RECENT AMERICAN DECISIONS.

Supreme Court of Vermont.

FRARY AND OTHERS *vs.* BOOTH AND OTHERS.[1]

A married woman contracting a debt for her own benefit, may make it an express charge on her separate estate, and her mortgage for that purpose will be supported in equity.

A husband may by his acts, as well as by express agreement, divest himself of his marital rights in his wife's property so as to make it her separate estate.

A wife left her husband in 1847. In 1852, property was devised to her, which she occupied and controlled without any interference of her husband until the present time. In 1857 she made a mortgage upon her estate to secure payment of a debt for necessaries for the support of herself and children, and in 1858 she obtained a divorce and made a second mortgage on the same property. *Held*, that though as between her and the husband the devise to her lacked the affirmative words necessary to constitute a separate estate in the strict meaning of the terms, yet under the circumstances it was to be considered her separate estate as between her and the first mortgagee.

Such first mortgage may also be supported in equity on the principle that where a married woman trades as a *feme sole*, or obtains credit on her separate estate, a court of equity will hold the proceeds of the business or the estate subject to the claims of her creditors.

Or on the principle that the estate of a married woman living apart from her husband is liable for her maintenance.

The second mortgage having been made with notice of the circumstances, has no equity to come in before the first.

The statutes of Vermont, in regard to the conveyance of married women's estates, do not affect the jurisdiction of the courts of equity over the subject of separate estates.

Appeal from the Court of Chancery in and for the county of Orange.

Hebard, for the orators.

Peck, for the defendants.

The opinion of the court was delivered by

BARRETT, J.—In this case the following are the facts material to the leading questions presented in the argument. Mrs. Booth was the adopted daughter of Mr. Norton, and, up to the time of her marriage, lived in his family in Strafford. Soon after her marriage she went with her husband to Canada, where he had relatives, and lived with him a short time, and then (sometime

1 We are indebted for this case to the kindness of Mr. Justice BARRETT.

prior to 1847) returned to her home in Strafford with two children, issue of the marriage. Her husband has ever since remained in Canada. Till the death of Mr. Norton, in 1853, she continued to live in his family, taking a leading part in household affairs, and receiving support for herself and children, except that she furnished their clothing. In 1852, Mr. Norton made his will, giving to Mrs. Booth his home, farm, stock, horses, farming tools, &c. After his decease the will was duly probated and established, and Mrs. Booth has continued to reside in the family homestead, holding, occupying, and managing the property given her by the will, supporting herself and children without any aid from her husband, and without any claim or interference by him in respect to the control, management, or disposition of said property, and without any claim or offer by him to live with his wife and children: he, during all the time, being destitute of property and credit, and wholly irresponsible. After the decease of Mr. Norton, Mrs. Booth purchased goods of Frary & Co., and of other stores in which Mr. Harris was interested as partner, necessary for the support of herself and children, on credit given solely to herself, in reliance on her right and interest in the property given her by said will. In settlement of the accounts for said goods she executed the notes described in the bill in this case, and on the 12th of October, 1857, she executed to Frary a mortgage of said farm to secure the payment of said notes. At the General Term of the Supreme Court in November, 1858, she obtained a divorce from her husband, after which, and on the 24th day of said November, she executed a mortgage of the same property to J. S. Moore, as set forth in his answer. Mr. Moore was executor of said will of Mr. Norton, which will made the debts of the testator, and the expense of settling his estate, a charge upon a piece of land in Granville, in case what should be due to the estate should prove insufficient for that purpose.

Mrs. Booth makes defence on the ground that she was *feme covert* when the orator's mortgage was executed, and that she gave it upon compulsion by threats of suit and the attachment of her property. Mr. Moore defends on the same ground, and insists that his mortgage is entitled to priority. He also defends on the ground that, as executor, he has paid the debts of the testator and the expense of administration under the will, out of his own money; and, in any event, claims that he is entitled to a lien upon said mortgaged property for such payment, in priority to the orator's mortgage.

Upon the facts thus stated, with other incidental facts which will appear in the course of the discussion, it is to be determined whether the orators are entitled to enforce against the property the security which said mortgage purports to give.

