that governments are instituted to enforce, and not to destroy, private contracts; and that the Constitution guards this great end of government so carefully that it expressly forbids any State, in virtue of its general, reserved and undelegated powers, to pass any law impairing the obligation of contracts, whilst it delegates to the legislature of the Federal Government no power to pass such a law. In this sentiment, the inviolability of private contracts, American minds were, a few years since, an absolute unit. And it gives me pleasure to record the fact, because a sensitive regard to the obligation of contracts is a rule of morality that binds communities and nations as well as individuals, and is the more honourable when, as in the instance of nations, there can be no legal remedies to enforce it.

The people who framed and adopted the Constitution of the United States had a common law which made gold and silver the only legal tender, but under the Articles of Confederation the States had more than once, by advice of the Congress, substituted paper money, and thus the people knew by personal experience what was best; and when they put it into their fundamental law that no State should make anything but gold and silver a legal tender, or pass any law impairing contracts, and withheld from the Federal Government all power to do these things, they gave the highest evidence they could give

of their determination to have a metallic standard of values, and to have contracts executed according to their tenor.

Yet, on the 25th day of February, 1862, the Congress of the United States passed an Act, authorizing the issue of United States notes to the amount of one hundred and fifty millions of dollars, and declaring that they “shall be lawful money, and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest on public bonds.”

The first thing to engage my attention, in considering the constitutionality of this Act of Congress, is the expression, “all debts, public and private.” The debts of a country always bear a necessary relation to the currency of the country, though at all times they greatly exceed it, because every dollar of currency is expected to be used several times in paying debts, and so long as a specie basis is maintained, currency can be, and is actually so used. The entire currency of the country – the paper money of the States, as well as all lawful money of the Federal Government, whether paper or specie – would have to be multiplied, therefore, many times, to express the aggregate of public and private debts. What was that aggregate at the date of this enactment? I have had neither the leisure nor the means at command to make even an approximate estimate of it, but when we consider that it would include very much of the indebtedness of the Federal Government, all the debts of all the State governments, the debts of counties, cities, boroughs, townships, and every species of municipality; the debts of all corporations, associations and partnerships, as well as the debts of individuals, however secured or evidenced; we see that the aggregate must have been immense – a sum to be counted by hundreds of millions of dollars, and the figures to express which would be too unwieldy for the purposes of a judicial opinion. But it was not all due on the day this law was passed, and therefore did not require a legal tender commensurate with itself. The one hundred and fifty millions of greenbacks, as they are familiarly called, and the sums issued under similar Acts subsequently passed, were perhaps equal to the actual indebtedness of the country due that day; and as they, when used to pay debts, would fall back into the circulation of the country, they would, like all other currency, multiply themselves many times as legal tenders, and, in a period of years, serve to pay very much, if not the whole of the vast indebtedness of the country, as it would from time to time fall due and become payable. The Act has been in operation for three years and more, and has furnished the legal tender for paying the debts that have fallen due, duties and interest on public bonds only excepted; and if it shall last for any considerable time, every debtor will avail himself of it when his pay-day comes.

Now, such being the nature and obligation of all the debts of the country (excepting always those excepted in the statute and the inconsiderable sums contracted to be paid in specific chattels), let us look for a moment at the effect of the statute upon them. Since the date of

the act the premium on gold has risen to 160 per cent., and has fallen, in the present month, to 30 per cent., and between these extremes it has touched all points by a continual fluctuation. If the average premium should be assumed at 100 per cent., it would be equivalent to an average discount of 50 per cent. upon the legal tender provided by the Act of Congress, and one-half of every debt paid by it has been sacrificed. But if 50 should be assumed as the average premium, the discount on greenbacks would be about 33 1/3 per cent., showing the operation of the law to have been a sacrifice of a third of the debts falling due. From such observations as I have been able to make, I believe the average discount since February, 1862, to have been about 40 per cent., so that, for the purposes of the present discussion, 33 per cent. may be very confidently assumed. Assuming that the aggregate of debts at the date of the law exceeded the entire currency of the country, it is material to observe that every dollar of these debts, except in the inconsiderable instances otherwise specially expressed, was contracted upon the specie basis, and liable and entitled to be demanded in gold or silver coin. Not that, in point of fact, they would have been so paid; for in a sound state of the currency the legal tender is rarely demanded; but, in point of law, they were all payable in the legal tender of the country, and in nothing else. Such was the tenor and obligation of the contracts out of which that vast indebtedness grew. Debt is the creature of contract; and the law of the land at the time a contract is made, enters into, permeates, and incorporates itself with the contract, and becomes an essential element of it, as much as if it were expressly recited in the text of the contract. According to the law of the land, before the 25th of February, 1862, gold and silver were the only legal tender in payment of debts; and every debt, unless the contrary were expressly stipulated, was legally payable in nothing but gold or silver.

In some of the ground-rent cases before us the contract was expressed to be payable in gold or silver; and in one of them the weight of the silver dollar to be paid is expressly fixed at 17 pennyweights and 6 grains, or 414 grains, which is one and a half grains heavier than the silver dollar, as fixed by the Act of Congress of 18th January, 1837; but in all of these ground-rent covenants lawful money of the United States is stipulated for; and at the date of the contracts nothing but gold or silver was lawful money for the purpose of paying debts. It may be granted, that where the parties had agreed upon a heavier silver dollar than that in common use, the difference would have to be compensated in current dollars; but where gold or silver was stipulated for, without mentioning the weight of the coin, the lawful dollar for the time being would be intended. Where coin was not mentioned at all, but only lawful money of the United States, the creditor would have the right to demand, and the debtor was bound by his contract to pay so many dollars in the current gold and silver coin of the United States, or in foreign coin at the rates prescribed in existing Acts of Congress. The diversities in these covenants, therefore, may be disregarded for present purposes; and if they are debts at all (which shall be considered hereafter), they may all be placed on the same footing as other debts; that is, debts which, by the law of their creation,

can be legally extinguished only by the tender of gold or silver coins at their statute rates.

What, then, was this Act of Congress but an invitation to debtors to take a depreciated paper currency and pay off their debts at the rate of fifty, or, at most, sixty-seven cents in the dollar? What but a cancellation, a blotting out of all that part of the debts of the country which represent the difference between paper money and coin? What was it but confiscation of thirty-three dollars in every hundred of debts?

Debtors were not slow to yield to the temptation. Purchasing the treasury notes with other paper money, they sought their creditors as keenly as sometimes they elude them, and paid off immense sums in a currency that violated the obligation of the contract. These suits now before us involve a struggle between parties to contracts to keep them on the ground on which they were originally based, or to get them on the new ground laid by this Act of Congress.

The immediate question we have to decide is: Was Congress intrusted with power by the Constitution to make such havoc of private rights and to impair the obligation of every money contract in the land?

Those who hold the affirmative of this question ought to make the source of such a power very plain. It is not too much to ask them to point out the words in the written document we have to deal with, which, being read according to their grammatical and historical meaning, did expressly, or by necessary implication, vest in Congress this destructive power. It is one of the infelicities of the occasion that the advocates of the power are not agreed as to the part of the Constitution they will make responsible for it. Some charge it on the coining power, some on the borrowing power, some on the war power, some on the clause relating to commerce; whilst others state the argument more comprehensively though less definitely, as is printed in one of our paper-books, in these words: "If to carry on war, regulate commerce, or maintain a navy, it be necessary to make paper money and give it a legal-tender character, or to carry into effect any other substantive power under any circumstances, Congress has the power by implication. The degree of necessity is a question of legislative discretion, not of judicial cognisance."

In view of these inconsistent derivations of the supposed power, it is quite natural to doubt whether it was conferred at all, though if the argument above quoted be sound, it makes an end of all controversy on the subject, for it resolves the government into the unrestrained will of Congress. As that argument is the substance of much that has been said and written in behalf of the power, let it be examined for a moment. If, to execute a granted power of the Constitution, Congress should conceive it necessary to revoke all the land titles of the country, to abolish the marriage relation, to substitute primogeniture for our

systems of intestacy, or to do any other preposterous thing which may be imagined, the argument is, that the power must be implied, and the degree of the necessity is not subject to judicial cognisance. Not so thought Chief Justice Marshall and the Supreme Court of the United States, in *McCullough v. The State of Maryland*, 4 Wheat. 316, and in *Osborne v. United States Bank*, 9 Wheat. 816, where the doctrine was asserted that it belongs to that court to make the final decision upon constitutional questions, and that the clause conferring power to make “necessary” laws for carrying granted powers into effect meant not an absolute physical necessity so strong that one thing could not exist without the other; but if the end be legitimate and within the scope of the Constitution, all means which are appropriate to this end, and which are not prohibited, are lawful. This is the judicial test of necessary laws, and according to it, those who support this Act of Congress must begin by showing that impairing the obligation of contracts and blotting out from a third to a half of the debts of the country are legitimate “ends” of the Constitution and within its “scope.” Because, until this is established – until these ends are shown to be legitimate fruits of the Constitution, results which it was planned and framed to produce – there can be no question raised about “necessary” means. It were idle to discuss appropriate or necessary means to an impossible or inadmissible end. Or, will we reverse that maxim of questionable morality which teaches that the end justifies the means, and say that whenever means are satisfactory to a majority in Congress the end must be legitimate. If so – and this is the highest point to which I have seen the argument pushed – then our Constitution is waste paper, and Judge Marshall’s declaration, in the above cases, that the Government of the United States is one of enumerated powers, and that it can exercise only the powers granted to it, is nonsense. If, however, any man can demonstrate that the Federal Government was formed for so base a purpose as the impairing the obligation of contracts, I give up the controversy, and I agree that this Act of Congress was appropriate, if not necessary, to that end. But if, on the other hand, the government was formed to enforce contracts and protect private rights, it has not been shown, and it cannot be, that the legislation in question was ordinary, appropriate or necessary.

Coming now to a more direct treatment of the question before us, it is to be observed that the power to declare anything a legal tender is nowhere expressly conferred in the Constitution. But a power necessarily incident to another that is clearly granted, may be implied; and I think the power to make gold and silver coin a legal tender may be legitimately implied from the clause empowering Congress “to coin money, and regulate the value thereof and of foreign coin, and fix the standard of weights and measures.”

To coin money, is to stamp metal and convert it into coin; and to regulate the value thereof, is to declare, by proclamation or statute, the value of the coin as a currency, and thus essentially, if not necessarily, to make it a legal tender in payment of debts. This is an act of sovereignty which, in some countries, has been applied to other substances than metals,

but which was granted to Congress solely for the purpose of coining the precious metals that the people might be supplied with a uniform and pure metallic standard of values throughout the Union: *Marigold's Case*, 9 How. 560.

Such metals, when coined and made lawful money, and foreign coins, would have been legal tenders in payment of debts by the common law, quite irrespective of statutes; but we have had several statutes since the adoption of the Constitution to regulate the value of coins, both foreign and domestic, and to declare them legal tenders according to their statute values. Thus the Act of Congress of 2d April 1792, establishing the mint, carried out the idea of the Constitution by declaring that, "there shall be from time to time struck and coined at the said mint coins of gold, silver and copper, of the denominations, values and descriptions" therein-afterwards described, and the sixteenth section made these gold and silver coins a legal tender. The Act of 18th January 1837, supplementary to the above law, reduced the weight of the silver dollar, and made the gold and silver coins of the mint a legal tender. By the Act of April 1806, foreign gold and silver coins shall pass current as money, and be a legal tender at the respective values assigned them in the statute. The copper coinage of the mint was not made a legal tender by these statutes, and, though lawful money of the United States, has been judicially declared not to be a legal tender: *McClarín v. Nesbitt, Nott & McCord* 519.

Many other statutes have been passed on the subject; but these are enough to show how Congress has exercised the constitutional grant of coining money and regulating the value thereof, and how the power of prescribing a legal tender has been treated as incidental to this express grant. To what end was a mint provided with assayers, engravers and all appliances for coining the precious metals, with dies for stamping the coin, and the pennyweights and grains of the respective coins prescribed by statute, if this grant of the Constitution had not reference to metallic currency? If to coin money meant to stamp or print paper, as is sometimes argued now-a-days, here was a very bungling, expensive and ill-contrived execution of the power; and it is wonderful that all the Congresses before that of 1862 had not found out the more convenient and expeditious mode. In my apprehension, the legislation before 1862 was strictly constitutional, as I am sure it was reasonable and beneficial; and let it never be forgotten that every contract for the payment of money, which existed in the United States on the 25th of February 1862, had been made on the faith of that legislation, and was, therefore, capable of being discharged only by gold or silver coin. That was the law of the land, and, therefore, it was the law of all the contracts of the land. And no legislative power could alter that law, except for future contracts, without impairing the obligation of contracts and violating faith.

If I am right in treating the power to make anything a legal tender as an incidental power, and if that incident has in all our history been annexed to and exercised with the power of

coining, then I conclude it does not belong to the war power, or to the power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

Is it incidental to the power to borrow money? I agree that the Act under consideration was, in some sort, a law for borrowing money, though it is not so entitled. By making a depreciated paper currency a legal tender every debtor was tempted to take it of the government, in exchange for other paper money, and pay off his specie debts with it. I have already shown that the effect of the Act was to annihilate from a third to half of the indebtedness of the country. Was that borrowing money within the meaning of the Constitution? If Congress had required every creditor to assign to the government a third or half of his bonds, notes, mortgages, ground-rents and other money securities, that might have been considered a forced loan; but when a creditor is required to take depreciated paper in satisfaction of a debt contracted on the specie basis, it is more like confiscation than it is like the constitutional right to borrow money. Having the right to borrow money, Congress has an undoubted right to issue evidences of indebtedness therefor; and I will not dispute their right to declare these evidences lawful money, so that men may deal with it in future contracts; but I do very earnestly deny the right and power of Congress to make such "lawful money" a tender in payment of past contracted debts. It was an intrusion of governmental power upon the relation which creditors and debtors had established between themselves on the faith of prior legislation. It was an impairing of the obligation of that relation. It was tempting men to breach of good faith, and, therefore, not only unconstitutional, but of extremely evil example.

It is no part of my duty to speak of this Act of Congress in its financial aspect, and yet there is an observation which I will make on that subject, because it bears somewhat on the constitutional question. By overthrowing the specie basis and flooding the country with a depreciated paper currency at a time when the government was the chief purchaser and consumer of the products of the country, it raised prices on itself, and unnecessarily augmented the public debt, which will be a burthen upon the future industry of the people. Did the people grant to their representatives the power to do this? They granted the power to furnish a metallic currency, but in what part of the fundamental law did they grant the power to take it away?

If it be true that war cannot be carried on without paper money, it is not true that war requires paper money to be made a legal tender. Our government has carried on several wars, foreign and domestic, and a commerce that has penetrated every part of the globe, upon a paper currency, State and Federal, having a sound specie basis, without making a dollar of that paper currency a legal tender. Where, then, is the ground for the assumption that this Act of Congress was demanded by the exigencies of our civil war? Had Congress borrowed gold and silver enough at current rates to maintain the specie basis of our paper

currency, I believe it could be demonstrated (though it is not my purpose to enter into the question) that the debt of the country to-day would have been less than half what it is, and that no one effort of the government would have lost energy or effect.

Not, however, to pursue these views further, I return to my position that none of the clauses of the Constitution that have been invoked sustain this legislation; for, however good the motives for the enactment, or however stern the apparent necessities for it, I can look upon it as nothing short of a violation of the faith of contracts; and though one rose from the dead to testify against the fathers of the country, I could not be persuaded that they placed so pernicious a power in the Constitution. The proposition is too monstrous to be entertained. No men who ever lived understood better, or respected more religiously, the obligations of plighted faith; and that they empowered the government, under pressure of any emergencies, to strike down, at one fell swoop, a third of the debts and credits of the country, is so incredible, that it ought not to be asserted until it can be proved. No evidence has been shown. No book of history, no judicial record five years old, no legislation before 1862, no tradition, no romance tells us that the Constitution was ever so read. And this is the reason why the professional mind was a unit on this point until a very recent period – the reason why the weighty words of Mr. Webster, which I placed at the head of this opinion, not only condensed the whole constitutional argument, but expressed the universal thought of the people. In the language of Fisher Ames upon the Jay treaty: “If there could be a resurrection from the foot of the gallows, if the victims of justice could live again, collect together and form a society, they would, however loath, soon find that it was their interest to make others respect, and they would therefore respect themselves, the obligations of good faith.”

May I not assume and assert that the Constitution of the United States pays at least as much respect to the obligations of good faith as a community of felons would find themselves compelled to do? Whilst much more than this might be justly claimed in behalf of the Constitution, nothing more need be conceded to condemn this Act of Congress. If the Constitution did not authorize that part of the enactment that relates to legal tender, it is null and void; and were the reasons for passing it a thousand fold stronger than they were, it were better to sacrifice the enactment to the Constitution than to repudiate the morality of the Constitution. “Good faith is the philosophy of politics, the religion of governments.” It is worth more than many Acts of Congress, infinitely more than the one before us.

My judgment is, that so much of the Act as makes anything, except silver and gold, a legal tender in payment of debts, is unconstitutional and void.

But, it is said, the principal sum mentioned in these ground-rent deeds is not a debt within the meaning of the Act of Congress, because the ground-rent tenant, though entitled to pay

it, is not obliged ever to do so. The annual or semi-annual interest upon that principal he is bound by his covenants to pay; and when we speak of this as a ground-rent, it is by common consent a debt. Our present question, however, has regard not to these periodical payments, but to the principal sum; and as to that, its technical classification is, undoubtedly, as a rent-service, which is an estate in land. But, though an estate, may it not also be a debt within the purview of the Act of Congress? I suppose that Congress used that word debt in its largest, most comprehensive, and popular sense, and that they meant by it every sum of money which one man was either obliged or entitled to pay, and which another had a legal right to receive.

An estate in land may also be a debt. Where land is bought and sold by articles of agreement, both vendor and vendee have an estate, and yet the unpaid purchase-money is a debt on the part of the vendee. True, there is a covenant that obliges him to pay, and in that point the analogy fails, but the point which the analogy illustrates is that purchase-money is a debt, whilst at the same time it is the measure of an estate. The principal of a ground-rent deed is nothing but purchase-money for land, and the covenants confer on the purchaser an option instead of an obligation to pay. When he exercises his option he has a legal right to pay, and the landlord is obliged to receive, and then, if never before, it becomes a debt. It may be likened to the right of a former owner to redeem his land, sold for taxes. That right is an estate or interest in the land; but the owner is not obliged to redeem; yet, when he exercises his option, the redemption-money is universally regarded as a debt. Since this Act of Congress, it has never been doubted that redemption-money could be paid in treasury notes. I think my Brother Agnew's opinion at *Nisi Prius*, in *Shollenberger v. Brinton*, followed, if not endorsed, by my Brother Thompson in *Davis v. Burton*, has not been shaken by anything advanced in argument, and is not inconsistent with the point ruled in *Bossler v. Kuhn*, 8 W. & S. 183. The point ruled there was that a ground-rent becoming due after the discharge of the debtor, under the bankrupt law, was not extinguished by his certificate. When there was no covenant to pay, and no offer to exercise his option, it was necessary to say there was no debt within the bankrupt law; but that which distinguishes these cases from *Bossler v. Kuhn* is the very circumstance that gave rise to the cases, the offer of the tenants to pay. The covenants had given the option to pay principal or interest. So long as he elected to pay interest, that only was a debt; but on his election to pay principal, that became no less a debt.

A curious point has been taken – that, though debts, these ground-rents are not within the Act of Congress, because they stipulate for gold and silver. It is said Congress have not power to alter people's contracts when they stipulate for gold or silver, but have full power to do so if they only stipulate for lawful money. I cannot comprehend such reasoning. It is an extreme act of sovereignty to touch private contracts at all by legislation, but that the sovereign should be obliged to keep his hands off a contract that expressed the legal

obligation, though at liberty to invade that which just as clearly implied the same legal obligation, is an incomprehensible distinction, especially in a case where the sovereign has expressed the only debts intended to be excepted.

But a full answer to the notion that a contract for gold and silver money is of a higher class than a contract for the lawful money of the country is found in the fact that when the law is called in to enforce such a contract, it gives a judgment for so much lawful money only, and permits that judgment to be paid in the same currency that is a legal tender in payment of all other debts.

Holding, therefore, that Congress meant by all debts everything in the nature of a contract for money, except what they excepted, I make no distinction in the cases before us, but treat them all as alike within the purview of the Act of Congress; but, inasmuch as I hold the act unconstitutional and void, I concur in reversing some and in affirming others of the judgments in the foregoing cases.

THOMPSON, J.

The question of the constitutionality of the legal-tender notes offered as an extinguishment of the principal of the ground-rent in this case was but little discussed in the argument, although involved in it, as the opinion of the chief justice, just read, abundantly shows; but as I think the case ought to be reversed on another ground, I withhold my opinion on that point, to be expressed in the case of *Mervine v. Sailor et al.*, to be decided at this term. The only question, therefore, now is, was the tender in notes of the United States of America, issued under the authority of the Act of Congress, passed February 25th 1862, commonly called “legal-tender notes,” sufficient to extinguish the capital of the ground-rent reserved to the defendants?

The Act provides that said notes shall “be lawful money, and a legal tender in payment of all debts, public or private, within the United States, except duties on imports and interest (on the public debt) as aforesaid.”

As these notes are not the universal currency and standard of value in the country, but born of the occasion which gave rise to them, and co-exist with another species of currency, namely, gold and silver, which furnish a universal standard of value, we are to give effect to them only as a substitute for the latter, in the cases and instances in which that effect is given by the statute. The above quotation shows that the Act makes them a legal tender in payment of debts, public or private, with the exceptions noticed.

The first question to be considered, therefore, is, whether the principal of the ground-rent

is a debt, so that the legal-tender notes offered operated to extinguish it?

