

LEGAL TENDER NOTES BEFORE THE SUPREME COURT.

Emperor of Austria v. Kossuth et al., 7 Jur. N. S. 483, before V. C. STUART; s. c. before Court of Ch. Appeal, Id. 639; 2 Story Eq. Ju. § 951 *e.*

It is declared in *Craig v. State of Missouri*, 4 Pet. 410, and is a fact in history familiarly known, that the states, before the adoption of the Constitution, had repeatedly exercised the power of issuing bills of credit and declaring them lawful tender for private debts, that is, making them lawful money. The confederacy before the adoption of the Constitution, possessed no power over the subject of lawful tender, and were compelled to, as they repeatedly did, appeal to the states to declare the national bills of credit lawful tender.

This was one of the defects in the national authority, which it was the purpose of the Constitution to remedy. This was done by prohibiting the states from coining money or issuing bills of credit, or making anything but gold and silver a tender for private debts. This in effect took from the states all power over the subjects, both of making money and declaring legal tender. This seems to be so regarded by Ch. J. MARSHALL, in *Craig v. Missouri*, *supra*, where he shows very clearly that both these functions are prohibited to the states. This must be so if the states could neither coin money or issue bills of credit, since this covers the whole subject of tender laws. And accordingly we find that Congress has always controlled the subject of tender since the adoption of the Constitution, and the states have never attempted to interfere. This, of itself, is such a practical construction of the Constitution as must, on every sound principal, be regarded as settling the respective powers of the nation and the states over the subject of tender laws.

We think it fair too to say, that the entire power of making money is, by the Constitution, given to Congress. We have seen that it existed before the formation of the national government in all the states, and that it is now prohibited to them all. It must therefore exist in Congress, or not at all. If it had been the purpose of the Constitution to prohibit the power of issuing bills of credit and making them lawful tender, equally to the national government as to the states, it is impossible to conjecture why it should not have been done in the same or similar terms. The fact that both are distinctly and expressly prohibited to the states, and that not one word is said in regard to their being exercised by the nation, is certainly a very significant intimation that it was not deemed proper to extend the prohibition beyond the states, but to leave its exercise by the nation to the necessities and emergencies of after times, to be exercised or not according to future exigencies, the same as it exists in all free and sovereign states.

This is very obviously to be inferred from the consideration that the whole subject of issuing bills of credit and making them lawful money was familiar to the delegates, in the

then recent experience of the times, and especially must it have been present to their minds in making such express provisions in regard to its exercise by the states. It could not, therefore, have been supposed the national government would never have occasion to exercise such a power, since that had very recently been done by a national government possessing far less automatic power than the one then about to be created, upon the basis of paramount national sovereignty. Nor is it fair to conclude that it was then supposed there could never arise an emergency where it might be necessary to declare these bills of credit lawful tender or lawful money; since the nation had just had experience of that same necessity and had appealed to the states for the exercise of that same power, which they were now in express terms prohibiting them from exercising in future. And if it had been the purpose to extinguish and utterly abolish this power everywhere, we can conjecture no good reason why that should not have been done in terms, either by prohibiting all bills of credit as lawful money, or else declaring, as in regard to the states, that Congress or the nation should never make anything but gold or silver a lawful tender for private debts. We must surely conclude either that it was intended to abolish this known and important function of government or else leave its exercise to the nation.

Whether, therefore, we look for this power in the clause "To borrow money on the credit of the United States," or that "To raise and support armies," which is evidently but a subdivision of the former, or whether we find it embraced under the liberal and only sensible construction of the power to "coin money, regulate the value thereof, and of foreign coin," is not very material. It must be obvious to all that an instrument creating a paramount national sovereignty, and prohibiting the exercise of all sovereign national functions, such as making money, by the states, should not, except upon strict necessity, resulting from the terms used, be so construed as to destroy or essentially abridge so important and indispensable a national function as the creation of paper currency upon great and pressing emergencies; a function exercised by all commercial states in those trying exigencies which, as in all future time must be expected to occur.

We only desire further to say that it seems to us that the courts and the profession have manifested more refinement than wisdom in giving the clause in the Constitution, "to coin money," such a precise and literal interpretation as to exclude all paper money under all circumstances. In its most literal sense it will extend to all kinds of metal, to iron and tin, as well as gold and silver, and perhaps also to every substance capable of receiving and retaining an impression, for coining in its most literal import means nothing but stamping with a device. Any material, therefore, which can be stamped may be coined. And