Before presenting the views of the court upon the main grounds upon which the case was discussed in the argument, we remark, that we do not concur with the learned counsel for the defence, in assuming as a conclusive proposition, that the mortgage executed by Mrs. Booth to the orators is wholly void. At common law, and irrespective of the statute of this state, it would be void and ineffective; and it would be equally so in equity, unless the purpose, occasion, and circumstances of giving it, bring it within the operation of principles upon which courts of equity give such instruments a legitimate vitality and effect. Sec. 2, p. 448 of Gen. St.:—"A husband and wife may, by their joint deed, convey the real estate of the wife in like manner as she might do by her separate deed if she were unmarried," and the provisions of ch. 71 of Gen. St., by which the wife may, in case of desertion or ill treatment by the husband, make disposition of her property without his joining in the deed, do not affect the subject as it is involved in and presented by this case. The first of said enactments does not declare the sole deed of the wife void, nor does it imply that it is, except as resulting from the effect of coverture at common law. It has regard only to the effect of that relation at common law, and was designed to provide a mode by which she might transfer the title to her real estate at law, notwithstanding the common law effect of coverture. It is an *enabling* and not a disabling or restrictive act, and can by no means be regarded as trenching upon the scope of equitable jurisdiction and interposition in reference to the rights, liabilities, and duties of married women in respect to their property and contracts.

In *Buchanan* vs. *Chamberlin et al.*, in Orange county, 1858 (not reported), a mortgage, given by the wife to secure the payment of money borrowed to pay towards the purchase of the mortgaged property, was held valid against the husband and the children, the wife having deceased.

The latter of said statutory provisions was designed to give, not an *exclusive*, but an additional and somewhat summary means as against the husband, for insuring to the wife the use and benefit of her own property for her support, in case she should be abandoned by, or compelled by ill-treatment to live apart

from, him. They cannot, upon any ground of reason, be construed as taking away or curtailing the scope of interposition by courts of equity in cases falling within the ordinary cognisance of such courts.

Passing, without further remark, the point made in defence upon the statutes referred to, we come to the more important ground of debate.

In courts of equity, for many purposes, the separate and unmerged existence of the wife, both in respect to her person, her property, and her contracts, is recognised, asserted, and made the ground of action to the same extent as if she had not been married; and the course of adjudication has now pretty clearly defined the principles, and indicated the category of cases upon and in which this may properly be done. Within the scope of those principles and cases, there are many cases in which, for the purpose of protecting the wife, and of doing justice to other parties, the wife has been treated as *feme sole sub modo*, and to a limited extent, in respect to contracts made by her, and in respect to rights and interests in property held by or accruing through her.

Though cases at law were largely cited in the argument by orators' counsel, but little aid can be derived from them in dealing with this subject in the forum of equity. Some analogies of principle, and some deductions of reason from them, may give more or less countenance to the doctrine held and administered by courts of equity, but the cases themselves can hardly be regarded as establishing either principles or rules that control or direct the action of those courts. It is to be determined, therefore, whether the principles and cases which appertain to this subject in those courts, require the relief to be granted that is invoked by this bill.

In England it is established law in equity, that a *feme covert* has the same power of charging or appropriating her *separate* estate, as if she were *feme sole*, unless there be a restriction in the instrument by which she is invested with such estate. The main and important difference in respect to the extent of such power in her, as held in England, and by the courts of different states in this country, consists in this,—in some of the states it is held that she can charge or appropriate her separate estate only in such manner and to such extent as she is expressly authorized to do by the instrument of conveyance or settlement;

while in others it is held that she can charge or appropriate it for her own benefit, or for the benefit of her estate, as fully as if sole, provided there be no restriction in this respect in the instrument of conveyance or settlement. The English rule has been adopted in Connecticut. In *Imlay* vs. *Huntington*, 20 Conn. Rep. 146, STORRS, J., in the course of an elaborate opinion, says:—"We adopt the English rule, not only as supported by the highest authority, but because we think it is also supported by the strongest reasons." The same is reasserted in 32 Conn. R.

In New York, in the case of *The Methodist Episcopal Church* vs. *Jaques*, 17 Johns. Rep. 548, upon the fullest consideration by the Court of Error, the English rule was approved and maintained, though it may be regarded as subsequently limited to the charge or appropriation by the wife for the benefit of herself or her estate. In *N. A. Coal Co.* vs. *Dyett*, 7 Paige Rep. 9, it is held that "the *feme covert*, as to her separate estate, is considered as a *feme sole*, and may in person, or by her legally authorized agent, bind such separate estate with the payment of debts contracted for the benefit of that estate, or for her own benefit, upon the credit of the separate estate." And the same doctrine is held in *Gardner* vs. *Gardner*, 7 Paige Rep. 112. In this last case, when in the Court of Errors, 22 Wend. Rep., COWEN, J., held the following language:—"If the wife holds an estate separate from and independent of her husband, as she may do in equity, chancery considers her, in respect to her power over this estate, as a *feme sole;* and although she is still incapable of charging herself at law, and equally incapable in equity of charging herself personally with debts, yet I think the better opinion is, that separate debts, contracted by her expressly on her own account, shall, in all cases, be considered an appointment or appropriation for the benefit of the creditors, as to so much of her separate estate as is sufficient to pay the debts, if she be not disabled to charge it by the terms of the donation."