If we have recourse to the legal definition of the term “debt,” they did not. Blackstone says, the legal acceptance of debt is a sum of money due by certain and express agreement: 3d vol. 154. It need not be demandable presently, but must be so at some time. *Debitum in presenti solvendum in futuro* may constitute, and does mostly constitute, what we call a debt. As is said in *Broomfield v. Smith*, 1 M. & W. 542, it is of the essence of a debt that it be demandable at some time; if it be not so, no claim can be maintained for it as a debt either in law or in equity. Of course there must be some party having the right to demand the discharge of it in accordance with the agreement creating it.

On the argument and at consultation, I was inclined to adopt the idea that at the moment of exercising the option to extinguish the rent by the owner of the fee, the sum to be paid *eo instanti* became a debt. This conclusion resulted rather from consequences supposed liable to flow from an opposite conclusion than from a logical view of the subject. I feared that redemptions of tax sales and the like, might be affected injuriously by such a conclusion; but on reflection I do not think they would, as tax sales and the allowance of a redemption is a mode of collecting taxes, and taxes are of the character of debts. They are properly debts created by law when overdue. But neither the law nor any contract renders it obligatory at any time, on the owner of the fee of land held on ground-rent, to extinguish the *corpus* of the rent; and while it remains unextinguished it is so far from being a debt, it is not even a chose in action of any sort, but an estate partaking of the nature of the realty from which it springs. It descends to the heir and not to executors or administrators. It is an incorporeal hereditament, in which of course the owner has a fee, if the estate out of which it is reserved is a fee: 1 Barr 349; 3 Wright 42; 2 Harris 445.

The effect of the covenant to allow an extinguishment is simply an irrevocable proposition by the owner that his estate may be merged into the fee of the land by the performance of the conditions proposed. It is not, therefore, the payment of a debt; not alone because it is not demandable at any time, but in addition thereto, it is the acquisition of an estate which the law transmits as the consequence of the payment of a price; a different thing, altogether, from what we understand by paying a debt, even in the popular sense of the term.

But it is assumed that when the option is exercised to pay off the *corpus* of the rent, the relation of the parties as well as the amount to be paid is changed. This may be granted without prejudice to the principle here sought to be maintained. It must be remembered that the only mode of enforcing the option is by making the tender, and as the tender must take place and be perfect, in order to work the change it must be in such money as prior to the mutation would satisfy the covenant; otherwise we would embrace the sophism, that the

principal being converted into a debt by the tender, the tender is made good by a conversion of the principal. The reasoning on this point, however plausibly advanced, amounts to scarcely more than this. At the best it requires the construction of an artificial theory to make the principal of a ground-rent a debt, and this I do not regard as demanded, in order either to give effect to the Act of Congress, which should be interpreted in the ordinary legal meaning of the terms used, or the relation created between the parties by the ground-rent deed. In fact, to hold as claimed by the appellee would be to violate, beyond dispute, the express terms on and by which he had the option to acquire the estate of the appellant in the ground-rent, unless indeed we should succeed in persuading ourselves that silver money is paper money, and paper money is silver.

I know of no better established rule than that laws in derogation of established rights are to be strictly construed. The construction contended for here is the very opposite of this principle. If a universal rule had been adopted by Congress in regard to the effect and operation of the issue of legal-tender notes, so as to supersede all other *media* of currency, there would have arisen a rule of necessity out of such a revolution as would have required the courts to give the same effect to the substituted money as belonged to the displaced; but that is not the case. These notes are by express words restrained of their universality as a legal tender. And this makes it obvious that the intention of Congress was that they were to be legal tenders only within the legal boundaries defined by the terms used, viz.: in payment of debts. It must have been the object of the Act to afford the means of payment in paper instead of coin to those who could be compelled to pay their debts. Those who were not so situated needed no law of relief or convenience. The owners of real estate on ground-rents could not be compelled to pay anything but the annual rent as it accrued, and as this became a debt when due, the law applied to that because the tenant could be compelled to pay it; but is there not an infinite difference between that and the principal sum, which, although existing, could not be demanded?

I derive support to my conclusion that the principal of the ground-rent in this case is not a debt, from two decisions recently made in this city, viz.: Philadelphia and Reading Railroad Company v. Morrison, in the Circuit Court of the United States, opinion by Grier, J.; and Patterson's Petition, in the Common Pleas, opinion by Allison, J.; both reported in the Legal Intelligencer of November 18th 1864. In support of this view I also rely on Bossler v. Kuhn, 8 W. & S. 186. In the opinion delivered by Gibson, C. J., it is said "a rent-service is not a debt." In Sergeant v. Ingersoll, 1 Wh. 337, ground-rents were held to be rent-service, and a covenant to pay it is not a covenant to pay a debt; it is a security for the performance of a collateral act. The annual payments spring into existence, and for the first time become debts when they are demandable, for while they are growing due the landlord has no property in anything distinct from the *corpus* of the rent or the realty of which they are the produce, and the fruit must be severed from the tree which bears it before it can

become personal property and a chose in action. I close this part of my opinion by a reference to a practical test or two.

By the Act of 1844 debts due and owing by solvent debtors were made taxable for state and county purposes. It is certain that this was not supposed to cover the *corpus* of a ground-rent, for that is required to be valued and taxed to the owner not as a debt due, but in its character as property. Nor do I suppose any insolvent debtor ever returned his ground landlord as a creditor to the extent of the principal of the rent. Indeed, the idea that it is a debt is of recent origin, and is supported neither by authority nor just analogy.

If these views be correct, it follows that the principal of the ground-rent in question was extinguishable only on the terms of the covenant, namely, by a tender in payment of lawful silver money. While I agree with what is sometimes asserted in these cases, that whatever is lawful money of the kind stipulated to be received at the time of exercising the option to pay, will be a good tender notwithstanding the sovereign power may have changed its value; undoubtedly the rightful exercise of power in a State is not to be controlled by the mere terms of contracts. For example, our coin was reduced in its standard of fineness in 1837, and no court ever held that it was not a legal tender in payment of debts and engagements entered into when it was intrinsically more valuable. The case of the Mixed Money, to be found in Sir John Davies's Irish Reports 48, is in point to this effect. But, notwithstanding this, if a purchaser of ground takes it on special terms and conditions as to the redemption of the annual duty by paying the principal out of which it accrues, I see no hardship in holding him to the terms, if they be legally possible, and I do not believe there is an instance on record in which a decree for specific performance in the absence of fraud ever was made without performance by the party seeking to have performance, unless he was prevented by the party, the law, or the act of God. Impossible conditions, especially subsequent, never defeat a contract; but "the rule does not extend to contracts founded on difficult, impossible, or contingent considerations, for it is the duty of the promissor well to weigh the difficulty or impracticability of the consideration before he binds himself to perform it; and the law will not help him to avoid duties which he has deliberately imposed upon himself so long as they are possible." Story on Cont. 463, and note. The original grantor of the land in this case, and his grantor of the ground-rent, established the law of the case as it was to be between them and their assignees, and in the absence of any intent on the part of Congress to break down such contracts to give greater scope to the paper currency created by it, supposing the right to impose them be conceded, we have no right to abate a tittle of what the parties agreed should have the effect of performance, the possibility to perform remaining unimpaired. For these reasons and another, which I think exists, noticed in the outset as waived, I am for reversing this case.

MERVINE v. SAILOR.

The views herein expressed may be better understood by keeping in mind the form of action, and that it is an action of covenant to recover damages for a breach of contract by the defendants, in failing to pay the plaintiff a certain ground-rent which they had contracted to do, “in lawful silver money of the United States of America, each dollar weighing 17 dwts. and 6 grains at least.” The defendants deny a breach of the contract, and set up performance by pleading a tender of the number of dollars in legal-tender notes of the United States, and the court below held their plea good.

I cannot bring my mind to this conclusion, for the reasons which I will state as briefly as the nature of the case will admit.

It is not the less true because common-place, that the intention of the parties to a contract, not *malum in se*, nor *malum prohibitum*, shall govern it in its interpretation, where it appears, or can be discovered; and in cases where the intent is not patent, while exploring it, the subject-matter of the contract is often a circumstance that may explain much that would otherwise seem inexplicable. That the intention should govern, results from the right that all have in a free country, to dispose of their property and bind themselves in contracts as they please, provided they avoid trespassing on the law or public morality. If they may not, they have little claim to be considered free. They are but *automata*, speaking the language which state or judicial assumption may permit them, but not their own.

Another principle is, that contracts are liable to a modification, or rather to be affected, sometimes by constitutional legislation, but which does not abrogate them or release the parties to them – such as increased taxation, the exercise of the right of eminent domain, changes in the currency, and the like. To illustrate in view of the theory of the defendants in this case, lawful money which may be a legal tender when a contract is entered into, and which may have been in contemplation of the parties as a medium of payment, may be changed and altered, and a different standard of weight and fineness, less valuable, may be adopted in its stead, which, if declared to be a legal tender, will be so. The necessity of the state to do so, and it is constitutionally allowable, is superior to individual rights. Such has been the case in regard to our domestic coins in several instances. By the Act of 1792, the standard weight of the dollar was fixed at 17 dwts. and 8 grains, and this was reduced in 1837 to 17 dwts. and 4 grains. But this did not affect its character as a legal tender in payment of debts contracted prior thereto, because of the principle just stated. Many of such changes have taken place in England, one in which I remember the change in the standard was notified to the people by proclamation, having emanated probably in an order of the Privy Council. The case of the Mixed Money, to be found in Sir John Davies’s Reports (Irish) 48, in the reign of King James I., is in point to this principle, that a contract may be satisfied by a payment of what is a legal tender at the time the contract is to be performed or the debt falls due, although in depreciated money.

This is insisted on by the defendant, and is true as a principle. But is their case within it? I certainly do not think it is. It has no relation to contracts payable in specific articles. It has no bearing on such cases. If payment be agreed to be made in wheat, iron or silver, by weight, it affects not them, for it has no reference to the medium established in individual cases by parties, but only to the general currency of the country. Payment in kind or specific articles must be made as agreed, and the rule is, that the increase of price of the articles, or the difficulty in procuring them, will not excuse the contractor from his obligations to deliver or pay the value thereof at the appointed time of delivery. Every man takes the risk of the performance of his special contracts. "It is the duty of the promissor," says Story on Cont., § 463, "well to weigh the difficulty or improbability of his consideration before he binds himself to perform it, and the law will not help him to avoid duties which he has deliberately imposed upon himself, so long as they are possible:" and see 16 East 201; 15 M. & W. 261.

These are general principles about which there can be little dispute. Was the contract of the defendants payable in money and within the first class of principles, or in a commodity or specific article, and within the last?

At the date of their contract, the 29th March 1839, and since, silver dollars weighing 17 dwts. and 4 grains, would have satisfied their contract if the covenant be not special. We ought to presume that they knew this; and we must do so, for the contrary is not pretended. We must also assume that they intended that it should not be solvable in the standard coin which was a legal tender, but in something else, because they have said so, and by saying so, they have demonstrated their intention to take their case out of the ordinary rule fixed by law for its satisfaction, and have brought it under the rule of the contract, which is the law of the case; being neither illegal nor against the policy of the law. The special character of the contract is manifest in the stipulation in regard to weight. The fineness was fixed by reference to the dollar of the United States of America. So many times 17 dwts. and 6 grains of silver of this dollar, or its standard fineness, was what was to be paid annually, if we regard the contract at all. And why shall we not? Where is our authority for saying that if even the dollar of 17 dwts. and 4 grains had been tendered, the plaintiff would have been obliged to take it, and entailed a loss of over \$2 per year, or since the date of the contract equal to about \$60? The sum is small, but there is no law forbidding people to deal closely about small matters, and their contracts are to be regarded as in other things, unless within the rule of *de minimis*. But the calculation serves to show that the contract was special and excludes the idea of payment in the ordinary currency of silver or gold, and is used for this alone.

Another consideration that ought not to be overlooked, is that the parties bargained for a medium not used in mercantile or trading transactions at the time. The money so used was

of the legal standard and weight, as fixed by the Act of 1837. That they did not mean this as the medium of satisfaction for their contract admits not of a doubt, because they contracted for a different thing to be paid and received in payment. Not an impossible thing, nor a difficult thing, but a different thing. The defendant agreed to risk the difficulty of performance in that medium, and they have not the right to plead *non in hæc fœdera veni*. They should comply specifically or its legal equivalent.

The suggestion that the stipulation as to weight was to meet the diminution in the value of the coin by abrasion, is not satisfactory as accounting for the specification in the contract. It would be entitled to consideration, if the payment had been provided to be in dollars of the mint weight, but it was not, as shown. Besides, coins reduced below legal weight by clipping, sweating, abrasion or any other process, are not legal tenders; it was therefore a provision not necessary to guard the rights of the plaintiff, if the contract was intended simply to be dischargeable in ordinary legal coin. There is no accounting for the terms of the contract, excepting that they were intended to be special, and to produce so much silver annually. To give it this construction works out the intentions of the parties, and is attended with no more difficulty than if it had been made payable in so many bushels of wheat or tons of iron. The articles or their equivalent would in such cases be the rule. We have no right to assume that the plaintiff would have parted with his property, or the defendants could have acquired it, excepting on the very terms agreed upon; but if we affirm this judgment, we disregard the stipulation to pay in silver of such weight and amount as the parties agreed upon, and we adopt a principle alien to the contract, and that it is an ordinary debt; as much so as if secured by due-bill or note, and payable not only not in silver of any weight, but in promises to pay, being notes of the United States. This is not an execution in any sense in my judgment of the contract. It was not paper, no matter how good, the plaintiff contracted for, but silver. He is entitled to a substantial compliance with his contract on this basis and this alone, for such is the contract. There are many cases of contracts payable in specific currency, called “money” and “dollars,” which have been enforced as special contracts, the word *dollar* not carrying the contract into constitutional currency or legal-tender money. In 7 Mo. 597, is the case of *Farwell v. Fay*. It was a case of this kind, and there is a single remark by Scott, J., so applicable to the case in hand, that I cannot forbear to quote it. “The parties,” says the judge, “must have had this” – the difference between the currency of the law and the contract – “in mind, or they would not have deviated from the usual course, but would simply have made the bill payable in dollars.” The case of *Pilmer v. Branch Bank at Des Moines*, Law Reg. (1865) 336, is an interesting case on the subject of contracts payable in currency, to which a collection of all the cases on the subject in a note is appended, and goes far to prove the ground herein contended for.

But I must not further enlarge; I am of opinion that the tender of the notes in question was

not a compliance with the defendant's contract, and that the plaintiff was entitled to recover in damages what the silver was worth, with interest when suit was brought.

The judiciary of a state is neither prohibited nor excused from pronouncing an Act of Congress when involved in any issue regularly before them unconstitutional and invalid, if they so believe it to be. It is true, their decision would not be a finality, and would stand in relation to the Supreme Court of the United States like a decision at *Nisi Prius*, liable to be reviewed, reversed or affirmed; but until reversed, it would be the law within the jurisdiction of the court pronouncing judgment. There is no insubordination, therefore, in determining adversely to the constitutionality of an Act of Congress, when it has not been declared constitutional by the ultimate tribunal, the Supreme Court of the United States. No such decision has been made on the subject before us now, nor has this court heretofore passed upon it. It is well known that the Act of Congress of the 25th February 1862, has been approved by several of the courts of the last resort in some of the States; by a majority in the Court of Appeals in the state of New York, in *Meyer v. Rosevelt*, reversing a decision of the Supreme Court, made in March 1863, if I do not mistake. So in Massachusetts, and perhaps in several other states. In Indiana, in *The Bank of Indiana v. Reynolds*, Law Reg. 1865, &c., a contrary doctrine was held. With us in the District Court of Philadelphia, in this case, the decision was in favour of the constitutionality of the act, and so maintained by a majority of the court; and also in *Trott v. Borie*; but the decision of the majority was in this case combated in an able opinion by Sharswood, president. In the Circuit Court of the United States for the eastern district of this state, in *Morrison v. The Reading Railroad Co.*, Judge Cadwalader delivered a learned opinion against the constitutionality of the law, while Grier, J., confined his opinion in the case to other points which he considered determined it. It is plain that great diversity of opinion exists in regard to this question, and that we could not, if we would, avoid a determination of it, there being no decision up to this time in the ultimate tribunal, the Supreme Court of the United States.

As it is my duty as a member of the court to do, I will give the result of my best reflections and conclusions on the question as concisely as possible, stating well-known and adjudged principles, without the trouble of citing cases.

It may be regarded as judicially settled that Congress can lawfully exercise only such powers as are expressly granted in the Constitution, or that are necessarily incidental to some power. Indeed such is in substance and essence the express rule of the Constitution itself. Art. X. of the Amendments provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or the people."

It is obvious, therefore, that in order to ascertain what powers are conferred upon Congress

in cases of any given claim of power, we must first see if it be express; and if it be not, ascertain if possible if it is necessary to the execution of any other express power – not absolutely necessary on the one hand, nor necessary, in the sense of convenience, on the other. Story on Const., § 609; but simply necessary and proper to the healthful exercise of the power to which it is an incident. But the necessity is not to be tested by individual instances of extreme and doubtful exercise of powers by Congress. To refer to such a standard is simply to yield the construction of the Constitution in the particular to be ascertained, to Congress; and it is not the constitutional arbiter in such cases. That would be to constitute it the sole judge of its own powers.

The power to be sought for here, is that under which Congress authorized the treasury department to issue notes of the United States, to circulate as money and be a legal tender in payment of debts, some of which were offered as a tender in discharge of the defendant's covenant. It must be somewhere if it be lawful.

That the power to issue such notes and declare them a legal tender, and thus make them money, at least so far as the characteristics of money go, is express in the Constitution, no one will pretend. If, therefore, it exist at all, it must be incidental to some other express power.

There is an express grant to Congress in the Constitution “to coin money and regulate the value thereof, and of foreign coin.” This is the *sole* express grant on the subject of making money of any kind. It cannot be necessary to multiply words and adduce definitions to establish the idea that the words “to coin money,” embrace the idea of making it of metal. It implies this as plainly as if it had been so said – words could not have made the thought plainer. And they imply necessarily the general process of manufacture, namely, that it was to be accomplished by the use of chemicals, crucibles and dies, and not by paper, ink and printing-presses. Nobody, whose opinions are worth anything, would deny this; and therefore, so far as the grant goes, we may safely conclude it does not embrace the power to make and issue *paper* as money. A construction that would substitute printing for coining, and paper for metals, as equivalent things, would find, I think, but few advocates.

As the power to issue paper money, if it exists, is not an express power, to what does it belong as a necessary or proper incident? I esteem it an argument of weight here, that among its warmest advocates it is vagrant; sometimes claiming to rest in one part of the Constitution, and then in another, and finally when no safe ground is found, assuming to be independent of and higher than the Constitution, existing in the necessity of things. Sometimes it is claimed to be necessary in the regulation of commerce; then in the raising and maintenance of an army and navy; then as a mode of borrowing money; and finally as a necessity belonging to all powers alike. Let us look for a moment at these claims.

It ought to be enough to say, of the first of these pretensions, that the Act of Congress is not based upon any supposed required regulation of commerce, nor has it been suggested that anything of the kind was in view in prompting the issue of legal-tender notes. Had it been even so, that money was needed for such a purpose, and paper was needed to execute the purpose, why make it a legal tender? The government could not compel foreigners to accept it. Treasury notes in the ordinary form would answer quite as well, if paper would answer at all; but it is in just such a purpose paper money would not answer at all. Its fluctuations would defeat the object; at most it would be but the representative of values at home and not abroad; there could be no regular exchange adopted in regard to it as there could with a metallic standard. I throw out of view any question of regulating commerce between the States, that was not needed at the time. But it is a waste of time to contest the necessity of paper money as incident to this power.

To raise and support an army and maintain a navy, is an express grant. The indefinite increase to meet emergencies was anticipated by the framers of the Constitution, and the means of support was provided for this condition of things, as amply as in ordinary times. The power to coin money; of taxation without limit when needed; and the power to borrow, are expressly given, and liable to be devoted to these ends. These powers being exercised would reach into every vein and artery of wealth, and drain them, if necessary, to maintain the government in its hour of trial, and much more readily in ordinary seasons. They must have been thought adequate to every emergency; for emergencies were anticipated, as other provisions abundantly show, and they have proved sufficient through many trials for more than eighty years. How then can the power now exercised be claimed as a necessary means to an end, and in the presence of these undoubtedly sufficient means, in other words, as incidental to the war power of raising and maintaining an army and a navy? The necessary means of support are expressly given, and not shown, and not pretended to have been shown, to be inadequate. The word *necessary* does not mean *convenient* merely. The express grant to make all laws which shall be “necessary and proper” for carrying into effect the expressly granted power, does not mean such as are merely *convenient*. They are not only to be *necessary*, but at the same time they *must be proper* to the occasion calling for the exercise – Story on the Const. §§ 601-4. This clause, which is often misunderstood – sometimes purposely – only gives the right of legislating on the subject of express powers, so as to supply *proper* and *necessary* aids not defined in the Constitution, which is necessarily general in its provisions. This shows how anxious were its framers to leave as little to implication as possible; for even the right to legislate, which might be an implied one, we think, on any inexpress grant, was thought ought not to be left to rest on implication, and hence the power is expressly given, but limited to such things only as are both *necessary* and *proper*. No sound mind would contend for a moment, I think, for the idea that an incident might exist under this authority, entirely different and distinct from those suitable to the character, and proper to execute the principal in view of the nature of

the government established. To make and issue paper as money, when the Constitution was established in this particular, only on the power and basis of money to be coined, and therefore metallic, I think departs from the nature of the government in this particular, and palpably transcends the power conferred by the Constitution, unless indeed we may persuade ourselves that authority to do a thing in one way means quite another, or many others, or whatever may be convenient.