The same rule as in *N. A. Coal Co.* vs. *Dyett, supra*, is recognised by the Vice-Chancellor, 2 Sanf. Ch. Rep. 287, in *Curtis* vs. *Engel*, and is explicitly sanctioned in *Yale* vs. *Dederer*, 18 N. Y. Rep. 265. It is true, in this case, when again before the Court of Appeals, 22 N. Y. Rep. 450, SELDEN, J., attempts to weaken the stability of the law as thus held and adhered to in New York. While we cannot accord success to the attempt, yet it is perti-

nent to the case in hand to remark, that the court hold in that case an *express* charge, created by a married woman upon her separate estate for her own benefit, to be valid in equity.

In the recent case of *Todd and others* vs. *Mrs. Lee and husband*, 15 Wis. Rep. 365, DIXON, C. J., upon an extended examination and discussion of the subject, says:—"Within all the authorities, the separate estate of a married woman will be charged in equity with the payment of debts contracted for her benefit."

The lack of general equity powers in the courts has, perhaps, precluded the adjudication of the subject in the New England States, except Connecticut and Vermont; and in Vermont it has not before been called into judgment. We are prepared, however, to adopt the principle of the law as established in England, Connecticut, and New York, to the extent, at least, that a married woman may charge her separate property for her own benefit (and that is all that the present case requires), regarding it as resting in sound legal and moral reasons, and resulting in securing to the wife all proper protection, while effectuating justice between her and those with whom she has dealt with reference to and upon the credit of her separate property.

This brings us to the question,—was the property embraced in the mortgage of Mrs. Booth to the orators, her *separate* property, within the true intent and spirit of the law, as held and administered upon this subject, in a legitimate application of it to the facts of this case? The will of Mr. Norton gave it to her alone, without condition or limitation, its language being, "I give and devise to Adeline Booth, of Strafford, all my home-farm, so called, consisting of about sixty-three acres, and also I give and bequeath to her all my stock and horses," &c., &c. It is clear, upon well-established principles applicable to title created by will, that she was vested with an absolute estate in fee in the farm, subject only to the marital rights of the husband. *Separate estate* in a married woman involves, as the characterizing fact, that she holds it to her sole use, in exclusion of the marital rights of the husband. If the will had expressed it to be to her sole use, in exclusion of the right of the husband to control or dispose of it, it would have been her *separate estate* in the fullest legal sense and effect of the expression, though it was land given to her directly without the interposition of trustees. In the earlier English cases, adopting the doctrine of the subject

from the civil law, the *separate property* consisted in personalty invested, with provision that the wife should have the proceeds to the extent and in the manner specified, or the income and proceeds of lands held by trustees. This, indeed, has been true of most of the cases throughout the whole course of adjudications upon this subject in the English equity courts. Hence, upon a cursory view, the impression is easily derived, that *separate estate* is predicable only of personalty invested, or of the income of real estate vested in trustees. Even PRATT, J., in a dissenting opinion in *Albany Fire Ins. Co.* vs. *Bay*, 4 Coms. Rep. 27, says:—"*Separate estates* in married women, which courts of equity recognise their right to dispose of as *femes sole*, are strictly equitable estates. They are always created by deed, devise, or marriage settlement, vesting the legal estate in some third person." But in the American note to the case of *Hulme* vs. *Tenant*, 1 Lead. Cas. in Eq. p. 417, it is said, "the intervention of a trustee is not necessary to the validity of a trust to the separate use of a married woman. If real or personal property be given to her separate use, her interest will be protected by converting the husband into a trustee:" and a large number of American cases is cited, which establish this as the law in this country. The case of *Fanny Porter* vs. *Bank of Rutland and others*, 19 Vt. Rep. 410, adopts and stands upon this view of the law. Indeed, the necessity of an actual or even an ideal trust, in order to constitute a separate estate of the wife, which she may bind for the payment of her debts, has been abandoned in England, as appears by the case of *Owens* vs. *Dickinson*, 1 Craig. & Phil. 48, and by the still later case of *Johnson* vs. *Gallager*, 7 Lond. Jur. N. S. 273; and it is now held that such estate may exist without the fact or fiction of a trustee, and be directly reached by execution out of the Court of Chancery.

As before remarked, the will gave to Mrs. Booth an absolute title to the real estate; and we receive the impression from the peculiar language of the deed, in giving it to her without naming heirs, in connection with the fact that she was, and for a long time had been, living apart from her husband, with the burden of supporting herself and her children cast upon her, without any care or aid from him; that it was the intention of the testator to give her the property named, both real and personal, as her separate property. But it would, probably, be going too far to say that the will itself, as an instrument conferring title, can

be held to have that effect. It lacks the ordinary affirmative expressions which have been held requisite to exclude the husband from his marital rights in property thus coming to the wife.

As already said, *separate estate* in a married woman involves, as the characterizing fact, that she holds it to her sole use in exclusion of the marital rights of the husband. The cases uniformly show that the law of the subject had its origin, and has been developed, established, and applied, with reference to claims made by the husband, or by those standing in his right, in virtue of his marital rights, as against the exclusive right of the wife to the property in question. In such cases the rule has become established that the instrument of conveyance or settlement must contain explicit words of exclusion in order to shut out the husband and his assigns from his marital rights.

But in the present case, neither the husband, nor any one under him, is claiming any right in the property. The will was made during his separation from his wife; the testator died, and the will took effect to pass the title to Mrs. Booth while the separation was continuing. She was left by the testator at his death in the possession of the property as her home and resource for support, and she continued ever after in that possession, controlling and managing the property, without any interposition or claim by her husband; being (as before said) left by him to support herself and children, without any contribution or offer of aid by him in that behalf. This, we think, may properly be regarded as a practical and continuing negation, on his part, of any right or interest in the property, in virtue of his marital rights,—a practical and continuing construction and effect given to the will, as giving to the wife the absolute title in exclusion of himself as husband,—an effectual appropriation of the property to her sole and separate use.

If the husband, by an ante-nuptial agreement, had stipulated that the property coming to the wife during coverture, should be her sole and separate property, and subject to her exclusive disposal, such agreement would be effectual in equity to disembarrass the wife from any marital restraints in the disposition of such property. See *Barron* vs. *Barron et al.*, 24 Vt. 375, in which the cases involving the subject are extensively examined and the law ably discussed by ISHAM, J.

So, too, a post-nuptial agreement of a similar character, made upon sufficient consideration (as, for instance, that the wife should support herself, or herself and children, without calling on the

husband therefor, if performed by the wife), would in equity be held equally effectual. True, there was no such agreement, in terms, in this case. Still, we think the facts before stated put the husband in the same relation to this property as if there had been. We think no principle nor rule of the law is infringed in the present case, in which the question does not arise upon a claim by the husband or in his right, by holding that property which the wife holds by absolute title and disembarrassed of any claim resting upon the marital rights of her husband, is to be regarded as her separate property, within the principles and in subserviency to the purposes of the law governing the subject; and that in such case it makes no difference in what way it is invested with such character of separate property. If it is thus held by her, then, in equity, she has power to charge it for her own benefit the same as if she were discovert.

We therefore hold that Mrs. Booth, for the credit which she had obtained, was warranted in making the debts a charge upon the land thus owned by her, and that the mortgage to the orators, which we find to have been given voluntarily and without compulsion, constitutes an express charge upon, and appropriation of, the property for the payment of the debts specified therein.

There is another line of judicial administration in equity, the principle of which seems ample to warrant this court in effectuating the pledge of the property for the payment of the debts in question; and that is, cases where the wife, with the consent of the husband, has carried on business in her own name as sole trader or otherwise. It is established beyond controversy, that the property and proceeds of the business may be held by the wife's creditors, for the payment of the debts contracted in that business, against any claim or right of the husband, and, in most cases, against his creditors. This was recently held by this court in a case in Windsor county, not yet reported: *Partridge et al.* vs. *Wardner et al.* See Story Eq. § 1385–6–7, in which last section it is said:—"If a husband should desert his wife, and she should be enabled by the aid of friends to carry on a separate trade (as that of milliner), her earnings in such trade will be enforced in equity against the claims of her husband." This all goes upon the ground that the creditors of the wife have an equitable right to the property and proceeds of the business, in reliance upon which they extended to her the credit. As *against the wife* that right is plain, and was never called in question. It

has only been controverted upon some counter claim of the husband, his assigns or creditors.

Where, therefore, the wife, as in this case, has title to property which the husband permits her to hold, use, and dispose of for the support of herself and children, in his neglect to do anything in that behalf—he interposing no claim in respect to said property, and she has obtained credit for the necessary means of living in reliance upon such property, and has expressly pledged it as security for the redemption of such credit, it would seem to be interpolating a new principle both in equity law and in ethics, to hold that she, or those standing in her right, may, in virtue of a technical rule of marital disability, evade that equity of her creditors. It would be matter of some difficulty to assign a plausible, much more a solid reason for so holding. It certainly could not be on the score of any countervailing equity in her, for none such exists, but the contrary. Nor could it be on the score of disability, for that is excluded by well-known rules and settled principles of equity law.