By a sort of metempsychosis, the authority for paper money – not treasury notes, but paper called money – is supposed to exist under the granted power to borrow money. I admit that the Constitution is not to be construed technically, but in the ordinary and usual acceptation and meaning of its language: 7 W. & S. 127. But there is no technicality in the position that to borrow is to establish the contract relation of debtor and creditor. The consideration for the promise of the borrower to pay, is the money he receives from the lender, and this is always in a business transaction to be with interest, and at some specified time. The notes now under consideration are promises to pay, without time and interest, without any reference to money received, but, as we know, in payment of property received or services rendered, and which the party advancing the property, or rendering the services, could not refuse to receive as money. They are, therefore, not certificates of loan, nor do they acknowledge to be securities for loans made. They are no part of the machinery used in borrowing and lending; and to support or attempt to support their legality, on the principle of borrowing money, would be far, very far indeed, from rendering and interpreting the clause in its usual, common and ordinary meaning; it would be more than a technicality. As a means of borrowing money, the authority to issue these notes cannot find shelter in this haven of the Constitution.

I have no doubt, and therefore I admit, that in the exercise of the power to borrow money, it may be authorized either in large or small amounts, as the government may determine; to be accompanied with appropriate securities. But to be within the constitutional permission, the entire transaction must belong to the contract or transaction of borrowing. It would be a fraud on the Constitution, or perhaps more properly, upon the people whose instrument it is, to issue a thing to be called and provided with the attributes of money not authorized, and thus claim authority for the Act, by calling it something else that is authorized by the Constitution. I agree that the securities for loans may be bought and sold, and pass from hand to hand *ad libitum*, but still they must be securities for loans, a sort of government stocks, and *not money*. We have been borrowing money in large amounts these four years past, but the form of the transaction has been to give our bonds to the lender, redeemable after a certain number of years, with a certain rate of interest. These transactions, both in form and substance, separate themselves most widely. The one is borrowing in a legitimate form. The other is creating money out of paper. The one has the warrant of the Constitution for its support, the other has not – at least in my opinion.

If anything outside of the Constitution itself were needed to convince us that no such power, either *overt* or *covert*, is contained in it, it may be readily found in the contemporaneous history of the times in which it was framed and adopted. In the Madison Papers, vol. 2, p. 1232, the original report to the convention of the clause to borrow money is given. “The legislature of the United States,” says the report, “shall have power to borrow money, *and emit bills of credit of the United States.*” We have a most instructive account of the disposition in the convention of that portion of the report “to emit bills of credit of the United States,” in the letter of Luther Martin to the House of Delegates of Maryland, addressed to Mr. Dyer, the speaker. That distinguished man was at the time the Attorney-General of Maryland, and had been an active and able member of the convention that framed the Constitution. The letter may be found at page 381, vol. 1, of Elliott’s Debates in the Convention.

He says: “When we came to this part of the report a motion was made to strike out the words ‘to emit bills of credit.’ Against the motion we argued that it would be improper to deprive Congress of that power; that it would be a novelty unprecedented to establish a government which should not have such authority; that it was impossible to look forward into futurity, so far as to decide that events might not happen that should render the exercise of such a power absolutely necessary; and that we doubted whether, if a war should take place, it would be possible for the country to defend itself, without having recourse to *paper credit*, in which case there would be a necessity of becoming a prey to our enemies, or of *violating the Constitution* of our government; and that considering the administration of the government would be principally in the hands of the wealthy, there would be little reason to fear an abuse of the power by an unnecessary or injurious exercise of it. But, sir, a majority of the convention, being wise beyond every event, and being willing to risk any political evil rather than admit the idea of a paper emission in any possible case, refused to trust this authority to a government to which they were trusting the most unlimited powers of taxation, and to the mercy of which they were willing literally to trust the liberty and property of the citizens of every state in the Union. THEY ERASED THE CLAUSE *from the system.*”

This is clear testimony from a disappointed advocate of the power to issue paper money, for that is what the excised words meant, and who for this and other reasons desired to see the form of government proposed, rejected by the people of Maryland, his constituents. So convinced, does it appear, was this distinguished man and others in the convention, that with this clause out – nowhere else to be found in the “system” proposed – they claimed that, if ever exercised, as they supposed it would be in time of war, it would only be in violation of the Constitution itself. This is like prophecy realized. It was stricken out, and left simply the power to borrow money, bereft of its associate power “to emit bills of credit.” Now what is meant by bills of credit is defined in many places. In *Craig v. The*

State of Missouri, 4 Pet. 431, Chief Justice Marshall says: “To emit bills of credit, conveys to the mind the idea of *paper intended to circulate through the community for its ordinary purposes as money*.” See also 4 Kent 407; 4 Dall. XXII.; Story on Const. § 1362 to 1364.

If Mr. Martin was not mistaken in describing the hostility of the convention to a power in the Constitution to emit bills of credit, in other words paper money, a thing well known and disastrously tried by the States and the Confederation, it is incredible to suppose that it was notwithstanding still intended to retain it in the *system* in an incidental form. The desire was so intense that it should not exist, that the majority, says he, “were willing to encounter any political evil rather than the idea of a *paper currency in any possible case!*”

It is with just such an issue I am endeavouring to deal; for the Act of Congress, whose validity I deny, says of the paper authorized to be issued under it, that it shall be “LAWFUL MONEY, AND A LEGAL TENDER.”

The Madison Papers prove the same thing. Curtis, in his history of the Constitution, vol. 2, p. 365, says, referring himself to these papers: “Fears were entertained (in the convention) that an absolute prohibition of *paper money* would excite the strenuous opposition of its partisans against the Constitution; but it was thought best to CRUSH it, and accordingly the votes of all the States but two were given to a proposition to prohibit absolutely the issuing of bills of credit.” Is it possible that, after all this, the power still lurks within it? For my part, I think not.

I admit that extraneous and even contemporaneous testimony that such a power was not intended to be granted to Congress will not prevail against an obvious construction, or clause in the instrument indicating its existence; but when that is so doubtful as not to be found in any definite form either as a principal or an incidental power, what was done showing its intended exclusion is eminently proper and an important aid in interpreting what might seem otherwise doubtful. I have already shown, or endeavoured to do so, that it is not a necessary incident to any power, requiring money to carry it into effect, for that can be had by borrowing, taxing and coining; and, furthermore, that it would be an improper incident to other powers to which it has been deemed to belong. It exceeds my feeble capacity to discover a place for it anywhere in the Constitution, and I have never met with any one who could successfully demonstrate that it is there, or prove to the satisfaction of all where it is, or even to any considerable number where it may be found.

The last ground upon which “it is justified by its friends,” and not by any means the least common, is the broad platform of necessity – the principle on which Mr. Martin said it would be exercised if ever, but then in violation of the Constitution. This position has the advantage of being set free of restraint or trammel, constitutional or judicial. It is a

proverb, “*necessitas non habet legem.*” It knows no law but that which it creates. Surely this will not be insisted upon as a safe ground upon which a limited government may stand. It is exactly an antagonistic principle. If such a plea be entertained, its operation need not be expected to be limited to the issue of paper money in emergent times. It may as well extend to any other subject desired by those who happen for the time being to be in power, to the destruction of the safeguards around life, liberty and property, and this would be despotism. I pray that the day is far distant when the successful appeal to such a principle may be made to justify any unauthorized action on the part of the representatives of the people.

I am quite free to admit that Congress has a large discretion in choosing the means to be employed in executing the various powers of our government. But this discretion must be about means sanctioned by the Constitution. For instance, if the act to be performed require more money than the ordinary capacity of the treasury will afford, they undoubtedly may resolve either to borrow the required sum, or raise it by taxation, or perform it only as fast as the ordinary resources of the treasury will permit. But it could not be done by the exercise of a power to confiscate the property of individuals, and apply the proceeds to the purposes intended; or by compelling the people in time of profound peace to perform manual service in executing it. There is no allowable choice between such alternatives. They must be constitutional, or the alternatives must not be exercised.

No government on earth ever had a harder strain upon its energies than ours has had during the last four years. But I believe, however much alarm may have conduced to the resort to measures not entirely reconcilable with the Constitution, yet that its clearly defined powers being fully exercised, would have been ample for all the emergencies of the times. Powers to provide the sinews of war were palpable on the face of the Constitution: namely, in the power to borrow money and to tax *ad libitum*. These resorts would, as already said, reach every point where supplies might be obtained. Besides, too, the right to deal on the credit of the government and to coin money existed. These seem like ample powers. But this I am not obliged to deal with. It is the constitutionality of the Act of Congress with which I have to do; and if this course of reasoning should result in a denial of the legality of the notes in question, it would not be the fault of the principle, but the want of authority to pass the Act. In such an event it would be for the people to adopt some means to assuage or mitigate the inconvenience that would result. But about that I need not trouble myself. I accept, as the rule governing me, the axiom that if it was worth while to frame a constitution it is a duty to preserve it.

Nothing but the presence of the convictions of duty could have induced me to undergo the labour of preparing an opinion on a subject so largely and ably discussed by others more competent to do justice to it. I am of opinion, without saying more, that the tender was

insufficient in all these cases, and that the judgment should be reversed wherever the tenders were held to be sufficient.

STRONG, J.

All these cases present the question whether the Act of Congress of February 25th 1862, entitled "An Act to authorize the issue of United States notes, and for the redemption and funding thereof, and for funding the floating debt of the United States," was a legitimate exercise of the powers conferred upon Congress by the Federal Constitution. The act authorized the secretary of the treasury to issue, on the credit of the United States, \$150,000,000 of United States notes, not bearing interest, payable to bearer at the treasury of the United States, and of such denominations as he might deem expedient, not less than \$5 each. And the act further enacted that the notes shall be receivable in payment of all taxes, internal duties, excises, debts, and demands of every kind, due to the United States (except duties on imports), and of all claims and demands against the United States, of every kind whatsoever, except for interest upon bonds and notes which shall be paid in coin, and shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid." The great question now presented is, whether it was competent for Congress to impress upon the notes issued under the act the character of money, and make them a legal tender for all debts public and private, except for duties on imports and interest on United States bonds and notes. I do not understand that the constitutional right of Congress to provide for the issue of treasury notes is controverted. It is the power to give them the effect declared, which is denied.

It is impossible to approach a consideration of this question without being impressed with a conviction of its magnitude. The interests involved in it, both public and private, are so vast, and the possible consequences of our judgment so momentous, that it would be unpardonable if we did not give to it our most careful and anxious consideration. Happily the question is not entirely new. It has engaged the attention of the Court of Appeals of the State of New York, and of the Supreme Court of California, in both of which courts very able judgments have been pronounced sustaining the constitutionality of the action of Congress. The investigation and reasoning of the judges of those courts has been to me a great assistance, and they have left little to be said. Other courts also have very thoroughly considered the question.

It is a well-settled principle that when the constitutionality of an Act of Congress is called in question there must be a presumption in its favour. True, a different rule is to be applied when the validity of an Act of Congress is under consideration from that which prevails when the action of a State legislature is assailed. In the former, the inquiry is whether the

act was warranted by any of the enumerated powers conferred upon Congress, or by any of those not enumerated but included in the comprehensive provision that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the specified powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. The constitutionality of a State law, on the other hand, if it be an act of legislation, depends on the question whether it has been prohibited. But in both cases there is an intendment in favour of the law, arising from the fact that Congress or the State legislature has enacted it. A decent respect for a co-ordinate branch of the government demands that the judiciary should presume there has been no transgression of power by men who have acted officially under the obligation of an oath to maintain the Constitution. It must be a clear and unequivocal case which will justify a court in setting aside as invalid either an Act of the State or Federal legislature. This has often been decided by this court as well as elsewhere. In *The Commonwealth v. Smith*, 4 Binn. 123, it was said: "It must be remembered that for weighty reasons it has been assumed as a principle, in construing constitutions by the Supreme Court of the United States, by this court, and by every other court of reputation in the United States, that an Act of the legislature is not to be declared void, unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt." And in *Fletcher v. Peck*, 6 Cranch 87, Chief Justice Marshall said: "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its Acts to be considered void. 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."

I recognise fully the doctrine that neither the government of the United States, nor any of its departments, can claim powers not expressly given by the Constitution, or given by necessary implication. Every Act of Congress must be authorized by express grant of power, or by a law necessary and proper for carrying into execution some power expressly stated, or vested in the government of the United States, or in some department or officer thereof. The specified powers conferred upon Congress are not numerous. Among them are the following: "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:" "To borrow money on the credit of the United States:" "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes:" "To coin money, regulate the value thereof, and of foreign coin:" "To declare war:" "To raise and support armies – to provide and maintain a navy." These are what are sometimes called substantive or independent powers, conferred in the briefest possible language. In addition to these, is a class of powers ancillary to them and to all powers vested in the government, but not enumerated and from their very nature incapable of enumeration. They are such as are embraced in the last clause of section 8th of article 1st of the Constitution, which declares

that Congress shall have power “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof. Without these non-enumerated ancillary powers, either expressly given or implied, the grant of those which are specified would have been an empty gift. They could not have been executed.

At the outset of our investigation, it should be observed, that to understand the nature and extent of the powers conferred by the Constitution, whether substantive or ancillary, it is indispensable to keep in view the objects for which the Constitution was adopted and for which its powers were granted. This is a universal rule of construction not only of statutes, wills and personal contracts, but also of constitutions. If the general purpose of the instrument be ascertained, its language is to be construed so far as possible as subservient to that purpose. And there are more urgent reasons for regarding the general purpose in examining the powers conferred by a constitution than there are in construing a will or contract. A constitution is necessarily but framework. It prescribes mainly outlines, and leaves the filling up for action under it. In *Martin v. Hunter*, 1 Wheaton 326, Judge Story said: “The Constitution unavoidably deals in general language. It did not suit the purpose of the people in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution.” And still more distinctly was it said by Chief Justice Marshall, in *McCullough v. The State of Maryland*, 4 Wheaton 405: “A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which it may be carried into execution, would partake of the prolixity of a political code, and would scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.” Citations of other authorities to the same effect might be multiplied, but the reasonableness of such a rule of construction is too apparent to need more. If this be the true light in which the Constitution of the United States is to be interpreted, that is a very narrow view which regards any one of the specified powers, independent of its relation to the others, or to them all aggregated. Each must be considered as but a part of a system, a constituent of a whole. No single power specified is the ultimate end for which the Constitution was adopted. It may be, in a very proper sense, an intermediate end, but it is itself a means for the accomplishment of a single and higher end. Thus the power to lay or collect taxes or to coin money and regulate its value, or the power to raise and support armies, or to provide for and maintain a navy, can only be regarded as an instrument for accomplishing an ultimate end, and that end the establishment of a government, sovereign within its sphere, to form a more perfect union than that which existed under the old Confederacy,

to establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty. The same may be said of all the powers enumerated in the Constitution, and of those which are classified but not mentioned in detail. They are all means to an ultimate end, and it is impossible to comprehend what is meant by the words in which they were granted without keeping in view the great purposes for which they were given.

Look now for a moment at the paramount object which those who adopted the Constitution had in view, as exhibited by the instrument itself. It was to establish a government, for the common defence, to insure domestic tranquillity, establish justice and secure the blessings of liberty. To this government was necessarily committed the power of perpetuating itself. In *Cohens v. State of Virginia*, 6 Wheat. 414, Chief Justice Marshall said: "America has chosen to be in many respects and to many purposes a nation, and for all these purposes her government is complete; for all these objects it is supreme. It can then, in effecting these objects, legitimately control all individuals or governments within the American territory." He added, in the same case, "A constitution is framed for ages to come, and is designed to approach immortality as near as mortality can approach it. Its course cannot always be tranquil; it is exposed to storms and tempests, and its framers must be unwise statesmen indeed if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it is sure to encounter." To this may be added what the same great judge said in *McCullough v. Maryland*, *supra*. Said he: "The sword and the purse, and all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that those vast powers draw after them others of inferior importance merely because they are inferior. Such an idea can never be advanced. But it may be with great reason contended that a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation depend, must also be intrusted with ample means for their execution." It was to enable this government to accomplish the purposes sought in its creation, that all the powers it possesses were given to it. And they were declared to be sovereign powers. They were limited in number, but not in efficiency. "In the construction of the Constitution it has always been held that the powers vested by it in the government are complete in themselves and that they may be exercised to their utmost extent, and that there are no other limitations upon them than such as are prescribed in the Constitution." This was distinctly said in *Gibbons v. Ogden*, 9 Wheat. 196. Nor was it alone to enable the government to secure the ends of its institution that the powers were conferred upon it. The gift of the power imposed a duty to use it for the purposes for which it was given. It is the duty of the government to maintain its own perpetuity, to provide for the common defence, to suppress insurrections and rebellion and to repel invasions. Said Mr. Justice Daniel in *United States v. Marigold*, 9 How. 560: "Whatever functions Congress are by the Constitution authorized to perform, they are, when the public good

requires it, bound to perform.” It is a most unreasonable construction of the Constitution that denies to such a government the right to employ freely every means, not prohibited, necessary to the execution of the expressly-granted powers and to the fulfilment of its great duties. No attempt was made in the Constitution itself to define what laws Congress might pass in execution of its powers. All instrumentalities were left to the discretion of Congress, subject only to the restriction that they shall be necessary and proper, not merely for carrying into execution the enumerated powers given to Congress, but all other powers vested in the government, or any department or officer thereof.

It is also to be observed that it is not indispensable to the existence of every power claimed for the Federal Government, that it should be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may fairly be deduced from more than one of the substantive powers expressly defined, and indeed from them all combined. It is allowable to group together any number of the defined grants of power, and show that from them all it results that the power claimed has been conferred. Such a treatment of the Constitution is recognised by its own provisions. A remarkable illustration of this may be found in its language respecting the writ of *habeas corpus*. The power to suspend the privilege of that writ is not expressly given, nor can it be deduced from any one of the expressly-specified grants of power. Yet it is provided that the privilege of the writ shall not be suspended except in certain defined contingencies. This is no express grant of power. On the contrary, it is a restriction. But it conveys an irresistible implication that somewhere in the Constitution the power to suspend the privilege of the writ was granted, either by some one or more of the specifications of power, or by them all combined. I do not, however, affirm that it is not fairly inferable from the restrictive clause alone. And that important powers were understood by the people who adopted the Constitution to have been created by it; powers not enumerated, and not included incidentally in any one of those enumerated, is manifested by the amendments. These may be said to have originated before the Constitution was adopted. They were suggested in the conventions of the States, and proposed at the first session of the first Congress that convened under the Constitution, and before any complaint was made of a disposition to assume doubtful powers. The preamble to the resolution submitting them for adoption recites as follows: “The conventions of a number of the States having at the time of their adopting of the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added.” This was the origin of the first ten amendments. The Constitution had been considered and debated, not only in the convention by which it was framed, but in all the conventions of the people of the several States, by the public press, by pamphleteers, in public meetings of the people, at the fireside, and especially by Hamilton, Madison and Jay, in the papers afterwards collected in the *Federalist*; and the result was the proposal and adoption of the first ten articles of the amendments. They are

very significant. They tend strongly to show that, in the judgment of those who adopted the Constitution, there were powers created by it, not defined nor deducible from any one specified power, but which, if they existed at all, grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted. Most of these amendments are denials of power which had not been expressly granted, and which was in no sense incident to any declared grant or means to an avowed end. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.

In accordance with such a construction of the powers conferred by the Constitution, has been the whole history of the government, and of Congressional legislation, generally unquestioned, or if questioned, sanctioned by the Supreme Court of the United States. This history has exhibited from its commencement the use of a very wide discretion in the selection of the necessary and proper means to effectuate the great objects for which the government was framed. This is true, not only when an attempt has been made to execute a single power definitely given, but equally when the means adopted have manifestly been incident not to any one description of power, but to all combined in the Constitution. One of the earliest illustrations of this was the purchase of Louisiana in 1803, and its subsequent admission as a State into the Union. What enumerated power authorized this? It never was supported except as an incident to the aggregate of powers conferred upon the government by the Constitution. It must be admitted that this pressed the implied powers of the government to their extremest limit. The act done was necessary, in any sense that I can discover, neither to the perpetuity nor efficiency of the government, nor to its competency to fulfil any of the purposes for which it was created. Under the power to regulate commerce, Congress has by law improved harbours, established observatories, built light-houses and buoys, provided for the registry and enrolment of ships, prescribed to some extent the mode of their construction, and enacted a code for the government of seamen. Under this and its other powers over the revenue and the currency of the country, for the convenience of the treasury and internal commerce, Congress early created a corporation known as the United States Bank. It was not owned by the United States. The government was a stockholder only to the extent of one-fifth of its capital. It was essentially a private corporation, seeking private profit. It was constitutional only, if at all, upon the ground that it was a convenient instrument or means for accomplishing one or more of the primary ends for which the government was established, or, in the language of the Constitution itself, “necessary and proper” for carrying into execution some or all of the powers vested in the government. Clearly, this necessity, if any existed, was not a direct and obvious one. If the choice of such means was within the discretionary power of Congress, that discretion is large. Yet the Supreme Court of the United States, in *McCullough v. Maryland*, 4 Wheat. 416, unanimously ruled that in authorizing the bank, Congress had not transcended its powers. Chief Justice Marshall, with a clearness of

reasoning and comprehensiveness of view that will never cease to command respect, laid down in that case the principles by which the Constitution has always been construed. “We think,” said he, “the sound construction of the Constitution must allow to the National Legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all the means which are appropriate, which are plainly adapted to the end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.”

Under the power to establish post-offices and post-roads, Congress has made provision for carrying the mails, punishing theft of letters, and robbery of the mails, and even for transporting them across the ocean.