The result of the views already presented seems to be fully warranted upon other grounds.

There are several ways, upon well-settled principles, in which, as against the husband, the property of the wife would be subjected to the support of herself and children.

In *Guy* vs. *Pearkes*, 18 Ves. Rep. 196, the Lord Chancellor ordered the *Accountant-General* to sell stocks held under a will by a legatee whose husband had deserted her soon after marriage, and for several years had furnished nothing for her support, and to repay advances made from year to year by a friend of the wife for her support, who made such advances upon the faith of being repaid out of that fund, and that the dividends of the remaining fund be paid to her for her future support.

In the American notes to *Murray* vs. *Lord Elibank*, Lead. Cas. in Eq. vol. 1, p. 496, it is said, "there is a class of decisions which indicate that, where the husband has misbehaved, and abandoned or ill-treated his wife, so as to justify a divorce or separation, the wife's property in action, and it seems also even property not under the jurisdiction of the court, will be laid hold of by the Court of Chancery and appropriated to the support of the wife and her children;" and several cases to that effect are cited in different states. It is further said: "It may probably, also, be considered as established, that if the husband is entirely insolvent, and the wife is without means of support, equity will sustain a

bill by the wife, through her next friend, against the husband, or his assigns or creditors, seeking to get possession of the property at law;" and several cases to that effect are referred to.

In *Haviland* vs. *Myers*, 6 J. C. R. 25, Chancellor KENT said: "The rule was settled that the wife's equity to a suitable provision for the maintenance of herself and her children out of her separate real and personal estate, descended or devised to her during coverture, was well established, and would prevail equally against the husband or his assigns, and against any sale made or lien created by him, even for a valuable consideration, or in payment of a just debt; * * * and this equity might be extended, if the circumstances of the case should require it, to the *whole* of the real and personal estate so devised or descended to the wife." This savors strongly of the idea that even as against the husband and those standing upon his right, the courts recognise a *separate estate* in the wife, for certain purposes, which was not created such by express terms,—for in that case the property was *inherited*,—not devised or conveyed by deed: See *Drummond* vs. *Magee*, 4 J. C. R. 318. In closing a full, elaborate, and discriminating review of most of the cases bearing upon the wife's rights in equity as to her own property, it is said in the note above cited, on p. 501: "The maintenance of the wife from her own property, in cases of the husband's neglect to provide for her, is, no doubt, a ground of original jurisdiction to be exercised upon a bill filed by her."

What has thus been said in the note, as above cited, and held in the cases referred to, we regard as sound in principles, and sustained by ample reasons. In the light of the law as thus established and administered, we think it would have been the clear duty of the Court of Chancery, upon the facts shown in the present case, upon the application of Mrs. Booth, as against any attempt of her husband to control or dispose of the property coming to her under Mr. Norton's will, to interpose in her behalf, and secure support for herself and children out of said property; and in case of such support having been obtained on her credit, and in reliance on said property, to subject said property to the redemption of such credit, as a condition of entitling the husband to assert his marital rights in respect to it.

She, without occasion for invoking aid from that court, and with the acquiescence, at least, of her husband, made use of that property for just the purposes, and in just such a way, as a means of obtaining support for herself and children, as the Court

of Chancery would have authorized her to make. Upon the strength of it she obtained credit for necessaries, and pledged it for the redemption of that credit. It is now submitted whether such use and disposition of it will be upheld and effectuated. At this point it is worthy to be repeated as a striking feature of the case, that not Mr. Booth, or any one standing in his right, but Mrs. Booth and her subsequent grantee in mortgage, are claiming to avoid the legitimacy of the use and disposition she made of the property in her transactions with the orators. No case is cited and no reason is assigned, *bearing upon the equities* growing out of those transactions, or the relation of the parties, why the defendants should be permitted to assert the invalidity of the orators' security. But the defence is rested upon implications educed from certain statutory provisions and upon arbitrary technical rules. We think the former are not warranted, and that the latter are inapplicable.

As between Mrs. Booth and the orators the equity is clear, and there is no warrant, either in law or morals, for permitting her or her subsequent mortgagee to call in question the validity of the security given by her to the orators.

As Mr. Moore took his mortgage with full knowledge of the existence of the mortgage to the orators, he is not entitled to the priority which he claims by reason of it.

As to his claim of a lien on the mortgaged property by reason of payments made by him as executor, nothing is shown in the case why the land in Granville and the debts due the estate have not been resorted to according to the provisions of the will. In order to entitle him to assert a lien upon the home-farm to affect any legitimate disposition that has been made of it, it is incumbent on him to show that the provision made in the will for the payment of debts and expenses, has been faithfully administered, and has proved inadequate. As to all this the case is entirely silent. There is, therefore, no ground for the lien claimed.

The *pro forma* decree of the Chancellor is reversed, with costs, and the case remanded for a decree of foreclosure according to the prayer of the bill.

I. 1. Nothing was earlier or more firmly settled at common law than the merger of the wife's personality and civil existence in that of the husband. At an early day, however, the courts of equity recognised a right to a separate estate in the wife: Witham *vs.* Waterhouse, Tothill 91 (38 Eliz.); Fleshward *vs.* Jackson, Id. 94 (21 Jac.); Bletsow *vs.* Sawyer, 1 Vern. 245. This

being established, the right of disposing of such estate followed as a necessary incident, and was also conceded at an early day: Fettiplace *vs.* Gorges, 3 Bro. C. C. 8.

2. But the *jus disponendi* is not necessarily absolute. It might always be qualified by express terms in the instrument creating the estate: 2 Story Eq. § 1382, *a*. The troublesome question, however, was as to the extent of the wife's powers where there was no express limitation of them in the deed of creation of the estate, and on this the courts have been at variance for about a century. The point is stated very clearly by Mr. Justice BARRETT in the principal case, can a *feme covert* charge her estate only in such manner and to such extent as she is expressly authorized by the deed of settlement, or can she charge it for her own benefit or that of her estate itself, as fully as if sole, provided there be no express restrictions in the deed of settlement. The decisions upon this point are numerous and contradictory, both in England and the United States. The English cases have been very elaborately reviewed in Ewing *vs.* Smith, 3 Desaussure 427; Jacques *vs.* M. E. Church, 17 Johns. 548; Yale *vs.* Dederer, 22 N. Y. 450, which are the leading American cases, and in Parks *vs.* White, 11 Vesey Jr. 209, in which last case Lord ELDON settled the English law in favor of the wife's general powers as a *feme sole* except where limited by the deed creating the estate.

In the state of New York the question arose in Meth. Ep. Church *vs.* Jacques, 3 Johns. Ch. 118, and Chancellor KENT, after a very careful examination of the cases decided against the English doctrine, but the Court of Errors reversed his decision and expressly adopted the English rule, 17 Johns. 548, and this has been uniformly followed in New York ever since: N. A. Coal Co. *vs.* Dyett, 7 Paige Ch. 1; Gardner *vs.* Gardner, 22 Wend, 526; Curtis *vs.* Engel, 2 Sandf. Ch. 287; Yale *vs.* Dederer, 18 N. Y. 269; 22 N. Y. 450.

The same rule has been adopted in Connecticut: Imlay *vs.* Huntington, 20 Conn. 146; in New Jersey, Leaycraft *vs.* Hedden, 3 Green Ch. 512; in Ohio, Hardy *vs.* Van Harlingen, 7 Ohio, N. S. 208; in Missouri, Whitesides *vs.* Cannon, 23 Mo. 457; Segond *vs.* Garland, Id. 547; in Maryland, Cooke *vs.* Husbands, 11 Md. 492; Chew's Adm's. *vs.* Beall, 13 Md. 348, which appear to overrule the earlier decisions in Tarr *vs.* Williams, 4 Md. Ch. 68, and Miller *vs.* Williamson, 5 Md. 219; and now in Vermont by the principal case, though with a restriction which will be noticed hereafter.

On the other hand, the Court of Appeals of South Carolina, in 1811, in Ewing *vs.* Smith, 3 Desaus. 417, also examined the cases with great care, and, reversing the decision of the Chancellor, who had followed the English precedents, held the question to be *res nova* in this country, and the better principle to be that the *feme covert* has no powers but those expressly given by the deed of settlement, which is the sole source or fountain of her authority.

The same rule has been adopted in Pennsylvania, Lancaster *vs.* Dolan, 1 Rawle 231 (overruling the earlier case of Newlin *vs.* Newlin, 1 S. & R. 275). And this doctrine has been adhered to in Pennsylvania with great strictness, so that a *feme covert's* bond was held absolutely void, though the deed of settlement gave her power to make a deed under her hand and seal as if unmarried: Dorrance *vs.* Scott, 3 Whart. 309; Wallace *vs.* Coston, 9 Watts 137. The only exception that has been made is in favor of the validity of a judgment confessed by judgment-bond for the purchase-money of real estate. Here it has been held that the conveyance