These are but illustrations of the manner in which the Constitution has been understood by the Federal Legislature, an understanding in which they have been supported by the Supreme Court of the United States. It is of more importance however to observe, that Congress has often exercised powers that are not expressly given, nor incident to any enumerated power, and which cannot be said to be necessary means for securing any of the proximate ends specified in the Constitution. They are what are called by Judge Story, in his Commentaries on the Constitution, resulting powers arising from the aggregate powers of the government. He instances the right to sue and to make contracts. Other striking examples may be given. The oath required by law from officers of the government, is one. So is the acquisition of new territory, and so is the penal code. This last is worthy of brief notice. Congress is expressly authorized “to provide for the punishment of counterfeiting the securities and current coin of the United States, and to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.” They are also empowered to declare the punishment of treason. Impeachments are also provided for. This is the extent of the criminal jurisdiction expressly conferred. It might be argued, that the expression of these limited powers is tantamount to an exclusion of all other subjects of criminal legislation. Such is the argument in the present cases. It is said because Congress is empowered to coin money and regulate its value, it cannot declare anything else to be money, or make it a legal tender. Such a power it is said cannot be incident to any other or all other powers. Yet Congress by the Act of April 30th 1790, entitled “An Act more effectually to provide for the punishment of certain crimes against the United States,” and the supplementary Act of March 3d 1825, define and punish a large class of crimes other than those mentioned in the Constitution; some of the punishments prescribed are manifestly not in aid of the execution of any single substantive power. And that this has been rightfully done, no one doubts. This power to impose penalties for offences not described in the Constitution, has been affirmed in the Supreme Court. In *United States v.*

Marigold, 9 Howard 560, the only question presented was whether Congress could pass a law making it criminal to import spurious coin. The court held that the power existed, and Judge Daniel, in delivering the opinion of the court, said: "We trace the offence, and the authority to punish it, to the power given by the Constitution to coin money, and to the corresponding and necessary power and obligation to protect and preserve in its purity this constitutional currency for the benefit of the nation. While we hold it 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 fulfilment of clear and well defined duties." This case is important also as showing that a power may exist as an incident to an express power, though there is another express power relating to a part of its subject. I might also refer to the power of Congress to give priority to debts due the United States, which has been decided to be constitutional: *United States v. Fisher*, 2 Cranch 358. But enough has been said to show that a liberal construction has always been claimed by Congress, and accorded by the Supreme Court, to the grant of ancillary powers, that is, of those which are described as necessary and proper for the execution of the specified powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. And as in *McCullough v. Maryland*, so generally it has been held that what is meant by "necessary and proper," is not absolute necessity, but that the means used must be adapted or conducive to the legitimate end sought to be attained. The degree of the necessity is left to Congress, it is not for the courts.

In view, therefore, of the nature of the Constitution, of the avowed purposes for which it was formed, of its history, of the rules which have been adopted by the Supreme Court of the United States for its construction, and of the continuous and approved action of Congress under it, I cannot say Congress has no constitutional power to declare that treasury notes of the United States shall be lawful money, and a legal tender for debts public and private. To justify a denial of such power in Congress it is indispensable to hold that it has not been conferred by any one of the substantive grants, and also that it is not a necessary and proper means to the end of either levying and collecting taxes, borrowing money, raising and supporting armies, regulating commerce, providing and maintaining a navy, coining money and regulating the value thereof, or to any number of these ends, or to the great purpose for which the government was established and for which it is to be perpetuated. Yet who can deny that the Act of February 25th 1862, declaring treasury notes lawful money and a legal tender, has contributed in an eminent degree to enable the government to execute all these powers, to maintain its own perpetuity, and to fulfil the constitutional pledge to guaranty to each State a republican form of government? Indeed, without some such measure it is not easy to see how the objects sought to be attained by the Constitution could have been secured. And even if they could have been; if some other

means equally efficient could have been chosen, it is not for a court to declare this means unauthorized, unless it can be shown that it is not adapted to the ends defined in the Constitution, or that it is prohibited.

It is then in my judgment unnecessary to seek for or to find in any one of the enumerated powers of Congress the right to declare the treasury notes of the United States lawful money, and a legal tender. If it is an ancillary means for executing them singly or aggregated, it is enough. I do not doubt, however, it is a legitimate incident to the power to borrow money. It is certainly as much so as is the power to exempt the securities of the United States from State taxation, and that they may be declared thus exempt, indeed that they are exempt without any such declaration, has been decided by the Supreme Court of the United States. In *Weston v. The City of Charleston*, 2 Peters 449, it was ruled that the power to borrow money on the credit of the United States contains in itself a prohibition against State taxation of the securities given for the loan. And in the recent case of *People v. Tax Commissioners*, 2 Black, it was ruled that Federal bonds are exempt from taxation in any form. There is a very close analogy between these cases and those now before us. I am unable to see any substantial distinction in the principle. The same objections which can be urged against the existence of any power to declare treasury notes money and a legal tender lie against protecting loans to the government from State taxation. One power as much as the other interferes with State and individual rights. One is quite as necessary as the other, to enable the government to borrow on favourable terms. Both aim to give to the securities of the government additional value. If there be any difference in principle, the power claimed in the Act of 1862 would seem to be most clear, for that is a means selected by Congress to execute acknowledged powers, while the other is held to be a constituent of a power itself. I do not propose, however, to go over the argument. It has been very ably done by some of the judges of the Court of Appeals of New York, in the cases of *Meyer v. Roosevelt*, and *The Metropolitan and The Shoe and Leather Bank v. Vandyck*, 13 Smith, in which the Act of Congress now under consideration was sustained as constitutional. It is objected to the attempt to sustain the action of Congress as a means of executing of the borrowing power, that one of the substantive powers cannot be implied as an incident of another, or used as a means for executing it, so as to warrant its being stripped of any limitation imposed in the express grant. This may be admitted in the words in which the objection is stated. But if it be meant that a substantive power cannot be used as a means for executing another, I cannot assent to it. Surely Congress may borrow money or lay taxes to enable it to support an army. It is empowered to use all means not prohibited, and it cannot matter that the means consist of other powers. But this objection is urged in connection with a denial that the right to issue treasury notes and declare them lawful money and a legal tender is a substantive power. If it is not, the objection against asserting it as an incident of one that is substantive fails. If it is itself a substantive power granted, the question is settled. In this connection the case of *The United States v.*

Marigold, already cited, is noteworthy. There an express power to punish a certain class of crimes was not regarded as an objection to deducing a power to punish other crimes from another substantive grant of power. Doing this violates no canon of construction.

I cannot throw off the impression that the whole argument against the right to declare the notes of the United States lawful money rests on the assumption that the clause of the Constitution which authorizes Congress to “coin money and regulate the value thereof, and of foreign coin,” is an implied prohibition of what is called paper money. If it is not, there is no reason why it should not be used as a means for executing the powers which are confessedly granted in express terms. There is no prohibition against such means unless it is implied in this provision. But this assumption seems to me at war with the language of the Constitution taken as a whole, and with the principles upon which it has always been construed. So far from its being a prohibition, it seems to me to have been intended to confer that general power over the currency which has been an acknowledged attribute of sovereignty. A government, a sovereignty was surely intended, not a league, not a compact, but a government, supreme in some particulars over States and people. It was so expressly declared. It is supreme over the currency so far as it is not limited; no other power can interfere with the currency of the country. The States are prohibited from coining money, emitting bills of credit, or making anything but gold and silver a legal tender for the payment of debts. Neither the State legislatures nor the people of the States in convention can declare what shall be money, or control in any manner the currency. Whatever power there is over the currency is vested in Congress. If the power to declare what is money is not there it is annihilated, and one of the ends of government is extinguished. Still this may have been intended. Some powers that usually belong to sovereignties were extinguished. But they were not extinguished by implication. When it was intended that governmental powers, universally acknowledged as such, should cease to exist, they were expressly denied, not only to the States, but to the Federal government, and generally the prohibitions to the States were for the purpose of rendering the Federal power more complete and exclusive. A prohibition to the States was in most cases designed to leave a clear field for Federal action. Now when it is considered in what brief and comprehensive terms the Constitution speaks, and how sensible its framers must have been that emergencies might arise, when the precious metals might prove inadequate to the wants of the government and the need of the people, when also it is considered that paper money was almost universally in use as a medium of exchange, I cannot think it a latitudinarian construction of the Constitution to regard the phrase “coin money and regulate its value,” as synonymous with making money or supplying a currency. If it had been the design to confer the power of declaring what should be money, in what language could it have been conferred more appropriate than that which was used? It was purposely comprehensive. Without a regard to the object intended it amounted to no grant at all. Congress was not empowered in express terms to declare what should be money, nor to purchase bullion for

coining, yet without these powers the authority to coin would not have effectuated the objects for which it must have been given. The power then cannot be construed literally. If it is, it is no power at all. If coining money and regulating its value means no more than putting a stamp upon pieces of metal and declaring what they are worth, it is no power over the currency, and there is no legalized currency. Stamping pieces of metal does not make them money. Coining money, therefore, and regulating its value means something more than making coins out of metallic substances. And again, there is no restriction to any particular metals. The States may not enact that anything but gold and silver shall be a legal tender, but Congress may coin money; that is, say the opponents of the constitutionality of this act, give the character of money to pieces of metal. It has made money out of copper and declared it a legal tender for small amounts. Its power to do this has not been questioned. Nor is there any provision that the pieces of metal which Congress may coin as money, shall have a legal value corresponding at all to the intrinsic value of the metal in the market. Upon this subject the Constitution is silent. The regulation of value may be changed from time to time. It has been more than once, without denial of the power of Congress to change it. Our coins have been debased, and a smaller weight of pure gold or silver is now required for a dollar than was formerly required. It seems, therefore, to have been left to Congress to determine how far the statutory value of coined metal should correspond with the market value of the same metal as bullion. It is not claimed that the expression “to coin money and regulate the value thereof,” expresses or implies any other restriction than that the substance of which it is coined shall be metallic. But it is possible that gold or silver be formed into a leaf not thicker than bank-note paper. If upon such a leaf, stamped in any way, a value be affixed by Congress of one hundred dollars, why is it not money, even in the view of those who insist that coining money is applicable only to metallic substances? There is no prescription of any form for the pieces of money that may be coined. Thus it appears that the object of the power was to enable Congress to furnish a currency, and the nature and value of the material of which it is to be constituted are certainly a subordinate, if not an immaterial thing. Indeed the intrinsic value of the material is left wholly to the discretion of Congress. And it may be added that the literal construction of the clause to “coin money and regulate the value thereof,” so much insisted upon in the argument against the constitutionality of the Act of February 25th 1862, not only renders the power nugatory, but it is at variance with the acknowledged rules for construing the other substantive powers granted to Congress. They have never been construed literally. Thus the power to make war and carry it on is conferred by the words “declare war.” A literal construction of these words would limit the power of Congress to a mere avowal of the existence of war. So the power to regulate commerce has always been construed according to its spirit, not its letter. It has even been held that under it foreign commerce might be destroyed in a time of peace. Such was in effect the decision that sustained the constitutionality of the embargo. The construction given to the power to establish post-offices and post-roads is another illustration of the

understanding that the express substantive powers of Congress are not to be construed literally. Why then should the phrase to “coin money” be so construed? When the Constitution was adopted the great thing sought in regard to the currency was uniformity of value. This could not be secured by local legislation. Hence the restrictions on the States, and the grant to the Federal legislature, without any express restrictions. The world had then passed the point of an exclusively metallic currency. It had proved inadequate for a time of war, and even for rapidly extending commerce. In view of this it appears to me no unwarranted stretch of constitutional authority to regard a grant of power to coin money, as no prohibition of power to make and use paper money as a means for executing other great powers of the government, if it be not itself a general and unrestricted power to create a currency.

For these reasons, and in view of the decisions of the Supreme Court of the United States, I cannot doubt the constitutional power of Congress to issue treasury notes of the United States, and to make them lawful money and a legal tender for the payment of all debts, public and private, except for duties on imports, and interest on United States bonds and notes.

It remains only to add upon this branch of the cases that I do not perceive any force in the objection that the Act of Congress impairs the obligation of private contracts. The objection is not founded in fact. It assumes at its start false premises. It assumes that an engagement to pay money is the assumption of an obligation to pay the kind of money recognised by law when the engagement was undertaken, or, if not that kind, money of equal intrinsic value in the market. But this is a mistaken meaning given to the contract. A promise to pay money made before February 25th 1862 was not a promise to pay gold or silver, much less a promise to pay a weight of gold or silver then defined. If there is anything settled, it is that a contract to pay money is satisfied according to its meaning by the payment of that which is money when the payment is made. I refer for this to Davies’ Rep. 28; *Barrington v. Potter*, Dyer 81 b, fol. 67; *U. S. v. Robertson*, 5 Peters 644; *Faw v. Marsteller*, 2 Cranch 20. No one ever thought that a debt of one thousand dollars contracted before 1834 could not be paid by one hundred eagles coined after that year, though they contain no more gold than ninety-four eagles, such as existed when the debt was made. Every contract is necessarily subject to the power of the government, whatever that may be, over the currency, and the obligation of the parties is undertaken with reference to that power.

But if it were admitted that the Act of 1862 does impair the obligation of contracts entered into before it was passed, the admission would not be even a first step toward showing it unconstitutional. It might be a cogent argument against its justice, but the question is one of constitutional power simply. If a power is granted, its existence is not to be disproved

by showing that it may work harsh results. The States are prohibited from passing any law impairing the obligation of contracts; the Federal government is not. On the contrary, its power to affect contracts and relieve from their obligation either directly or indirectly is expressly conferred. It may pass a bankrupt act embracing past as well as future contracts and discharging them. This is impairing contracts directly. The same thing may be done indirectly by declaring war or enacting an embargo. In *Evans v. Eaton*, 1 Peters' C. C. Rep. 322, Judge Washington said: "there is nothing in the Constitution of the United States which forbids Congress to pass laws violating the obligation of contracts, although such a power is denied to the States. Congress in the exercise of its delegated powers may unquestionably pass laws, the effect of which would undoubtedly be to impair or affect the validity of contracts." Nothing more need be added to show the groundlessness of this objection.

I cannot doubt, therefore, in view of the considerations mentioned, and after weighing carefully all the objections which have been urged, that Congress has constitutional power to issue treasury notes of the United States, and make them lawful money and a legal tender for the payment of all debts, public and private, except duties on imports and interest on United States bonds and notes.

Another question involved in some of these cases is whether the sum of money, which, by the ground-rent deeds, it is stipulated the landlord shall receive at the option of the tenant in extinguishment of the rent, is a debt within the meaning of the Act of Congress. Upon this I have the misfortune to differ from a majority of my brethren. I hold that it is not a debt, and therefore the landlord is under no obligation to receive it in legal-tender notes. In this opinion I concur with my brother Thompson.

READ, J.

Paper money, in the shape of bills of credit, was issued by the colony of Massachusetts, one hundred and seventy-five years ago, to pay an army returning unexpectedly from a disastrous expedition against Canada. All the colonies followed this example, and at the commencement of the American Revolution, the whole currency of the country was composed of these bills of credit and specie. In some cases these bills were made a legal tender in payment of all debts; in others they were receivable in all payments of taxes and dues to the government, and they were sometimes payable (nominally) in specie, and generally a certain fund was pledged for their redemption, and sometimes they were issued on the mere credit of the government. In some cases the tender, if refused, extinguished the debt.

In 1756 (June 2d, Allison 209) New Jersey issued 17,500 *l.* in bills of credit, for the further

supply and pay of the forces raised in the colony, under the command of Colonel Peter Schuyler, and also for subsisting and paying such of the troops of the colony as may be found necessary to remain in defence of the frontiers, or that may be detached from thence in pursuing the Indian enemy into their places of retreat. In 1761 (April 7th, Id. 238), another emission was directed of 25,000 *l.*, to defray the expense of raising six hundred effective volunteers for his Majesty's service. These bills were made a legal tender, and a refusal to accept or receive them in payment extinguished the debt. In 1762 (March 10th, Id. 245), 30,000 *l.* more were ordered to be struck, and this emission was also made a legal tender with a like effect.

In 1751 (24 Geo. II., c. 53; 7 Ruffhead 403), the English Parliament passed an Act to regulate and restrain paper bills of credit in his Majesty's colonies or plantations of Rhode Island and Providence Plantations, Connecticut, the Massachusetts Bay, and New Hampshire, in America, and to prevent the same being legal tenders in payments of money. Bills of credit issued after 29th September 1751 shall not be a legal tender, and it was provided that nothing in the said Act shall be construed to make the bills then subsisting in said colonies a legal tender.

In 1763 (4 Geo. III. c. 35; 10 Ruffhead 199), Parliament passed another Act to prevent paper bills of credit hereafter to be issued in any of his Majesty's colonies or plantations in America from being declared to be a legal tender in payments of money, and to prevent the legal tender of such bills as are now subsisting from being prolonged beyond the periods limited for calling in and sinking the same; and in 1773 (13 Geo. III., c. 57; 11 Stat. at Large 793), this Act was so far modified as to allow them to be made a legal tender to the public treasurers in the colonies in the payment of any duties, taxes or other debts due to the said public treasuries.

A very full statement of all the colonial laws and issues of bills of credit under them will be found in two cases in the Supreme Court of the United States, decided in 1830 and 1837: *Craig v. State of Missouri*, 4 Peters 410; *Briscoe v. Bank of Commonwealth of Kentucky*, 11 Id. 257; and see 13 How. 12.

It is clear, therefore, that the colonial governments borrowed money by the emission of bills of credit, which formed a very large portion of the currency or circulating medium, and that whenever it was deemed expedient to enhance their value they were made legal tenders in payment of all public and private debts, and in some cases a refusal to accept them extinguished the debt. Upon the breaking out of the Revolution, says Ramsay (2 Hist. Am. Rev. 165), "The only plausible expedient in their" (the Continental Congress) "power to adopt, was the emission of bills of credit representing specie, under a public engagement to be ultimately sunk by equal taxes, or exchanged for gold or silver. This practice had

been familiar from the first settlement of the colonies, and under proper restrictions had been found highly advantageous. Their resolution to raise an army in June 1775 was therefore followed by another to emit bills of credit to the amount of \$2,000,000. To that sum, on the 25th of the next month, it was resolved to add another million: 1 Jour. Cong. 126, June 23d; Id. 177.

These emissions were followed by others, and on the 11th January 1776 (2 Jour. Cong. 21), Congress resolved, “That any person refusing such currency, or obstructing or discouraging its circulation, should be treated as an enemy of his country; and on the 14th January 1777 (3 Jour. Cong. 19, 20), passed a very stringent resolution recommending, amongst other things, “to the Legislatures of the United States to pass laws to make the bills of Congress, issued by the Congress, a lawful tender in payment of public and private debts, and a refusal thereof an extinguishment of such debts.”

The convention of the State of Pennsylvania, which framed its first constitution, on the 1st August 1776, passed an ordinance, declaring “that the paper bills of credit issued by the Honourable the Continental Congress, or under the late laws, or by the resolves of the late Assembly of Pennsylvania, shall be legal tender in all cases whatsoever within this State:” Minutes of Convention, p. 60.

In conformity to the recommendation of Congress, the legislature of Pennsylvania, on the 29th January 1777 (McKean 7), passed a tender law of the strongest kind, with provisions of the most stringent character; and on the 20th March following, directed the emission of bills of credit to the value of 200,000 *l.*, and made them a legal tender: Id. 48; Johnson v. Hocker, 1 Dall. 406.

On the 16th March 1781, Congress recommended to the several States to amend their laws making the bills of credit emitted under the authority of Congress a legal tender, so that such bills shall not be a tender in any other manner than at their current value, compared with gold and silver, and on the 22d May following, recommended to the States where laws making paper bills a tender yet exist, to repeal the same: Id. 102.

On the 3d April 1781 (1 Smith L. 519), the General Assembly passed the Depreciation Act, scaling all debts and contracts made between the 1st January 1777 and the 1st March 1781, ranging from one and a half to seventy-five for one, and in compliance with the recommendation of Congress, on the 21st June, in the same year (2 Smith L. 1), repealed so much of all laws as declared the bills of credit to be a legal tender, and all the penalties and forfeitures attached thereto, but this repeal was not to affect any tender already made in due and legal manner.

The Continental money (3 Story's Com. Const. 223), to the amount of over three hundred millions, passed out of existence, but its extinction, and the depreciation of all other paper money, had caused private and public embarrassments of the most serious character. Private debts had accumulated during the war in almost as large a ratio as the public obligations. The clamours of the debtors, "and the supposed necessity of the case, led the legislature of Massachusetts (1 Curtis Hist. Cons. U. S. 268; Id. 253), in 1782, to a violation of principle, in a law known as the Tender Act, by which executions for debts might be satisfied by certain articles of property, to be taken at an appraisement;" and Mr. Crawford, in his speech on the bill to renew the charter of 1791 (Legisl. Hist. B. U. S. 442), said, "The construction upon the right to make anything but gold or silver a tender, is, that they shall not make specific articles a tender, as tobacco or cotton, as was the case in some of the States." "Not only," says Judge Story (3 Story's Com. Const. 236), "was paper money issued and declared to be a tender in payment of debts, but laws of another character, well known under the appellation of tender laws, appraisement laws, instalment laws, and suspension laws, were from time to time enacted, which prostrated all private credit and all private morals. By some of these laws the due payment of debts was suspended, debts were, in violation of the very terms of the contract, authorized to be paid by instalments at different periods; property of any sort, however worthless, either real or personal, might be tendered by the debtor in payment of his debts, and the creditor was compelled to take the property of the debtor, which he might seize on execution, at an appraisement wholly disproportionate to its known value."