and the bond are one transaction, and the *feme covert* takes the land subject to the lien, the bond and judgment remaining void as against her generally: Patterson *vs.* Robinson, 1 Casey 81; Ramborger *vs.* Ingraham, 2 Wright 146. It has also been held that a *feme covert* may agree to a revival of a judgment already obtained, though she cannot confess judgment even for a debt for improvement of her separate estate: Bruner's Appeal (March, 1864, not yet reported). So a power to appoint was held not to include a power to *devise* by an instrument in the nature of a will; Thomas *vs.* Folwell, 2 Whart. 11; and where a woman before marriage conveyed her estate to trustees for her sole use, and so that the rents and profits should not be liable for her husband's debts, "but be subject to her order alone," it was held that this did not give her the power to devise the *estate* by will: Lyne's Exr. *vs.* Crouse *et al.*, 1 Barr 111; and see, also, Rogers *vs.* Smith, 4 Barr 93; Steinman *vs.* Ewing, 7 Wright 63; and Wright *vs.* Brown *et ux.*, 8 Wright 224, where a married woman's mortgage of her separate estate (though executed jointly with her husband and with due formality), was declared void because the deed of settlement did not give the express power to sell or mortgage, and "on that subject," says STRONG, J., "silence is prohibition." The same rule is held in Rhode Island, Metcalf *vs.* Cook, 2 R. I. 355; in Tennessee, Morgan *vs.* Elam, 4 Yerger 375; Marshall *vs.* Stephens, 8 Humphreys 159; Litton *vs.* Baldwin, Id. 209; Ware *vs.* Sharp, 1 Swan 489.

3. In addition to the question of what the *feme covert's* powers are when not expressly limited by the deed of settlement, there is also the important question as to what words in such deed shall constitute a limitation. In Pennsylvania and the states that follow the same rule, of course the express language of the deed of settlement is the touchstone by which all doubtful powers must be tried—where that does not authorize any particular act, it is not to be allowed. But in the other states the presumption being in favor of full powers, it has been usually held that a greater power includes a less, as a power to sell includes a power to mortgage, &c.; and the expression of one mode of alienation or charge does not exclude other modes unless negative words be used, as, *e. g.*, the mention of a power to convey by deed does not exclude a power to devise by will, &c.: Imlay *vs.* Huntington, 20 Conn. 146; Hardy *vs.* Van Harlingen, 7 Ohio N. S. 208, and cases already cited. In Maryland, however, the rule appears to be otherwise, as it is said in Cooke *vs.* Husbands, 11 Md. 492, that where no enumeration is made in the deed, the *feme covert's* powers are general, but that it had been already decided in the previous cases of Tarr *vs.* Williams, 4 Md. Ch. 68, and Miller *vs.* Williamson, 5 Md. 219, which it was not intended to overrule, that the expression of one mode was the exclusion of others. And it *may be* the same rule will be followed in New Jersey, it being a matter of some doubt, as the Chancellor's words are in Leaycraft *vs.* Hedden, 3 Green Ch. 512, "if the terms of the deed *require* a particular mode of disposition, then as clearly those terms must be observed," &c.

II. In the discussion so far, it has been assumed that a power is claimed and exercised, or a charge made on her separate estate by a married woman, *expressly*, and it will be observed that in the principal case, Mr. Justice BARRETT is careful to limit the decision to the case in hand, where the charge was expressly made on the separate estate. But there is a large class of cases where the question has been as to the

extent to which the separate estate of a *feme covert* will be charged where the charge is not made upon it in express terms. Without going into the cases in detail, it may be said to be established:—

1. That a *feme covert* cannot make herself liable, generally, either in person or estate.

2. Nor will her separate estate be held liable in equity for her general contracts.

3. But her separate estate will be held liable for all debts, &c., which she expressly or by necessary implication charges upon it: 2 Story's Equity, §§ 1397–99.

4. In most states it is held, that in addition to the charge being either expressly made or necessarily implied to be upon the separate estate, the debt itself must be either for the benefit of such estate or for her own benefit upon the credit of it: Curtis *vs.* Engel, 2 Sandf. Ch. 287.

There has been much nicety of reasoning as to what will amount to proof of an intention to charge the separate estate. Where the debt is directly of advantage to the estate itself, the intention to charge it has been readily inferred, but where the advantage does not accrue to the estate, it has been generally held that the intention must be affirmatively made out: Koontz *vs.* McNab, 16 Md. 549; and in New York the intention must appear in the very contract which creates the debt: Yale *vs.* Dederer, 22 N. Y. 450. No satisfactory general rule has yet been laid down, and Mr. Justice STORY admits "the difficulty of distinguishing upon any clear reasoning, what ground of general presumption exists to infer an intention, not expressed, to charge any particular debt on her separate estate, that is not applicable to her general debts:" 2 Eq. § 1401.