The Continental money was issued by and expired with the Revolutionary Government, for the plan for a confederation, reported to Congress in July 1776, was not finally adopted by that body for recommendation to the States, until November 1777, and was not finally ratified by all the States until 1st March 1781. The legal-tender laws were passed by the States in regard to the Continental paper at the request of Congress, and were repealed by them upon their recommendation. In fact, the resolves and ordinances of Congress were inoperative whenever disobeyed, unless enforced by State legislation.

Under the Articles of Confederation (*Penhallow v. Doane's Adm.*, 3 Dallas 54), the executive, legislative and judicial powers were intrusted to one single body, the Congress, composed of delegates from the several States, each State being entitled to an equal vote, and all important matters requiring the vote of nine States out of the original thirteen. There was no Federal judiciary excepting courts for the trial of piracies and felonies committed on the high seas, and for receiving and determining finally appeals in all cases of captures, and such commissioners as might be from time to time appointed by Congress, to hear and decide controversies between two or more States, and private rights of soil claimed under different grants of two or more States. The Confederation may therefore be said, independently of these excepted cases, to have had no civil or criminal courts, and

no civil or criminal law or jurisprudence to be enforced by a Federal judiciary. Its machinery of government was of the most imperfect kind, and its operation was not upon the people, but upon the several States, who might at any moment stop its wheels.

Congress was given the power to borrow money, but it had no power of taxation, direct or indirect, even to provide for the payment of the interest, and the commerce of the country was left entirely within the control of the State legislatures, rendering it the commerce of thirteen different States, each of which could levy what duties it saw fit upon all exports and imports, provided they did not interfere with any treaties then proposed, or touch the property of the United States, or that of any other State: 1 Curtis Hist. Const. 148.

A more ill-constructed, inefficient and powerless general government than that of the Confederation, cannot well be imagined.

On the 31st December 1781 (1 Legisl. Hist. B. U. S. 12), the Congress of the Confederation passed an ordinance to incorporate the subscribers to the Bank of North America; and on the 13th July 1787, an ordinance for the government of the territory of the United States north-west of the river Ohio, organizing territorial governments, and providing for the future formation of five States in the said territory: 12 Journ. Cong. 85.

Then came the present Constitution of the United States, when its territory was bounded by the Atlantic, the British Colonies, Louisiana and the Floridas, and had no access to the Gulf of Mexico but through the dominions of Spain, and the whole continent of North and South America was owned by four powers, England, Spain, Portugal and our own government. The only sea-coast belonging to the United States was on the Atlantic Ocean, and the population was not four millions, free and slave. The Constitution, no doubt, was made with reference to existing facts; but the powers to declare war and to make treaties, looked forward to a period when new territory would be acquired by force of arms or by peaceful negotiation. Our relations with Spain, in regard to the Mississippi, made it certain that the first acquisition would be from the territories of that power, as it was essential to our prosperity as a nation, that the whole course of the Father of Waters should be ours.

The acquisition by treaty of Louisiana opened up two questions: first, the application of the clause relative to the government of the territories of the United States, which had been decided by the first Congress to authorize that body to establish corporations in the form of territorial governments, and regulating the public and private status of its inhabitants, by positively excluding slavery to this new territory; and secondly, to the admission of States formed out of it beyond our original limits. Our treaty with Spain gave us Florida, which followed the example of Louisiana. Annexation by Acts of Congress gave us the State of Texas, and conquest and our treaties with Mexico and Great Britain gave or

confirmed our title to seventeen degrees of north latitude, and an undisputed possession of all the territory north of the southern boundary of New Mexico, and limited only by the British possessions.

The Constitution has therefore extended and adapted itself to a nearly quadrupled area of territory, and to a population more than seven times its original number. All this has been accomplished by a very liberal construction of the powers of Congress; for there is not a word in the Constitution looking to the acquisition of foreign territory by treaty, or by conquest, or to the erection of territorial governments in, or to the admission of States formed out of such territory, nor to the annexation and admission of an entirely foreign State into the Union. So, under the power of regulating commerce, and as flowing from, and as an incident to it, was the embargo of 1807, which in its terms was unlimited in duration, and could be removed only by a subsequent Act of Congress. So, under the power to lay taxes, prohibitory duties have been laid to protect and encourage domestic manufactures. So, under the powers to make war, and to establish post-roads, and as incident thereto (12 Stat. at Large 489), Congress have incorporated a company to construct a railroad and telegraph line, which, with its connections, will extend from the Missouri river to the Pacific Ocean, and the use of it is secured to the government for postal, military and other purposes. So, under the power to make all needful rules and regulations respecting the territory, Congress have abolished slavery in all the territories of the United States, which great evil will soon be abolished in the whole Union by the constitutional amendment.

These large powers, which grow out of a few lines in the Constitution, in which they are not in any way expressly mentioned, but are incidental to and are a means of carrying out the expressly enumerated powers, arise from the fact that the government proceeds directly from the people, and is emphatically and truly a government of the people. "In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit:" *McCulloch v. State of Maryland*, 4 Wheat. 403, 405.

If any one proposition could command the universal assent of mankind, we might expect it would be this, – that the government of the Union, though limited in its powers, is supreme within its sphere of action. It is the government of all; its powers are delegated by all; it represents all, and acts for all. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason. The people in express terms have decided it by saying, "This Constitution, and the laws of the United States which shall be made in pursuance thereof," shall be the supreme law of the land, "and by requiring that the members of the State legislatures and the officers of the executive and judicial departments of the States shall take the oath of fidelity to it:"

McCulloch v. State of Maryland, 4 Wheat. 406.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, “anything in the Constitution or laws of any State to the contrary notwithstanding.”

The Constitution gave a self-acting government, independent of all others, with a proper separation of the executive, legislative and judicial departments, with civil and criminal tribunals, and with supreme authority to enforce its own laws, without the interference of any other power; and it recognised neither nullification, nor secession, nor rebellion, nor any revolutionary action whatever.

At the time of the adoption of the Constitution there were three State banking institutions. One in Massachusetts, chartered in 1784, one in New York, and the Bank of North America, in this State, which finally became a state bank in 1787. By the 10th section of the first article the States were forbidden “to coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts,” or to pass “any law impairing the obligation of contracts.” After funding the foreign and domestic debt of the United States, and the assumed debt of the States, organizing the treasury department, and providing a revenue for the support of the government, the secretary of the treasury (Alexander Hamilton) submitted to Congress a plan for a national bank, as an institution of primary importance to the prosperous administration of the finances, and of the greatest utility in the operations connected with the support of the public credit. In the accompanying report and in his opinion on the constitutionality of a national bank, furnished to General Washington, at his request, are to be found all the arguments as to its constitutionality and expediency which have since been presented to the public in various shapes and forms. These papers evince the comprehensive intellect and fertile genius of the founder of our treasury system.

The Act incorporating the first Bank of the United States was passed 25th of February 1791 (1 Stat. at Large 191), and expired on the 4th of March 1811. The second bank was chartered on the 10th April 1816, and expired on the 3d of March 1836.

In *McCulloch v. State of Maryland*, in 1819 (4 Wheat. 316, 400), the Supreme Court of the United States, after a most elaborate argument by the ablest counsel of the Union, decided the bank to be constitutional. Chief Justice Marshall, delivering the unanimous opinion of the court, said, “Although among the enumerated powers of government we do not find the word ‘bank,’ or ‘incorporation,’ we find the great powers to levy and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies and navies. The sword and the purse, all the external relations, and no

inconsiderable portion of the industry of the nation, are intrusted to its government:" Id. 407.

But a government intrusted with such ample powers must also be intrusted with ample means for their execution, and must be allowed to select the means; and the court held that "the Constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the government to general reasoning:" Id. 411, 412. To its enumeration of powers is added that of making "all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any departments thereof." The words necessary in this clause mean "needful," "requisite," "essential," "conducive to," and the clause itself "is placed among the powers of Congress, not among the limitations on those powers; and its terms purport to enlarge, not to diminish the powers invested in the government:" Id. 418-20.

The court, therefore, held that Congress had the power to create such a corporation, whose bills or notes were receivable in all payments to the United States.

It would seem, therefore, that if Congress had the power to create a corporation to issue notes, they could themselves issue notes to serve as currency. That is, they could do directly what the Supreme Court declared they could do indirectly. There can, therefore, be no doubt that all notes issued by the government are lawful, of whatever denomination, and whether payable on demand or at any future period. They are really bills of credit, and in making them a legal tender, Congress are only following the example of the colonies when simple dependencies of Great Britain, and without any sovereign power.

The President (Mr. Madison), in his annual message of the 5th of December 1815 (Presidents' Messages 148), said: "It is, however, essential to every modification of the finances, that the benefits of an uniform national currency should be restored to the community. The absence of the precious metals will, it is believed, be a temporary evil; but, until they can again be rendered the general medium of exchange, it devolves on the wisdom of Congress to provide a substitute, which shall equally engage the confidence and accommodate the wants of the citizens throughout the Union. If the operation of the State banks cannot produce this result, the probable operation of a national bank will merit consideration; and if neither of these expedients be deemed effectual, it may become necessary to ascertain the terms upon which the notes of the government (no longer required as an instrument of credit) shall be issued, upon motives of general policy, as a common medium of circulation."

The President, in his veto of the Bank Bill, on the 30th of January 1815 (Id. 143), objected

to it, that it obliged the bank to pay its notes in specie, or be subject to the loss of its charter; and that, therefore, it could not be relied on during the war to provide a circulating medium, nor to furnish loans, or anticipations of the public revenue. “Without such an obligation,” said the President, “the notes of the bank, though not exchangeable for specie, yet, resting on good pledges, and performing the uses of specie in the payment of taxes and in other public transactions, would, as experience has ascertained, qualify the bank to supply at once a circulating medium and pecuniary aid to the government.”

The secretary of the treasury (Mr. Dallas), in his report of the 7th of December 1815 (Legis. Hist. B. U. S. 610), said: “By the Constitution of the United States, Congress is expressly vested with the power to coin money, to regulate the value of domestic and foreign coins in circulation, and (as a necessary implication from positive provisions) to emit bills of credit; while it is declared, in the same instrument, that ‘no State shall coin money, or emit bills of credit.’” “The constitutional and legal foundation of the monetary system of the United States is thus distinctly seen; and the power of the general government to institute and regulate it, whether the circulating medium consists of coin or of bills of credit, must, in its general policy, as in the terms of its investment, be deemed an exclusive power.”

“The power,” says Mr. Rawle, to “coin money, emit bills of credit and make anything but gold and silver a tender in the payment of debts, is likewise withdrawn from them (the States), although not withheld from the United States:” Rawle on Const. U. S. 136.

And De Tocqueville says: “The Union was invested with the power of controlling the monetary system, carrying the mails and opening the great roads which were to unite the different parts of the country:” *Democracy in America*, vol. 1, 195.

I cannot, therefore, doubt that Congress had the power to issue their notes as a national currency; and that, in order to give them their highest possible value, to make them lawful money and a legal tender, a power clearly taken from the States, and which could not be reserved to the people. It was a needful, requisite essential, conducive to, and proper means to carry into effect, the great powers of Congress before enumerated, and to give to the country an uniform currency of equal value all over the Union.

That this was done at a time, and under circumstances which admitted of no other means to carry those great powers into full and effective operation, a short review of the past and the present will clearly show.

At the commencement of the government (2 Pitkin’s Hist. U. S. 337, 338) the debt of the United States was estimated, including the assumed State debts, at seventy-five millions

and a half; and on the 1st of October 1815 (President's Message, 5th December 1815), after the War of 1812, it was ascertained to be one hundred and twenty millions of dollars, the whole of which was fully paid by the United States. The aggregate debt of the United States, on the 31st of March 1865, officially stated, was, in round numbers, two thousand three hundred and sixty-seven millions; and the interest of this sum, for the year then beginning, one hundred and three millions – an annual sum nearly equal to the whole national debt in 1815. A rebellion of the most gigantic character, involving eleven States in a forcible secession from the Union, and establishing a pretended confederate government, with all its outward forms, and a very large army, has produced this large debt, by obliging us to bring into the field nearly a million of men, and to create and support the most efficient navy in the world. It would have been in vain to attempt to meet this crisis with a mere gold and silver currency, or with any of the former expedients. The issue of legal-tender notes has alone enabled us to meet this exigency without resorting to foreign nations for loans, and to crush, as we have crushed, this most wicked, unholy and causeless rebellion, led by men who have resorted to robbery, wholesale attempts at arson and private assassination. The murder of the President, and the wholesale butchery of the secretary of state and his family, have fixed an indelible stain on this defeated treason.

The Bank of England had been in successful operation for nearly a century when the first Bank of the United States was incorporated, which had been foreshadowed by the proposition of Robert Morris in 1780, which ended in the Ordinance of the Congress of the Confederation incorporating the Bank of North America. The first bank was well managed, but the three State banks, in existence at its commencement, had increased to eighty-eight, when it expired in 1811, leaving the government entirely dependent on the State institutions for the paper, forming a large part of our mixed currency, and which, in 1814, became practically our only circulating medium (with the exception of the treasury notes) upon the suspension of specie payments in that year.

The Bank of England had suspended the payment of specie for its notes in 1797, under the sanction of the government, and did not resume specie payments until 1821, and during the whole of that period its notes were practically a legal tender. In 1825, she was on the brink of suspension. After the 1st August 1834, the notes of the Bank of England, payable to bearer on demand, were declared a legal tender on all occasions on which any tender of money may be legally made, so long as the Bank of England shall continue to pay on demand their said notes in legal coin. The bank in London is liable to pay all its notes, and those of every branch; but a branch bank is liable only to pay notes made specially payable at it. On the 19th July 1844, an issue department was established, separate from the banking department of the institution.

It is clear, therefore, that the only institution obliged to supply gold is the Bank of England,

and that in any unexpected emergency, by an order in Council temporarily, and by an Act of Parliament permanently, restricting the redemption of its notes in specie, its notes may become an universal legal tender, and form the only lawful money of the kingdom.

If the first Bank of the United States had been rechartered in 1811, it is hardly possible that it could have avoided suspending specie payments, and that in the temper displayed by the President and leading members of Congress in 1814, 1815 and 1816, it would have been legalized.

The second bank began under very unfavourable auspices, but by great efforts was enabled to pay specie during the course of its national existence, and if that had finally terminated its career as a bank, in 1834, it might have returned its capital to its stockholders. But the administration of the bank forgot that it owed its existence and its credit to the general government, who deposited its funds with it, and received its notes in all payments to the United States. The bank unwisely attempted to force a charter from Congress, and in doing this, erected itself into a political partisan, in opposition to the administration of General Jackson. The deposits were removed in October 1833, and the people sustained the measure. The bank then commenced an expansion of their discounts, making very large loans upon inadequate security, and by a series of unwise measures placed a large portion of their capital beyond their immediate control. In this situation, they sunk into a State institution, loaded with heavy bonuses, and large subscriptions to works of internal improvement, from which they never realized a dollar, and with notes in actual circulation amounting to \$20,114,227.56, whilst it had in its vaults only \$5,595,077.25 in specie. These notes being no longer receivable in payments to the United States (the 14th section of the charter being repealed by the Act of 15th June 1836, 5 Stat. at L. 48), were constantly returning, and notwithstanding the loans made in Europe, and the issue of post-notes, caused the suspension of the bank on the 11th May 1837, when its notes in circulation were over seven millions, its specie under a million and a half, and its total liabilities over twenty-five millions.

Its last dividend was on 1st July 1839, and, after trying two short resumptions, it finally passed into the hands of trustees for creditors in 1841. The only original stockholder that received back his capital was the United States, who, under the Act of 3d March 1837, accepted the settlement proposed by the bank, and took from them their four bonds dated 10th May 1837, for the several sums of \$1,986,589.04 each, with 6 per cent. interest from the 3d March 1836, which I believe were all paid. All the other stockholders lost every dollar. The first bank paid its stockholders, apparently, large dividends; but owing to the delay in paying the various instalments, after it ceased, in March 1811, an original stockholder retaining his stock to the last, received an interest of 6 per cent., and lost about 6 per cent. of his capital, whilst a similar stockholder in the second bank received less than

6 per cent. interest, and lost all his capital.

The payment of the national debt no doubt injured this institution, as it deprived it of a valuable investment of its capital, and forced it to extend its loans to individuals beyond what was probably prudent.

The State banks in time of profound peace have repeatedly suspended specie payments, and the banks in this State were in a state of suspension at the breaking out of the rebellion, resumed, and at the close of 1861 again suspended, which suspension has continued to the present time. It was certain, therefore, that a Bank of the United States was practically impossible, and no permanent reliance could be placed in State institutions over whom the government had no direct and effective control.

The United States had, therefore, no resource but to issue their own notes, and make them lawful money and a legal tender. It became expedient, also, to form national banking associations, to issue a national currency secured by a pledge of United States bonds, and redeemable on demand in the lawful money of the United States, the legal-tender notes. These national banks are to supply the place of all State banks as banks of issue, and will soon be, by the taxing power of the United States, the only issuers of a paper circulating medium. These institutions will aid materially in restoring the commerce and finances of the Southern States, where they will have an ample field for their operation.

If, therefore, the Legal-Tender Acts be unconstitutional, this wise and excellent system of banking is deprived of its principal feature in enhancing the value of the paper of the government, and this strikes at the very root of the whole plan of national banking.

I am therefore of opinion, that what are called the Legal-Tender Acts of Congress, are constitutional.

In this general conclusion, I am supported by the previous decisions of the Supreme Court of New York, for the Seventh Judicial District, and of the Court of Appeals of that State, and from the learned opinions delivered in both these tribunals, I have derived great aid and information. The Supreme Court of Iowa, in *Hitringer v. Bates*, 17 Iowa, which I have not seen, adopts the same view, and so did the Supreme Court of California, in the case of *Lick v. Faulkner*, decided at the July Term, 1864.

I have also derived much valuable information from the opinion of Judge Hare, and of our brother Agnew, when sitting as President Judge of the 17th Judicial District.

What, then, is the true construction of the Act of 25th February 1862, and of acts of a

similar character? By this Act the notes issued under it, payable to bearer on demand, “shall be receivable in payment of all taxes, internal duties, debts and demands of every kind due to the United States, *except duties on imports*, and of all claims and demands against the United States of every kind whatsoever, *except for interest upon bonds and notes, which shall be paid in coin*, and shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid:” 1 Stat. at L. 345, 532, 710, 822. There is no substantial difference in language in the subsequent acts.

The effect of this provision is to place these notes on the same legal footing as gold coin and silver dollars of the United States, and to make them as legally available in every respect except in the two instances of duties on imports and interest on the public debts, as lawful money and a legal tender. As gold and silver dollars would undoubtedly be a legal tender in payment of all debts, whether made payable in coin of any kind, foreign or domestic or otherwise, and whether they were rents, bonds, mortgages or deposits, so there can be no doubt, that in all such cases these notes are a legal tender. It is also clear, that in all suits judgment can only be entered for the amount stipulated in the contract, and execution can only issue for that sum, interest and costs: *Wood v. Bullens*, 6 Allen 516; *Henderson v. Pike*, S. C. Missouri; *Schoenberger v. Watts*, 1 Am. L. Reg. N. S. 553.

It is supposed, however, that the principal of a redeemable ground-rent stands upon a different footing. Since the Act of 4th April 1850 (*Brightly’s Purdon* 516), all ground-rents created after its passage are redeemable at any time “after the said ground-rents shall have fallen due.” The language of this Act is very plain in designating the whole transaction as a purchase. “Whenever a deed or other instrument of writing, conveying real estate, shall be made, wherein shall be contained a reservation of ground-rent to become perpetual upon the failure of the purchaser to comply with the conditions therein contained, no such covenant or condition shall be so construed as to make the said ground-rent a perpetual encumbrance upon the said real estate, but it shall and may be lawful for the purchaser thereof, at any time after the said ground-rent shall have fallen due, to pay the full amount of the same, and such payment shall be a complete discharge of such real estate from the encumbrance aforesaid.”

By an Act of 5th February, 1821 (*Brightly’s Purdon* 517), it had been provided that where such rents had become vested in minors, trustees or other persons not authorized to release or extinguish the same, either party might apply to the court, and have an order made directing such guardian, trustee or other person to receive such sum with arrearages and interest, and to execute a sufficient release of such ground-rents. And by an Act of 6th September 1860 (*Id.* 518), whenever there are judgments or liens on such ground-rents, the persons desiring to pay them off may apply to the court, and obtain an order to pay the

amount stipulated into court, who shall order the parties owning said ground-rents to extinguish the same.

In *Ex parte Huff*, Judge Kennedy said (2 Barr 228), “If it was competent for them (the executors) then to make the entire contract for the sale executory, what reasonable objection can there be to their making it so in part? I can see none. The stipulation contained in the deed, allowing the purchaser to redeem the lot from the payment of the ground-rent at any time within ten years, may be regarded as executory, and as forming part of the contract for an absolute sale out and out if the purchaser should elect to have it so, and therefore, as coming fairly within the powers given them by the will. It was a sale of the estate to the vendee in fee, to be held by him and his heirs upon their paying the ground-rent mentioned in the deed, with an election on their part to hold the estate absolutely, and entirely released from the payment of the ground-rent upon the paying at any time within the space of ten years, the gross sum of \$533.33. This was a sale of the estate in fee, leaving it to the election of the vendee, to be made within a limited time, whether he would continue to hold the estate by paying the ground-rent according to the terms of the deed, or would take and hold it released therefrom by paying the gross sum.”

I think, therefore, there can be no doubt that this postponed portion of the purchase-money, comes clearly within the meaning of the Act of Congress, and as gold coin would be a legal payment, so in the same way would be legal-tender notes. The words used in the Act of Congress, are the same that were employed by the revolutionary Congress in their recommendation to the States to have their issues made a legal tender, which produced the very comprehensive Act of Assembly of the 29th January 1777. If these payments cannot be made in legal-tender notes, then they are not protected from State legislation by the prohibition to the States making anything but gold and silver a tender in payment of debts. The word debts must be taken in its largest sense, without regard to mere State interpretation, which at one time held legacies not included within the term.

But ground-rents are almost entirely confined to the city of Philadelphia, and do not exist in other States, and it would be singular, that the annual rent reserved in the same terms, should be payable in legal-tender notes, whilst the principal of the purchase-money referring to its payment in the same kind of money or coin as aforesaid, should be only to be tendered in gold or silver dollars. This anomaly should not be allowed to interfere with a great general measure, vitally essential to the crushing out of the rebellion, and the preservation of the Union.

In all ordinary cases, a tender, either in coin or legal-tender notes, only stops interest. That a bill for specific performance lies in case of a tender of lawful money for the redemption-money of a ground-rent and a refusal, is clearly shown in *Weston v. Collins*, 12 Law Times

Rep., N. S. 4, S. C. 11 Jurist, N. S. 190, decided by Lord Chancellor Westbury on the 11th February in the present year.

AGNEW, J.

These cases grow out of the legal-tender clause of the Act of Congress, passed the 25th February 1862. Three questions have arisen: the constitutionality of this clause, its interpretation, and the debts to which it applies. Their determination will decide all the cases.

1. The constitutionality of the legal-tender clause.

The clause in the Act referred to declared that the treasury notes issued under this Act “shall also be lawful money, and a legal tender in payment of all debts, public and private, except duties on imports and interest as aforesaid.”

The precise extent of this legislation will be better understood by examining the character of treasury notes. Their form, denominations and use place them in the same class with bank notes. Our own observation as well as the usages of trade attest this. Indeed, standing upon the basis of all the taxable property of the country for their credit, they are superior as money to bank issues.

Lord Mansfield said of bank notes: “Now they are not goods, nor 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 other coin that is used in common payment as money or cash:” *Miller v. Race*, 1 Burrows 457. C. J. Gibson, recognising *Miller v. Race*, held that bank notes are “cash by the legislation of general consent, induced by their great convenience, if not the absolute necessities of mankind,” and decided that “a *bonâ fide* payment in notes which have received the qualities of money from the conventional laws of trade, is absolute satisfaction, notwithstanding the previous failure of the drawer:” *Bayard v. Shunk*, 1 W. & S. 92; see also *Bank U. S. v. Bank of Georgia*, 10 Wheat. 333.

Treasury notes fill largely the channels of trade, performing all the office of bank notes, and are money or cash. Congress, therefore, did not stamp upon them a new character, but gave them a new value as lawful money; and stripped of the mist of terms, made them effective in the payment of debts. A tender is but an offer, and it is legal because of the character of the thing tendered. The true point of this legislation, therefore, lies in the value and effect of the treasury note, and these are its legal incidents.

When the Act of 25th February 1862 was passed the nation was struggling to suppress a gigantic rebellion. Its public debt was then about \$500,000,000, and its daily expenditures over a million. The yearly revenue could not keep pace with the ordinary expenditures and the interest of the increasing debt. The total coinage of the mint was but sixty-five millions, while, by the mint estimate of 1858, the total specie of the country was but two hundred and fifty millions. The banks had poured out their means until the industry of the nation was in danger of prostration by absorption of the capital essential to its well-being. Without credit abroad, our means were to be drawn from a people already profusely drained. But the demands of war were inexorable, and money must be had. *Credit* only could yield the means. Whether its *form* should be an interest-bearing bond inviting the money of capitalists, or non-interest-bearing notes, made current by denominational divisions, with qualities adapted to circulation, was clearly within the legislative discretion.

The rebellion must be suppressed, and as a consequence the means must be procured. The constitutional powers to this end are “to raise and support armies,” “provide for and maintain a navy,” “to provide for calling out the militia, to execute the laws and suppress insurrections,” “to levy “and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States,” “and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.” Superadded was the duty to exercise them for the preservation of the Union.

Treasury notes are a legitimate means of *borrowing money, paying debts*, and of *purchasing supplies* to carry on the war; and are within the protection of the Constitution against counterfeiting its securities. A loan is a contract, and therefore involves submission by the borrower to the terms of the lender, who is under no compulsion to part with his money. The terms of a loan are dictated by the necessities of the borrower; and these terms create the character and incidents of the loan. The instrument or note is but the evidence, and simply expresses the terms of the loan, impressed upon it by the law creating it. The power to borrow clearly confers the authority to arrange the terms, create the instrument, and determine the legal incidents or qualities of it, necessary to fulfil the terms. And the fitness of the terms, and the legal incidents to give them effect, are limited only by their adaptation as means of exercising the power to borrow.

So also a purchase of supplies is a contract, in which the government stands in the same relation to the seller, and is compelled to come to his terms of payment. In the payment of debts the same relation exists, the creditor not being bound to receive the notes of the government as *money*. In all these cases the government *must* come to *terms* or fail in the execution of its powers. If all these parties demand *money*, money must be paid.

On the 25th of February 1862, one hundred and fifty millions of dollars were needed, with

a future prospect replete with larger demands. Treasury notes seemed to Congress (who alone could decide how the credit of the United States should be pledged) the best form of security for borrowing, buying and paying. But the magnitude of the scale of issue, with the future demands also in view, was in itself a cause of extraordinary depreciation of the public credit; for it could not escape the control of the laws of currency and trade. To take them without that quality which would make them current, would devolve loss on the holder; to refuse them, would sacrifice the government. Without the legal incidents of money, capable of paying public and private debts, they could not enter freely into circulation. This quality was therefore necessary in the exigency to enable Congress to borrow money, pay debts and purchase supplies; otherwise its credit must ruinously depreciate, and perhaps become incompetent to these ends. It was not a case of ordinary policy not demanding this quality; but a controlling necessity requiring adequate means to execute the war powers, by borrowing, purchasing and paying. The stamping upon the instrument of the character of lawful money efficient to pay debts was the exercise of a direct means for executing these powers. This quality enters into the terms of the loan, purchase or payment, because the lender, seller or creditor is not bound to accept it without that character enstamped. It is therefore imparted to the note for the benefit of the *holder* in whatever relation he may stand as lender, creditor or seller – as the means of maintaining the public credit. As I shall refer to this again, it is to be noticed that the purpose of this legislation is to benefit the *holder*, and is not directed against the *creditor*. The latter feels the effect only as a consequence of the exercise of the powers already referred to. The stamping of this legal value and effect upon the treasury note, therefore, falls directly within the express power of making all laws necessary and proper to execute other powers.

Besides the immediate bearing this legislation has upon the powers named, it has a direct bearing also upon the execution of other powers involving the “general welfare,” which Congress is bound to keep in view, while providing for the means of carrying on the war. All national prosperity rests ultimately upon labour, and it is commerce which makes the products of labour available. Labour and commerce enter directly into the sources of revenue, and all loans and means of payment ultimately depend upon revenue. Congress was therefore bound to exercise its express powers over commerce and taxation by providing a medium of payment, such as would not only supply the means of carrying on the war, but would also prevent the decline of commerce, and would afford the means of paying taxes and sustaining the revenue. The specie and coinage of the country were totally insufficient for these purposes. If then this measure, which was absolutely essential to maintain the public credit as the means of borrowing money, purchasing supplies and paying debts, was also appropriate to facilitate commerce and revenue, this appropriateness, according to the Federal doctrine as expounded by C. J. Marshall, was also justified as the means of executing the power to regulate commerce and to levy taxes,

imposts, excises and duties.

But how has this power to pass necessary and proper laws for the execution of other powers, been interpreted by the Federal Courts? A question arose in *The United States v. Fisher*, 2 Cranch 358, upon the authority of Congress to impress upon debts due to the United States the legal incident entitling them to priority of payment, thereby setting aside State laws in the settlement of estates. C. J. Marshall, delivering the opinion, said: “It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the government of the United States, or in any department or officer thereof. In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained *that no law was authorized which was not indisputably necessary to give effect* to a specified power. When various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary because the end could be attained by other means. *Congress must possess the choice of means, and must be empowered to use any means* which are in fact conducive to the exercise of a power granted by the Constitution. The government is to pay the debts of the Union, and must be authorized to use the means which appear most eligible to effect the object.” Here there is inference upon inference. The express power is to pay the debts of the Union. Thence is inferred the power of preserving its own claims to the end of paying its debts. Thence comes an inference of a power to declare these claims first liens, as the means of preserving them.

In the case of *McCullough v. The State of Maryland*, 4 Wheaton 316, C. J. Marshall demonstrates that “the right of Congress to employ the necessary means for the execution of the powers of government, *is not left to general reasoning,*” that the word “necessary” imports no more than that one thing is convenient, or useful, or essential to another, and thus concludes: “We must admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow the National Legislature *that discretion with respect to the means*, by which the powers it confers are to be carried into execution which will enable this body to perform the high duties assigned to it, *in the manner most beneficial to the people*. Let the *end* be legitimate, let it be within the scope of the Constitution, *and all the means which are appropriate*, which plainly are adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.”

In *Fletcher v. Peck*, 6 Cranch 87, the same great expounder of Federal power said: But it is not on slight implications or vague conjectures the legislature is to be supposed to have transcended its powers or its Acts considered void. 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.”

Let me ask what clause of the Constitution forbids the notes of the government being made money, effectual in payment of debts; where the exigency demands it as a necessary means to borrow money, pay debts, make purchases and regulate commerce and taxation, or with what provision it is clearly incompatible? With C. J. Marshall I may answer, “We know of no rule for construing the extent of such powers, other than is given by the *language* of the instrument which confers them, taken in connection with the *purposes* for which they were conferred:” Gibbons v. Ogden, 9 Wheaton 188; or with Justice Story: “This instrument, like any other grant, is to have a reasonable construction according to the import of its terms; and when a general power is expressly given in general terms it is not to be restrained to particular cases, unless that construction grows out of the context *expressly* or by *necessary* implication.”

The language of C. J. Marshall well portrays that ruinous strictness of construction which emasculates the powers and impairs the usefulness of the Constitution. “If (says he) they contend for that narrow construction which in support of some theory not to be found in the Constitution would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument, for that narrow construction which would cripple the government and render it unequal for the object for which it was declared to be instituted, and to which the powers as fairly understood render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded.”

The practical interpretation of the clause to make all necessary and proper laws, may be illustrated by a few examples of the range within which constitutional *necessity* and *propriety* have been found.

From the power to appoint public ministers and consuls, Congress has enacted that ministers, chargés and consuls shall not correspond with public newspapers, recommend persons to office, accept presents, &c.

The priority already referred to, given to debts due *to* the United States, inferred solely from the power to pay debts due *from* them, is still further extended to the *sureties* of the debtors.

From the power to regulate commerce with the Indian tribes, and perhaps the clause in reference to territories, it is a long stride to the general Act of 3d March 1819, for instructing the Indians in agriculture, teaching their children reading, writing and arithmetic, and introducing among them the habits and arts of civilization. From the power to regulate commerce, C. J. Marshall inferred the power to regulate navigation. From the

inferred power to regulate navigation, Congress thence inferring the means, has legislated upon the shipment of seamen in the commercial marine, their shipping articles, form and effect, their wages, time of coming on board, desertions, discharges in foreign ports, the destitute, medicine-chests, short allowances, &c.

Under the power to establish post-offices and post-roads, Congress has purchased steamships to carry the mail upon the high road (figuratively speaking) of nations, and regulated their running, and has authorized post-routes outside of our own territory, across the isthmus, &c. It has also established an agricultural department, and a public printing-office, not under any express power, but because of their fitness to facilitate the execution of other powers.

From the power to collect taxes, excises, &c., Congress imposes a stamp duty on all contracts, and makes void the unstamped instrument, thus operating directly upon the contracts and business of individuals. Yet who doubts the power to legislate thus, as the necessary means of compelling payment of the revenue? It also requires licenses to be paid to follow ordinary employments of life, thus entering directly within the field of domestic affairs. This established practical construction of the power to pass necessary laws from mere fitness or convenience, is so interwoven with the whole fabric of the Constitution, that to overthrow it would destroy the government itself. The power, it must be remembered, is an express one, given to supplement and round off the whole circle of constitutional powers. The right of Congress, says C. J. Marshall, to employ the necessary means for the execution of the powers of government, “is not left to general reasoning.” The express power attaches to the means by force of the constitutional provision, and we are not to be turned around to seek some specific grant of power elsewhere. Having the express grant of the means, we have to look no further than to find an occasion for its exercise, and fitness in the means to be used. These being found, legislation upon the means is the exercise of an express power. This fitness is the answer to all attempts to derogate from the power by presenting examples of unfit means. Monstrous and preposterous examples of unfit means afford no argument against the use of fit means.

In this case all the elements meet. The occasion to borrow, to pay debts, and provide supplies, is found in the overwhelming national exigency, bringing into requisition the powers of raising and supporting armies, providing and maintaining a navy, and suppressing the insurrection. The mode of borrowing money, furnishing the materials of war and paying debts, clearly belongs to Congress. That of issuing non-interest-bearing notes being chosen, the right belonged to Congress to make their terms efficient as the means of borrowing, buying and paying. The immense sum called for by the national necessity, in presence of the debt already incurred, and in view of that in prospect, and the impossibility of offering a specie basis to preserve their credit, created a necessity to

provide the means of preventing ruinous depreciation, otherwise Congress must fail in the exercise of its just powers. This means was to add to their conventional character, as money by the laws and usages of trade, a *legal* sanction, which would make them *lawful* money as a medium for the payment of debts, thereby securing to the holder the ability to part with them, and the means of giving them currency. The incidental effect upon the creditor of the holder, is but a consequence of the necessary exercise of a lawful power which he must therefore bear. For while it is true that it is not essential that treasury notes should always be a legal tender, it is also true that the exigency may require it as the essential means of obtaining money and credit, of which Congress must judge in exercising its power over the means. This necessity, which prompts the exercise of the power, is recognised by its express terms as the constitutional ground of its execution, and is not a mere necessity used to excuse the want of power.

The view I have presented is to me conclusive of the question, and renders it unnecessary to run into disquisitions upon the existence of a general power to declare what shall be a legal tender in payment of debts; or the power to issue bills of credit as distinguished from securities for debt, or to coin paper money in lieu of metals. Granting their absence as general or independent powers, it does not exclude their use as particular means. Nothing less than an express prohibition, or clear incompatibility with other powers, or their manifest spirit, can debar their use. This point is well decided in *McCullough v. State of Maryland*, 4 Wheat. 316, and kindred cases. The incorporation of a bank for the safe-keeping, transmission and disbursement of the public moneys, and as the means of regulating commerce, levying and collecting public dues and paying debts, stands no nearer akin to these powers than the making of treasury notes money for the purposes of commerce, and as the means of borrowing, purchasing supplies and paying debts. Nor does the present general banking system stand on higher grounds. All are the legitimate means of exercising great national functions, acquiesced in and acted upon by the whole nation, without any real disbelief in their constitutionality. The power to coin money and regulate its value is not incompatible with the creation of another medium for the transactions of commerce, taxes, loans and payments, when the necessity is both apparent and uncontrollable as it now is. The whole specie of the country has never been adequate to its commerce and the ordinary business of the people, while now it is not the one-fourth of the national debt alone. The total coinage of the United States from 1793 to June 30th 1862 was \$864,947,020.20; and for the year 1862, \$65,023,658.06; for 1863, \$24,688,477.12, and for 1864, \$25,635.30. Will it be argued because Congress has the power to coin metals that commerce must languish – taxes, duties and debts be unpaid, and loans and purchases become impracticable from the want of a medium to effectuate these purposes? The States cannot furnish it, for they are forbidden to coin money, emit bills of credit or make anything but gold and silver a tender in payment of debts. The power to create a medium to perform these great functions lies somewhere. If forbidden to the State and not granted

to the Federal government, it remains with the people, and we present the singular spectacle of a great nation abnegating an essential sovereign power, and dependent for the exercise of its vital functions upon the voluntary contributions of private credit, for banks (themselves the creatures of law) are but private corporations, having, in a governmental sense, no power to make or issue money. But this power is governmental and not popular, and it is not to be conceived that a Constitution expressly prohibiting the exercise of these vital powers to the States, in the most precise terms, could have meant they should not be exercised by the National Government, when necessary to the proper execution of the express powers delegated over the subjects of commerce, war, taxation, loans and debts. The insufficiency of the precious metals for all the purposes of trade, and the various pursuits of men, and the uncontrollable laws of supply and demand, are facts the most stubborn cannot resist. Now when we find all the express and fundamental powers of the Constitution supplemented by one common, general and unrestricted express power to use the means necessary and proper for executing all the others, and when we see that the means in question are expressly forbidden to the State, the conclusion is inevitable that the right to these belongs to the Federal government. The power of declaring what shall be money cannot, from the nature of the thing, be exercised by the unorganized people, but necessarily belongs to the organized State. It is an essential element of corporate sovereignty belonging to the Federal government in the aspect presented as a power over the means, because prohibited to the State government.

Let me notice a few of the objections to the legal-tender clause. It is asked by what authority Federal legislation enters within the field of State or domestic affairs to affect the ordinary relations of citizens? Simply because being citizens of the United States also, whose laws and constitution are the supreme law of the land, they fall within the effects of the exercise of any Federal power. For example, bankruptcy, coin, weights and measures, taxation, fugitives from labour. So likewise commerce, war, borrowing money and paying debts.

But by what authority, it is asked, can Congress compel creditors to accept legal-tender notes in payment of debts? By the same authority precisely by which every citizen can be affected in the exercise of a lawful power. If, as I have shown, the government have the power to make these terms with the holder of these notes, as the means of executing other express powers, the consequences fall upon the creditor of the holder just as they do, in following the exercise of any other power. It is not legislation against the creditor as the object, but it is legislation for the holder as the subject, and the creditor must put up with the effect of it, as any other puts up with a consequence.

A State is expressly forbidden to impair contracts, and yet in *The West River Bridge Co. v. Dix*, 6 Howard 507, it was held that a State is not restrained by this clause when

exercising its power of eminent domain, though the consequence was to cut off a franchise granted by itself which had taken effect as a contract. In *Charles River Bridge Co. v. Marine Bridge Co.*, 11 Peters 420, a franchise of a right to take toll was utterly destroyed by a subsequent grant of a second charter, but not being directly aimed at the former, and being only the exercise of a lawful power, the law was sustained. So in *Watson v. Mercer*, 8 Peters 110, it was held that acts divesting antecedent rights of property are not ex post facto laws, and not unconstitutional. See also *Providence Branch v. Billings*, 4 Peters 514; *Monongahela Navigation v. Coons*, 6 W. & S. 101; *Philadelphia v. Trent. R. R.*, 6 Wharton 25.

The principle of all these cases is that a governmental power is not to be restrained in its exercise because its incidental effects alight upon rights that are protected from direct attack.

It would put an end to the execution of the most needful powers of government, if they could not be exercised because their consequences impair contract rights, and rights of property. Yet such laws must be passed. To say, therefore, that creditors cannot be affected by the incidental effects of the legislation necessary to regulate commerce, borrow money, support armies, maintain navies, and pay debts, is to assert that private rights rise higher than public powers antecedent in existence, and essential to the safety and welfare of the nation.

2. Contracts for the payment of coin.

Is a contract to pay in a specified kind of lawful money valid? It is hard to give a reason why so plain a question is asked, yet an interpretation is given to the words, “all debts,” in the Legal Tender Act, which nullifies past and prevents future contracts payable in gold or silver. If a tender of one hundred dollars in treasury notes will perform a contract for one hundred dollars in gold – or if a judgment for that sum, which can be satisfied in notes, will compensate non-payment of the same sum in gold – then no valid contract for gold can be made, and all distinctions founded upon rights of property are abolished. This interpretation blots out absolute rights and actual values impressed upon property by the laws of trade, and of supply and demand; for contracts for money, as the representative of property, are founded directly upon actual values.

To-day, my house has a certain market value in the different kinds of lawful money of the country, to wit – one hundred dollars in gold, one hundred and five in silver, or two hundred in treasury notes. The laws of trade, which have created this difference between the different kinds of money, are beyond my control. If to suit my purposes I sell for gold, and if notes to an equal number of dollars will pay my demand for gold, it is clear that not

only my contract is worthless, but I have suffered an actual loss of one-half of my property.

Did Congress intend to abolish the right to dispose of property at its actual value in a particular kind of lawful money, when it declared that treasury notes should be lawful money and a legal tender in payment of *all debts*, public and private, within the United States? This is not a question of power, but of interpretation. Conceding the fearful power to impair existing contracts, and to prohibit prospectively those which might impair the usefulness of the law, did Congress intend to destroy past contracts and sweep away all difference in the market value of money? This design is not definitely expressed; and if it be found in the law, it exists by the interpretation of the language, *all debts*. But if *all debts*, then debts payable in specific articles, as well as money. But, no; all debts must be limited to exclude this class. Well, then, all debts specifically payable in gold or silver? Certainly not, unless Congress meant to blot out rights and abolish values. If, then, debts payable in specific articles are not included in this phrase, and if Congress did not intend to destroy contract rights and actual values, the words “*all debts*” are subject to a limitation not expressed, but necessarily implied. What, then, is this limitation? Plainly it is indicated in its own words; lawful money is the predicate, and tender the consequence: “shall be lawful money *and* a legal tender in payment of all debts” – that is to say, a legal tender in payment of all debts payable in “lawful money.” Now this occupies the great field of payments; for implied contracts, and all express contracts in which the kind of lawful money is not specified, cover nine-tenths, perhaps a greater proportion, of the obligations for payment in lawful money. The purpose was to make these notes lawful money. The succeeding clause, to wit – “and a legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest as aforesaid,” was not so much intended to declare their effect as a tender – for as lawful money they would be a legal tender – as it was to introduce the exception as to duties on imports and interest.

Wherever, therefore, lawful money simply will satisfy a contract, these notes will perform it. But lawful money, merely as such, will not perform a contract payable in a specified kind; and there is nothing in the language of the law to make these notes perform a contract in a different sort of lawful money contrary to the stipulations in the agreement. Admitting the power of the sovereign to make money, and that contracts are subject to its exercise, it does not follow that he intends by every exertion of his authority to violate private rights of property, or contracts flowing from these rights, unless his intention be unequivocally expressed, or is to be inferred so clearly as to leave no doubt. The point made is not, as supposed by the Chief Justice, a want of power in the sovereign, but the fact that this power has not been exercised in this law.

It is a settled canon of interpretation that a law is not to be given a retroactive effect, so as to impair contracts or rights of property: *Dwarris on Statutes* 681.

To give it such effect the design of the legislature to do so must expressly appear: *Mulloch v. Souder*, 5 W. & S. 198. I argue, therefore, from the presumed justice of the national legislature, from the rules of interpretation, and from the absence of language necessarily importing it, that Congress did not intend to compel existing contracts, for a specific kind of money, to be paid in treasury notes, nor to control the laws of trade and of values by forbidding such contracts.

A contract to pay in gold or silver is not *expressly* forbidden. I know of no law which prescribes what sort of money shall be the subject of express contracts. It is not *impliedly* forbidden by any law making certain moneys a legal tender. When the law provides several kinds of lawful money capable of paying debts, it leaves it to the election of the debtor what kind he will pay. Having a right of election, what is there to forbid him to exercise it in the contract itself? The contract is his own act, and he does no more therein than he can do afterwards. If he can make a better bargain, or one more suited to his interest, by making his election in the contract, what is there to forbid him? He does no violence to the law, but he only makes the choice which the law gives to him. It is, therefore, not in derogation of law, but simply the exercise of a privilege, and the maxim of the law itself is that *conventio vincit legem*.

It violates no policy. The true policy of the law leaves parties to contract in the way which best suits their interests. Untrammelled trade promotes the interests of society. Parties may contract to pay in specific articles. No one doubts this, yet such a contract derogates from the law (if there can be such a thing) which makes lawful money a legal tender. If a merchant in the China trade needs silver money, why shall he not contract for it? If an importer needs gold, shall he not buy it? If one needs treasury notes to carry or remit to a distant point, may he not bargain for them? If my neighbour will not part with property I need, except for gold, may I not contract for gold to fulfil my bargain? But if all these special agreements are solvable in a different kind of money, merely because it is one kind of lawful money, then no binding contract for a specified kind can be made; for the creditor is always at the will of his debtor. Congress did not mean all these unjust and absurd consequences, and I conclude, therefore, that a contract to pay in silver cannot be performed by compulsion either in gold or treasury notes.

But, it is said, the judgment can be paid in treasury notes; the damages are only nominal; and, therefore, notes are a good tender to the debt itself though payable in silver. This has two answers. A tender of such notes is not equivalent to the money of the contract, or there would be no breach. A breach, whether the damages be nominal or actual, is the evidence of non-performance; and performance is the very matter in question. A refusal of what is not the money of the contract does not place the party tendering it in a position equivalent to performance.

But I deny that actual damages cannot be recovered for the breach of a contract payable in a specified kind of lawful money. This is a question of value: where the loss must be valued in lawful money as damages, as part of the judgment. If, in fact, there be a difference in value between the several kinds of lawful money, which is made expressly by the parties to enter into the contract, this difference is recognised by the contract, because it is founded upon actual rights of property. A loss of value, by a breach of the contract, must, therefore, be compensated in damages, otherwise justice is denied against the constitutional rights of the citizen: Section 11, Const. Penna., "That all courts shall be open, and every man for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." The judgment being payable in lawful money generally, and not restricted in kind, is necessarily payable in the cheapest kind of lawful money; for the moment that payment rests in the debtor's option as to kind, he tenders the cheapest money in the market that will pay his debt. For the same reason, values are always represented by the cheapest money in the market, because by far the largest proportion of payments rests in the debtor's option. Now it cannot be possible that if I sell my property at its market value in one kind of lawful money, I am to be put off with payment of the same number of dollars in another of half its value, by considering the damages in the judgment merely nominal. Take an illustration: Being in need of gold, I pay \$200 in treasury notes, and take a note or certificate of deposit for \$100 payable to-morrow in gold. To-morrow my debtor tenders me \$100 in notes, and when I sue him asks me to be put off with nominal damages, and then tenders me \$100.06 in notes upon the judgment. Is this the law, that actual values, substantial rights of property, are to be wholly sunk in legal forms? I think not; it is a total denial of justice, and a wholesale destruction of the right to contract upon subjects unforbidden by law or by public policy. The party is in no fault. Neither he nor Congress can control the law of supply and demand, or abrogate the laws of trade. As to all other subjects, the law awards damages according to the facts; and why not for money, which is the subject of the inexorable laws of trade? If a contract payable in specific articles be broken, damages are assessed according to their market price; and what is the difference if the party has specially bound himself to pay money having a real market value different from that kind which will satisfy the judgment? If a tender be in money worth but half the money of the contract, it involves a loss which the judgment should not perpetuate. The judgment should, therefore, include the actual damages, to make the party whole in lawful money, leaving the debtor to pay, as he certainly will, in the cheapest kind.

3. Ground-rents.

Money to be paid in extinguishment of a ground-rent is said not to be a debt, upon two grounds: First, because the rent is real estate. Second, because the payment is optional and not binding. A statement of the first ground answers itself. The money is that which pays

for the rent, the rent is that which is paid for; money is the price, rent is the estate. He who extinguishes, is he who pays; he who owns the estate, is he who is paid.

The ground-rent deed is a simple transaction. The grantor sells the land for an annual sum, payable for ever, but with an option to the purchaser to substitute, when he chooses, the payment of a sum agreed upon as a present equivalent of all the annual sums. This stipulated sum is the price which extinguishes the estate in the annual sums. It is as absurd to call silver dollars a ground-rent, because they are paid to extinguish it, as it would be to call them pork or wheat, because they pay for those articles.

The argument founded upon the option hinges upon the meaning of the word debt, which, it is said, is that of obligation – a liability which can be enforced. Before election there is no liability, and after it, it is said, there is none, because it cannot be converted into an obligation by the election of one of the parties, without the consent of the other. For example: a man may execute his bond to me voluntarily, but unless I accept it he does not become my debtor. The fallacy of this statement is in supposing that the option is but the initiation of a new contract, which, like a proposition, needs acceptance to complete it; while, in fact, it is only an alternative mode of performance under an old one. By the indenture, subscribed by both parties, the covenant for extinguishment conferred on the grantee a right to pay the whole price at once, as a substitute for the rent, and at the same time bound the grantor to receive it. The payment which follows election is simply an act of performance by authorized substitution which the grantor cannot refuse. It is not a voluntary offer, but the exercise of a covenant right; and does not need the consent of the grantor to convert it into an obligation, for that consent is contained in the covenant which gives the right to pay in this substituted mode. When the grantee offers to pay the money, he, therefore, only tenders performance, as allowed in the covenant, upon his choice of payment. The obligation arises in the pre-existing covenant; and, by notice of his election, he becomes bound to pay, unless the grantor discharges him by a refusal to accept. But if the grantor refuse to accept, it is said the grantee is not bound to pay, and, therefore, it is no debt. The fallacy lies here: he is not bound, it is true, but it is not because there was no obligation, but because the grantor's refusal discharged it, if the grantor avails himself of the refusal. Here he does not avail himself of it, and the grantor cannot set up his own refusal in discharge of the pre-existing covenant. When notice of the election and readiness to pay is given, the grantee fixes the mode of performance, and the subsequent tender is but an offer to pay according to the covenant. The obligation, therefore, arises in the previous covenant which stamps the money with the character of a debt, but in the alternative form of payment provided in the deed. The substituted form of payment is fixed by the election, and is recognised in the offer to pay on the one side, and the duty to accept on the other. In every just sense of the word, within the meaning of the Act of Congress, the sum tendered is a debt. It arises in contract, it is the stipulated price of an estate, it is

certain in amount, and it is recognised in the offer to pay, and in the duty to receive.

Take a familiar illustration – a note for one hundred dollars, payable in wheat or money, at the debtor's option; and he elects to pay money. The payee could not compel him to pay money; but, clearly, the money offered is a debt, the obligation resting in the note which gave the election. The obligation may be satisfied in either way, for each is but a mode of performance, though which it will be rests in the option of the debtor. What difference in the nature of the obligation is there between such a note, and another giving an option to pay an indefinite number of annual sums, or to pay a single sum as their equivalent? The instrument originates the liability, while the election only defines the mode of performance.

It may be seen as a debt in another aspect. A sufficient tender of the principal sum suspends the rent. Without an abandonment of the tender the rent cannot be recovered. What remains is manifestly a debt due for the extinguishment. The tender must be an act of performance, and not the initiation of a new obligation, else it could not suspend the rent. Therefore, the ground-rent deed is a contract for payment in two forms, the second at the option of the grantee. The election defines the form of payment, and the tender carries it into effect. The debt is rooted in the deed, and the payment in the election.

The subject of optional agreements has been considered and decided at this term, in the case of *Corson v. Mulvany*, re-affirming the principle of *Kerr v. Day*, 2 Harris 112.

I affirm the following propositions:

That the legal-tender clause in the Act of Congress is constitutional.

That the principal sum which redeems a ground-rent is a debt within this clause.

I deny this proposition: That contracts for the payment of coin are within its meaning. In *SHOLLENBERGER v. BRINTON*, *MERVINE v. SAILOR*, *BURTON v. DAVIS*, and *GRAHAM v. MARSHALL*, the decrees and judgments were affirmed:— In *KROENER v. COLHOUN*, *SANDFORD v. HAYS*, and *LAUGHLIN v. HARVEY*, the decrees and judgments were reversed.

In *SHOLLENBERGER v. BRINTON*, a rule was afterwards entered to show cause why the decree in that case should not be changed to a decree reversing the decree below, and dismissing the bill. A similar rule was entered in *MERVINE v. SAILOR*.

After argument, the opinion of the court was delivered by *WOODWARD, C. J.*

Shollenberger v. Brinton: This case came into this court by appeal or certificate from the Nisi Prius, and was considered and decided in connection with six other cases, all of which involved the construction and application of the Act of Congress of 25th February 1862, making treasury notes a legal tender in payment of private debts. In some of the cases, but not in this one, the constitutionality of the Act of Congress was denied. In this case, and some others of the group, the question whether the principal of a ground-rent deed was a debt within the meaning of the Act of Congress was raised. As the ground-rent covenant in this case stipulated for the payment of the rent in “lawful silver money of the United States,” and the ground-rent tenant was authorized to redeem the ground-rent at any time by the payment of the principal (\$3535), in “lawful money as aforesaid,” another question was whether this sum was payable in legal-tender notes.

On all the questions in the seven cases we delivered seriatim opinions at Harrisburg in May last, and then deduced from our conflicting opinions, as well as we could, the conclusions appropriate to each case, and entered the judgment in each case to which the conclusion of a majority of our number conducted us. The result, in this case, was an affirmance of the decree at Nisi Prius. Counsel, conceiving that in this case we had mistaken the proper application of the conclusions of a majority, obtained the above rule, and were fully heard in support of it. It is now to be decided.

The ground-rent deed stipulated, as already stated, for the payment of the rent and the redemption of the principal “in lawful silver money of the United States.” After the passage of the Act of Congress, commonly called the Legal-Tender Law, Shollenberger, the owner of the premises subject to the ground-rent, tendered to the owner of the rent the full amount of the principal in legal-tender notes, and demanded an extinguishment and release, which being refused, a bill in equity was filed to compel her to accept the tender notes and release the encumbrance. It came on before our brother Agnew, at Nisi Prius, before whom the constitutionality of the Act of Congress was waived, and who therefore ruled nothing upon that point. But he ruled that the principal of the ground-rent was a debt within the meaning of the Act of Congress, and as such was payable in greenbacks, and gave the plaintiff the decree prayed for. The defendant appealed, and in this court assigned four errors, all of which amounted to no more than that the court erred in holding that under the terms and conditions of the ground-rent deed the complainant was entitled to a release and extinguishment of the rent upon payment of the amount in legal-tender notes.

Now, whatever the questions in the other six cases, it is beyond all doubt that in this case the only question presented was whether a ground-rent stipulated to be paid in silver money was a debt within the meaning of the Act of Congress. And whoever will recur to the opinions we delivered at Harrisburg will see that a majority of this court were on the affirmative of that question, and therefore an affirmance of the decree at Nisi Prius was an

inevitable consequence.

Counsel embarrassed themselves, and to some extent us also, by arguing on the effect of a diversity of opinions on the bench in a case presenting two or more questions. If, for instance, three distinct questions arise in the same cause, and two judges are for affirming the court below on one question, but for reversing on the others, and other two are for affirming on question two, but for reversing on both or either of the other questions, and three are for affirming on the third question, is the judgment or decree below to be affirmed or reversed? We had a legal puzzle similar to this in *Reed v. Penrose*, 12 Casey 214, where but three of our number sat, and where there were three questions on which we divided in opinion. We solved that case, however, as all similar cases must be solved, by considering that as a court of errors and appeals we receive records from lower courts with the presumption that all things have been rightly done and that no error appears. Hence the plaintiff in error is put to his assignment of errors, which is in the nature of a declaration wherein he sets forth in clear and concise terms the errors of which he complains, and which he must prove by the record. The defendant in error pleads *in nullo erratum est*. Thus the parties are at issue, and the burthen of proof is on the plaintiff in error by virtue of the legal presumption alluded to above. Before he can demand judgment of reversal he must convince a majority of a quorum of this court that he has established some one of the errors assigned. When we all sit, three judges must concur in finding the same error, else the judgment or decree stands affirmed, no matter how diverse the reasons of the judges, if their respective reasons bring a majority to the sustaining of the same error. But if there be not this *concurrence* upon one and the same point, it signifies nothing that every judge on the bench finds error in the record.

Where, however, as in the case now before us, there was only a single error alleged upon the record, or, to speak more descriptively, where the four errors assigned raised only a single question for decision, the opinion of three judges in a full bench affirms or reverses necessarily, though those opinions upon the point presented may rest on diverse and even inconsistent reasons. In such a case the difficulties alluded to above cannot arise. Nor would they have been supposed to exist in this case if counsel had not taken opinions from us that were applicable to others of the cases before us at the same time, and applied them to this case. For instance, two judges thought the law unconstitutional, and therefore would have reversed any case in which the ruling that it was constitutional was assigned for error, but these two judges could not be added to the one or two who thought a ground-rent was not a debt, and thus a majority be obtained to reverse this decree, because in this case the constitutional question was not raised, and because also there was no concurrence of a majority for reversal upon the same point. To borrow from other cases, though they were considered and decided at the same time, rulings that were appropriate to their peculiar questions, and apply those rulings to reverse the decree in this case, where the same

questions were not presented, would be a palpable mistake.

We have examined the authorities to which the learned counsel referred us, but we cannot see that either the authorities or the argument submitted require any alteration of our decree.

Let the rule therefore be discharged.

Mervine v. Sailor: This was an action on a ground-rent deed for a half-yearly instalment of the accruing rent; the plea of a tender of treasury notes; a replication that the tender was insufficient because the rent was payable in “lawful silver money of the United States of America, each dollar weighing seventeen pennyweights and six grains at least;” demurrer to that replication and judgment in the demurrer for defendant; and then a writ of error to this court. The judgment on demurrer was assigned for error.

I believe all the judges were of opinion that the money sued for was a debt, and a majority held that though stipulated to be paid in dollars of a certain weight, it was nevertheless a debt within the meaning and subject to the operation of the Act of Congress. A majority also held the act constitutional.

Then it is very plain that this was a judgment to be affirmed, unless the two who doubted whether a debt of this special description was subject to the Act of Congress were to be added to the two who doubted the constitutionality of the enactment, and a majority for reversing be thus made up. But we have stated in *Brinton’s* case, herewith decided, that such a mode of making up a majority to reverse is not to be tolerated. It would subvert the theory of our judicial system, and complicate our administration of law and equity in inextricable difficulties. It would be also a denial of justice to parties, for he who has obtained a judgment or decree by judicial process has a right to the fruits of it unless a majority of the court of revision agree in finding the same error in the record.

The rule is discharged.

In *GRAHAM v. MARSHALL*, also, a rule was entered to show cause why the judgment of affirmance entered in the above cause should not be set aside, and a judgment of reversal in whole or in part be entered instead thereof.

The opinion of the court was delivered by *WOODWARD*, C. J.

The above rule was granted upon the earnest complaint of counsel that the several opinions delivered by us at Harrisburg last spring, on the constitutionality of the Act of Congress

of 26th February 1862, commonly called the Legal-Tender Law, ought to have resulted in the reversal, rather than the affirmance of this judgment. We had seven cases before us, including this one, which, though differing in facts and circumstances, were all supposed to involve the constitutionality of that enactment; and, instead of discussing each case separately, we discussed the principles common to them all, and then entered, in each case, the judgment to which the principles as settled by a majority of the court led us. Under the allegation that we had made a misapplication of our principles to this case, we granted the above rule and consented to hear argument; and the question now to be decided is, whether, upon the law as declared in those opinions, our judgment in this case is erroneous in whole or in part.

The action was founded on a paper sometimes called a certificate of deposit, and sometimes a promissory note, in the words and figures following:—

“Allegheny, March 24th 1862.

No. 916.

Six months after date, the Merchants’ and Farmers’ Bank will pay James Graham, Esq., fourteen thousand one hundred and forty-five dollars, with interest till due, at the rate of five per cent. per annum. If not presented at maturity, it will be continued as a renewal.

\$14,145, specie J. C. PORTER, Cashier”

When this paper was presented for payment, on the 27th March 1863, specie was demanded, which the cashier refused to pay, but offered legal-tender notes in payment, which were declined, and this suit was then brought to recover specie or its equivalent. On the trial of the cause the learned judge who presided in the Common Pleas of Allegheny, delivered the following charge to the jury:—

“We instruct you peremptorily that the Act of Congress is constitutional; that it is immaterial whether there was a special agreement to pay in specie or not, or whether the agreement or contract was made before the passage of the Act of Congress or afterwards, the agreement is simply void. You will return a verdict simply for the amount of the certificate of deposit with interest at five per cent. till demand, 27th March 1863, adding interest from bringing of suit to the present time.”

To the judgment entered upon the verdict that was rendered under these instructions, the plaintiff took a writ of error, and in this court assigned two errors, the first of which set forth the first of the above sentences, omitting only the words that affirmed the constitutionality of the Act of Congress, and beginning with the words “that it is

immaterial;” and the second error set forth the second sentence of the charge in *hæc verba*. It has been said that the constitutional question was not raised in this case, and that we erred in mixing it up with six other cases that did involve that question, and the proof of this position is in the omission, from the first of the above assignments of error, of that part of the charge which affirmed the constitutionality of the Act of Congress.

Why counsel omitted that part of the charge in their assignment, unless they believed it sound and unassailable, is hard to imagine; but as they have, on the present argument, placed upon the record, with leave of the court, an assignment that the act *is* unconstitutional in respect to such contracts as the present one, it is impossible to suppose that they concurred in opinion with the court below upon this point, and meant to abide by it.

But, however this may be, we think the first error, as originally assigned, could not be decided without passing upon the constitutional question, for the only ground upon which the court held the contract void, as a specie contract, was that the Act of Congress was constitutional and made it void. If the act were unconstitutional it could not make the contract void, and therefore when counsel asked us to reverse the court for holding the contract void, on the footing of the constitutionality of the act, they compelled us to pass upon the question as truly as if they had assigned the first member of the sentence for error. That assignment raised the constitutional question, and nothing else; for, although we might not agree with the learned judge in pronouncing a specie contract since the Act of Congress void, we would agree with him that, assuming the constitutionality of the enactment, the debt was solvable by greenbacks. Whether that assumption could be made, was necessarily involved in the case, and hence no wrong was done to the plaintiff when we considered his case in connection with the six other cases before us at the same time.

A majority held the act to be constitutional; but still the act was not applicable to this contract, say counsel, because the note or certificate was dated subsequent to the passage of the act. This position is not well taken in point of fact.

The original deposit was made in September 1861, and the certificate or note in suit was only a renewal of that contract. If this certificate be regarded as an independent contract as of the day of its date, then, although subsequent to the Act of February 1862, it was prior to several other Acts of Congress making treasury notes a legal tender in payment of debts. Thus, on the 17th January 1863, Congress authorized the issue of one hundred millions of treasury notes, on the 3d March 1863, of one hundred and fifty millions, including the hundred millions authorized in January, and of four hundred millions of interest-bearing notes, and all these notes were made legal tenders in payment of debts.

Here there were five hundred and fifty millions of greenbacks made legal tenders after the date of the paper in suit, and before the debt was demanded. But even if the position of counsel were well taken, would it follow that the Act of Congress, declared constitutional in respect to *prior* debts, was unconstitutional in respect to *subsequent* debts? So far from this being the necessary inference, the better argument would lead to an exactly *opposite* result. An act of legislation might be quite constitutional as to all contracts made under it, but utterly void as to contracts existing at its date. Retroactive legislation is always regarded with jealousy. The faith and obligation of contracts have generally been supposed to be beyond the reach of legislative power, and although a majority of us held they were not in this instance, yet surely if existing contracts were not, subsequent ones could with no show of reason claim to be. Counsel said it would be absurd to apply the Act of 1862 to subsequent contracts; it seems to us that it would be more absurd to confine its operation to prior contracts.

If, therefore, we should concede the postulate of counsel, that this contract was subsequent to the legislation in question, we could not adopt their conclusion; but their premises, no more than their conclusions, are sustainable.

What then is the effect of this constitutional legislation upon a specie contract? I do not stop to question whether this *is* a specie contract. Though there is but one word, in the corner of the paper, to import a specie contract, yet the bankers examined thought that sufficient, and I agree to it. A specie contract, then, means that it is one to be redeemed or paid in the gold or silver currency which alone were legal tenders before the Acts of Congress of 1862-3. Though the old Acts of Congress, which made gold and silver legal tenders, are supplied, they are not repealed, by these recent acts. Such contracts, therefore, are lawful, not void, as the court below said; and a tender of gold and silver coin would be a valid tender. But, under these latter Acts of Congress, greenbacks are no less a valid tender. The precise effect of the legislation, therefore, is to reduce specie contracts to the paper-money standard – to compel the man who has bargained for gold or silver coin to accept greenbacks. As a question of power, we repeat that such legislation is much more defensible in regard of *subsequent* than of *prior* contracts; for, in subsequent contracts, parties treat with their eyes wide open to existing law, whilst in prior contracts they anticipated no such legislative interference with their bargains.

What then, cannot parties so contract as to displace the latter Acts of Congress, and compel themselves to perform according to the old law? To prove that they could, counsel selected from our statutes regulating weights and measures, the instance of oats, which, by an Act of Assembly of 1818, were required to weigh thirty-two pounds to the bushel, but by the Act of 13th April 1859 (Purd. 1012), a bushel of oats is required to weigh only thirty pounds. Undoubtedly, a contract for oats at thirty-two pounds to the bushel would be a

lawful contract; or for coal or iron at 2240 pounds to the ton, though our statute ton consists of 2000 pounds; and in these cases, and all others like them, the law, if it could not enforce specific performance, would compensate the purchaser in damages according to the tenor of the contract.

But the analogy is delusive in this, that neither oats, nor coal, nor iron, nor any other commodity of commerce, not even gold and silver in bullion, has ever been declared a legal tender in payment of debts. The Constitution made the “coins” of gold and silver a legal tender, and these Acts of Congress have made treasury notes a legal tender, establishing thus a final and irreversible standard of all values. If Congress had said that oats at thirty pounds to the bushel should be a legal tender in payment of all debts, what would your contract for thirty-two pounds avail against the supreme power? Such a contract would be included in “all debts,” and so would be solvable by the legal standard of values. Weights and measures are regulated by statutes, and may be adjusted between parties by private contracts, but currency and legal tenders belong only to the supreme power in the State to regulate, and cannot be controlled by private contract. A promise to pay in a better currency than the legal standard is not an unlawful contract, and a moral obligation may result from it, but the law accounts this obligation an imperfect one because it cannot be enforced at law. It is enforceable only *in foro conscientiae*. When parties come into courts of law with their contracts, they must accept the rule the law-making power has prescribed. The legal obligation of money contracts can never rise higher than the legal standard of money. Debtors will pay their debts in the cheapest currency they can, and when Congress declares that all private debts shall be payable in a depreciated paper currency, and the courts hold such legislation constitutional, it signifies nothing that a particular debtor stipulated to pay in specie; his creditor must take that which the law has authorized the debtor to tender. Had the plaintiff below contracted for gold or silver as articles of commerce, he would have been entitled to recover their value, the same as if any other commodity had been contracted for; but he contracted for *specie* which is currency and a legal tender, and the legislative power has provided an equivalent in a certain form of paper, and has authorized every debtor to pay in that, *and in this exercise of legislative power the contract rights of the creditor were sacrificed*.

How injurious such legislation is to private rights and public morals has been heretofore shown, and is apparent to every observing and reflecting man. I was among those who denied the constitutional power of Congress to inflict so great a wrong upon the country, but I am bound to defer to the authority of a majority of this court, when regularly exercised, and if this legislation is constitutional it must have its course, though it make havoc of every specie contract in the land.

Now in regard to the second assignment, we think there was clear error in directing a

verdict that denied the plaintiff interest from the time of demand till the impetration of his writ. The demand was made on the 27th March 1863, and suit was brought 23d February 1864. Here were eleven months and twenty-seven days for which the plaintiff was entitled to recover interest at 6 per cent. on the principal sum in addition to what the court directed the jury to allow.

Is it necessary to reverse the judgment and send the case back to get this correction made? We think not. Our power to “modify” judgments is just as undoubted under the Act of 1836, as our power to affirm or reverse; and the modification here is not of a finding of the jury, for the jury acted only as the clerks of the court to register the court’s decision. The verdict was dictated by the court, and as much their act as the judgment rendered thereon. In a case so circumstanced, we can reach the justice due to the parties by increasing the judgment to the true amount, as if it were a case stated.

As to the right of the plaintiff to recover interest from the time of demand, we cannot doubt, for though there was an offer to pay in treasury notes, there was no legal tender of them proved such as would stop interest; and if a banker withhold a customer’s deposit after demand, we see no reason why he should not pay interest like all other defaulting debtors.

The judgment is affirmed for the amount directed by the court below, to be increased by legal interest added to the principal sum, from 17th March 1863 to 23d February 1864, and it is referred to the prothonotary of this court to ascertain the amount of the judgment so affirmed.

STRONG and AGNEW, Js., dissented from so much of this opinion as applied the terms of the Act of Congress to special contracts payable in specific coin; and

AGNEW, J., delivered the following opinion:—

The rule in this case did not open the discussion of the questions arising in the legal tender cases, but was intended to correct a supposed misapplication of the principles decided by the court to the facts of this particular case; and, as precisely stated by the chief justice, “the question now to be decided is, whether, upon the law as declared in those opinions, our judgment in this case is erroneous in whole or in part.” Upon this question I concur in the decision just rendered. But, in the opinion read, occasion is taken to discuss the merits of one of the points heretofore decided. From this I must dissent; both because it is unnecessary to the decision of the question before us, and because the conclusions are, in my judgment, unfounded.

The argument starting with the assumption that the Act of Congress of 26th February 1862 embraces a contract such as this, very easily reaches the conclusion that the power of the law is superior to that of the parties, and disables them from contracting for the payment of specie, and the contract may therefore be satisfied with legal tenders. But this begs the question, for it is not how far Congress can override the contract, but whether the contract is really within the intention of the enactment. Starting with the assumption referred to, it is not difficult to conceive how injurious such legislation is to private rights, or to descant upon the great wrong upon the country; of all which we are forcibly reminded. There is, however, a prior question to be decided, before the conclusion sought to be established can be reached, to wit: the interpretation of the legal-tender clause. If contracts specially payable in a specified kind of coin are not within the meaning and intention of the clause, the whole argument fails. On this question, it seems to me, the injury to private rights, and the wrong done to the country, by an interpretation which forbids all special contracts for coin, afford a powerful argument against an interpretation so injurious. It is a rule of interpretation that when general words in a statute embrace cases, and produce consequences, not within the mind of the lawmaker, and not intended to be inflicted, judicial interpretation will confine them to the true object intended to be attained. This is certainly better than to suffer exacerbation and perhaps exaggeration of the injurious consequences to reflect upon the lawmaker.

Having in my opinion upon the legal-tender cases shown, as I think, that the terms of the legal-tender clause are clearly subject to implied exceptions; that where there are several kinds of lawful money, parties are nowhere forbidden to contract for payment in a particular kind; that an election of kind belongs to the debtor, who can as well make it beforehand in his contract as afterwards, because it is unforbidden; that the interpretation which embraces coin contracts strikes out of existence rights of property and actual values; and that there is a remedy at law in the assessment of the damages which can be applied to contracts payable in coin; I shall not now enter into the discussion of the question of interpretation, but, referring to that opinion, content myself with concurring in the judgment discharging the rule and correcting the interest; but dissenting from the reasoning of the opinion upon a question not germane, as it seems to me, to the special matter before us.

***Wills v. Allison*, 51 Tenn. 385 (1871).**

Supreme Court of Tennessee.

W. T. Wills

v.

B. G. Allison.

April Term, 1871.

SNEED, J., delivered the opinion of the Court.

The action was brought to recover the amount of a due-bill, payable on demand in gold, and bearing date the 31st December, 1866. The instrument sued on is in the words and figures following:

“\$200.00. Due Wm. T. Wills, or order, two hundred dollars in gold, for value received. This December 31st, 1866, payable on demand.
B. G. Allison.”

The question made by the pleadings and proof is, whether the plaintiff is entitled to a specific verdict and judgment for gold coin, or its equivalent in legal tender notes, or for so many dollars, the amount of the note and interest. And in view of the unequal value of current gold coin and the legal tender notes of the currency of the United States, in which last named currency the latter judgment might be discharged by the payment of the number of dollars demanded with interest, the question is one of importance. The plaintiff avers and proves a demand of payment on the first day of January, 1867, and it is shown in the bill of exceptions that the plaintiff proposed to prove that at the time of said demand, gold coin was worth a premium of thirty per cent. over United States Treasury notes, or National Bank notes. The court excluded the proof as to the relative value of gold coin and legal tender notes. The plaintiff asked the court to charge the jury, if they found the note was payable in gold, to return their verdict accordingly, and after verdict, the plaintiff asked the court for a judgment in gold coin – all of which was by the court refused. The court thereupon charged the jury, that if they found from the proof that the plaintiff was entitled to recover that he could only recover the face of the note or due-bill in dollars and cents, together with interest from the time of demand of payment thereof; that plaintiff would not be entitled to recover the amount of said note or due-bill in gold coin – nor the premium which gold may have been worth over United States Treasury notes or National Bank notes

at the time of demand of payment. The verdict and judgment were for two hundred dollars, with interest. The plaintiff has appealed in error, and demands a specific enforcement of the contract for a payment in gold coin, or its equivalent in legal tender notes.

We have no reported case adjudicated by our own court upon the effect of the acts of Congress enacted during the late civil war, and known as the legal tender acts, upon contracts of this kind.

The question came before this court in 1867, in the case of Bolton v. Armour, from the Circuit Court of Shelby county. The action was upon a note executed March 7, 1865, and payable in gold or its equivalent, for one hundred and twenty-four dollars and sixty-four cents. The facts were agreed and submitted to the Judge of the Circuit Court, waiving a trial by jury. The plaintiff insisted that he was entitled to recover the value of the one hundred and twenty-four dollars and sixty-four cents in legal tender currency – estimating the value of the gold at forty per cent. premium, as it was at the time of the maturity of the note – and the defendant insisting that he was only liable for one hundred and twenty-four dollars and sixty-four cents, with interest. The court gave judgment for the defendant, and the plaintiff appealed in error. This case is sometimes referred to as a manuscript opinion. But there was no written opinion in the case, but a mere memorandum of an affirmance of the judgment indorsed upon the record and signed Shackelford, J.: Vide 1 King's Dig., sec. 1281. We can not, therefore, have the benefit of the line of argument which brought the court to its conclusion in that case, which we the more regret, as our convictions of the law have led our minds in a different direction.

We believe that the question of the constitutionality of the legal tender acts, in all its bearings, is at this moment pending before the Supreme Court of the United States; but conceding, for the sake of argument, that they are valid enactments, how do they affect the rights of the parties to this litigation? If the contract be against good morals or public policy, or in violation of any public law, the courts can not enforce it. If it be in neither respect obnoxious, then can a court of justice enforce it in any other way than to give effect to the intention of the parties, if that intention can be ascertained? This plain principle of law lies at the foundation of this question. The law is jealous of the inviolability of contracts, and only demands to know what the parties have intended by the terms and conditions thereof. If the parties are sui juris and otherwise capable of contracting – if the contract itself be fair and lawful, and infringe no rule of public policy, and no canon of good morals, the courts are bound to its specific enforcement. The meaning of a promise to pay two hundred dollars in gold, is, to pay two hundred gold dollars; and subject to the restrictions above stated, the law can not make the contract other or different in its legal effect from the stipulations agreed upon by the contracting parties. That the intention of the defendant was to pay this debt in gold coin, is indisputable. That the plaintiff

contracted to receive gold in payment, is alike unquestionable. It is not pretended that the lending of gold by one citizen to another – or the selling of property by one citizen to another to be paid for in gold or silver coin, is either immoral or impolitic. And so far from its being unlawful, it is said by Chief Justice Chase, that the tender acts not only do not prohibit, but by strong implication they sanction contracts made since their passage, for payment in gold: *Vide Butler v. Horwitz*, 7 Wal., 261.

It will be observed that this contract was made on the 31st December, 1866, and after the close of the late civil war, and can in no way stand affected by certain treasury regulations and military orders which were promulgated during the war, which forbade gold contracts among the citizens. These orders and regulations were essentially war measures, and it is claimed that under the laws of war they might be enforced within the military lines of the Federal armies. They were intended to give credit and currency to an enforced circulating medium which was issued and legalized in the midst of arms, and as a military necessity – and having performed their office, they were of no authority at the time of this contract; if, indeed, they could affect the validity of any contract; which we are not called upon in this case to determine.

The rights of these parties, then, depend upon the laws of this State at the time of the contract and the breach thereof, and are to be determined by those laws in relation to the laws of Congress, enacted under the Constitution of the Union, of which the State of Tennessee was then a member. The law is the source of the obligation of contracts, and the extent of the obligation is defined by the law in force at the time the contract is made: *Townsend v. Townsend*, *Peck's R.*, 1-21.

We do not propose to consider the constitutionality of the legal tender laws. In the view we have taken of this case, that question does not arise. It is enough to say, that while Congress has the exclusive power to coin money and regulate the value thereof – and while there is no specific grant of authority to make gold and silver or anything else a legal tender – yet the power has been exercised during the whole existence of the government in regard to gold and silver coin – and the acquiescence of every department of the general and state governments in the exercise of that power, has impressed it with the sanction of constitutional authority: *Vide Metropolitan Bank v. Van Dyck*, 27 N. Y. R., 426; *Martin v. Hunter*, 1 Wheat., 421; *Briscoe v. Bank of Kentucky*, 11 Pet., 527; *Story on Cons.*, sec. 425. It is certain that the State has no such power, and its citizens must accept the laws and ordinances of the Congress regulating the coinage of the precious metals into money, and fixing the value thereof, and also prescribing what shall be a legal tender in the payment of debts – so long as such laws are consistent with the fundamental law. The sovereignty of the State, it is said, extends to every thing which exists by its own authority, or is introduced by its permission – but not to those means which are employed by Congress to

carry into execution powers conferred on that body by the people of the United States: *Weston v. The City of Charleston*, 2 Pet. R., 449; *Bank of Commerce v. New York*, 2 Black, 632.

“Money,” said Sir William Blackstone, “is the universal medium or common standard, by comparison with which the value of all merchandise may be ascertained; or it is a sign which represents the value of all commodities,” 1 Bl. Com., 276; *Sto. on Con.*, sec. 1118. And so it is defined by Lord Ellenborough in 13 East, 20; and by Chancellor Kent in *Mann v. Mann*, 1 Johns. Ch. R., 236, to be cash; that is gold and silver, or the lawful circulating medium of the country – including banknotes, when they are known and approved of, and used in the market as cash. Before the passage of the late Legal Tender Acts, all verdicts and judgments for money were recoverable at the option of the plaintiff in gold and silver coin, which was the only legal tender: vide *Hepburn v. Griswold*, 8 Wal., 608. But it was not every gold and silver coin, even of universal credit and circulation that was a legal tender. No foreign coins, either of gold or silver, are now a legal tender; nor have they been so since 1857, when the law making certain foreign coins a legal tender was repealed, vide Act 1857, s. 3, Stat. at Large, vol. 11, 163. But all the gold coins of the United States according to their nominal value – the silver dollars of the coinage of the country, and the silver coin below the denomination of the dollar, coined prior to 1854, are a legal tender in payment of any sum whatever. The silver coins below the dollar of the date of 1854, and since, are a legal tender in sums not exceeding five dollars. The three cent silver coins of the date of 1851, 1852 and 1853, are a tender in sums not exceeding thirty cents. It was by an act passed by Congress in 1862, that certain Treasury notes were issued and declared a legal tender in the payment of all debts, public and private, except duties on imports and interest on the public debt. We can find nothing in that act which forbids the making of contracts for the payment of gold and silver in coin or bullion; but the act undoubtedly discriminates in favor of coin over Treasury notes, and makes the depreciation of the latter, to a greater or less decree, inevitable, as long as the period of redemption in coin is indeterminate or uncertain. The most important effect, however, of these legal tender acts, as they bear upon the question now under consideration, is in the fact, that the influx of the paper currency as a legal tender under the impress of governmental authority, has totally abolished gold and silver coin as a circulating medium, while they remain the standard of all values in trade and commerce, as well as in finance. Gold and silver coin can no longer be called a currency in this country, but they are in fact, as they are in law, a commodity to be bought and sold as any other article of traffic that is thrown upon the market.

This being so, by what law is it forbidden to the citizen to contract for the payment of a debt in gold as well as in dollars – in gold as well as in legal tender notes – in gold as well as in cotton or tobacco, or wheat or corn?

The law which makes the Treasury note a legal tender does not declare that gold and silver coin shall no longer be a legal tender. But if we are not to treat a contract for the payment of so many dollars in gold, as a contract for gold of the value of so many dollars, then we must take it that the parties have contracted for the payment of so many gold coins of the value each of one dollar, which is a recognized legal tender, and we must enforce it accordingly. The proposition that a contract for the payment of gold coin – a legal tender in the payment of all debts – can not be specifically enforced so as to carry out the intention of the contracting parties, would seem to be an absurdity in the law. That the Government has created two currencies, and declared that both shall be a legal tender, is no good reason why a contract for the payment of either should not be enforced just as the parties intended it. If parties contract merely for the payment of dollars, then the better currency can not be exacted, but the defendant may pay dollar for dollar in that kind of legal tender currency which is of least value in the market. But if they contract to pay in either the one or the other, they must be held to it. The measure of the defendant's liability in such case would be the market value of the gold or the Treasury notes at the time of the breach. He may, it is true, if the plaintiff waives his right to the gold, discharge the verdict in the legal tender currency of the least value in market, but he must make his payment equal to the value of the currency contracted to be paid at the time the contract was broken.

We can not reconcile the opposite view of this question with the most obvious principles of equity, justice, or honesty. The argument against this view of the question is, that the law has impressed Treasury notes with a legal value equal with that of gold or silver coin of the same denominations, for the purpose of paying individual debts with them, and it can not permit a discrimination against them in favor of gold and silver coin without allowing its authority to be substantially annulled: 7 Wal., 240.

But the Government has itself discriminated in favor of the gold and silver coin, so as to render the difference in value of the two currencies unavoidable, and their values are governed by the laws of trade and by certain cardinal principles of public economy, which the authority of the Government can not reach so long as commerce is free.

We are aware that some respectable authorities in the Northern States have announced views upon the questions differing from ours – but some of those opinions were evidently inspired by a disposition to foster and protect the war currency of the Government, without a due regard to the rights of the citizen. And, indeed, in one case the learned Judge who delivered the opinion seemed to doubt its soundness, and gravely announced that he would resolve all doubts in favor of the Government. But it seems to us that whether the parties to a “gold contract” have undertaken in their bargain to deal with gold as an article of merchandise or as money, there can be no sound reason why they should not enjoy the full benefit of the contract as both parties understood and intended it. The true rule is thus

stated: “to refer the injury inflicted by a breach of contract to the period when the contract was broken; to examine what the injured party would have got if the contract had then been fulfilled, and what he lost by its non-fulfillment.” Per Hare, J., *Shoenberger v. Watts*, 1 Am. L. Reg., new series 561. This would be estimated in currency, and judgment entered for the amount thus ascertained. A judgment, says the same learned Judge, upon a contract for doubloons would follow the same rule, and be not for doubloons, but for the value which the doubloons would have had, if delivered according to the contract. *Ib.* In the case of *Bronson v. Rodes*, Chief Justice Chase observes that a contract to pay a certain number of dollars in gold or silver coins is, in legal import, nothing else than an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight. It is not distinguishable, he says, in principle, from a contract to deliver an equal weight of bullion, of equal fineness. It is distinguishable, in circumstance only, by the fact that the sufficiency of the amount to be tendered in payment must be ascertained in the case of the bullion by assay and the scales, while in the case of coin it may be ascertained by count: 7 Wal., 250. In that case it was held that when obligations made payable in coin are sued upon, judgment may be entered for coined dollars and parts of dollars. In the case of *Butler v. Horwitz*, 7 Wal., 258, it is held that a contract to pay a certain sum in gold and silver coin is in substance and legal effect a contract to deliver a certain weight of gold and silver of a certain fineness, to be ascertained by count. 2. Whether the contract be for the delivery or payment of coin, or bullion, or other property, damages for non-performance must be assessed in lawful money; that is to say, in money declared to be legal tender in payment by a law made in pursuance of the constitution of the United States. 3. There are at this time two descriptions of lawful money in use under Acts of Congress, in either of which, assuming these act in respect to legal tender to be constitutional, damages for non-performance of contracts, whether made before or since the passage of these acts, may be assessed in the absence of any different understanding or agreement between the parties. 4. Where the intent of the parties as to the medium of payment is clearly expressed in the contract, damages for the breach of it, whether made before or since the enactment of these laws, may be properly assessed so as to give effect to that intent. 5. When, therefore, it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold and silver, damages should be assessed in coin, and judgment rendered accordingly: *Vid.* 7 Wal., 258. The views embodied in these five propositions of the opinion of Chief Justice Chase seems to us to be founded on the true principles by which contracts of this character are governed. We think they are just. We think they rest upon the sound doctrine of the law that in the enforcement of contracts the courts must give effect to the intention of the parties.

We hold that in an action upon a contract for the payment of so many dollars in gold, the plaintiff has a right to demand the gold in specie, and in the absence of such demand, his

measure of damages will be the value of the gold in legal tender treasury notes at the time said gold should have been paid under the contract.

Let the judgment be reversed and the cause be remanded for a new trial.

END.