There is also some discrepancy in the authorities in regard to the ground on which courts of equity enforce such charges. It is perhaps most commonly said, that the contract so to charge the estate is *pro tanto* an execution of the power of appointment, 2 Story's Eq. § 1399; but it is also said that the jurisdiction stands on the broad ground of justice that the estate should answer the debt. The early cases "proceeded on the notion of a trust and plain equity of requiring a married woman's engagements entered into for her own benefit, to be satisfied out of the trust estate:" COMSTOCK, J., Yale *vs.* Dederer, 18 N. Y. 274.

III. It is to be observed that these are questions of purely equitable jurisdiction, and have been discussed without reference to the recent statutes in the various states giving enlarged powers to married women in relation to their property. Notwithstanding these statutes, the doctrines discussed are held to be still the rules in equity in most states. Thus, in New York, the Act of 1849, that "any married female may take by inheritance, &c., and *convey and devise* real and personal property" as if unmarried, &c., is held not to give her the power to contract debts generally: Yale *vs.* Dederer, 18 N. Y. 272. And in Pennsylvania the Act of 1848 has been held not to enable a married woman to hold as a *feme sole*, but as if the property were settled to her separate use: Bear's Adm. *vs.* Bear, 9 Casey 525; Penn. Co. *vs.* Foster, 11 Casey 134; Wright *vs.* Brown *et ux.*, 8 Wright 224.

So in New Jersey, Pentz *vs.* Simonson and wife, 2 Beasley 232; Skillman *vs.* Skillman, Id. 403; and it has been generally held that the wife does not acquire any right to her earnings, except in Connecticut, where it appears to be given by the express language of the statutes: Whiting *et ux. vs.* Beckwith, 31 Conn. 596. J. T. M.

Supreme Court of Indiana.

WARREN *vs.* PAUL.

The provision of the Internal Revenue Act of July 4, 1864, requiring writs in state courts to be stamped, is not within the sphere of the legislative powers of the Federal Government, and is inoperative.

Section 8 of Art. 1 of the Constitution of the United States contains a delegation to Congress of power to suspend the writ of *habeas corpus*.

Appeal from the Elkhart Common Pleas.

Robert Lowry, for the appellant.

John H. Baker, for the appellee.

The opinion of the court was delivered by

PERKINS, J.—Suit to recover possession of personal property. Suit dismissed by the court, on motion of defendant, and a return of property ordered, because papers were not stamped as required by Act of Congress. The court refused permission to plaintiff to affix stamps, in court, to avoid a dismissal. The Internal Revenue Act of July 4th, 1864, enacts that stamps upon legal documents shall be thus:—

"Writ, or other original process by which any suit is commenced in any court of record, either of law or equity, 50 cents.

"Where the amount claimed in a writ, issued by a court not of record, is 100 dollars or over, 50 cents.

"Upon every confession of judgment, or cognovit, for 100 dollars or over (except in those cases where the tax for the writ of a commencement of suit has been paid), 50 cents.

"Writs or other process on appeals from justices' courts or other courts of inferior jurisdiction to a court of record, 50 cents.

"Warrants of distress, when the amount of rent claimed does not exceed 100 dollars, 25 cents.

"When the amount claimed exceeds 100 dollars, 50 cents. *Provided*, that no writ, summons, or other process issued by and returnable to a justice of the peace, except as hereinbefore provided, or by any police or municipal court having no larger jurisdiction as to the amount of damages it may render than a justice of the peace in the same state, or issued in a criminal or other

suit commenced by the United States or any state, shall be subject to the payment of stamp duties; *and provided, further*, that the stamp duties imposed by the foregoing Schedule B, on manifests, bills of lading, and passage tickets, shall not apply to steamboats or other vessels plying between ports of the United States and ports in British North America.

"Affidavits in suits or legal proceedings shall be exempt from stamp duties."

We quote this, being the latest act, because it involves the question to be decided, which is, has Congress power to tax legal proceedings in the state courts?

The powers of Congress are delegated by the Constitution; and "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."

We start out then, with the constitutional fact that state governments are to exist concurrently with the United States Government, possessed of independent powers, beyond the control of the United States Government; for they and their people possess all powers not granted to the United States. State governments then are to exist.

The powers delegated to the general government are specified in sec. 8 of art. 1. Section 9 of the same article contains restrictions and limitations on the powers granted generally in section 8, and section 10 of the same article contains the prohibitions upon the states.

Section 8 of art. 1 delegates power to Congress to organize courts, and therein, we may here remark, delegates to Congress power both to authorize the issue and to suspend the issue of the writ of *habeas corpus*, because that is a judicial writ, and the power to organize courts includes the power of determining what writs they may issue, or not issue, from time to time; hence it was necessary to place the restriction upon the power thus delegated to Congress to legislate for the courts which is contained in sec. 9, viz.: that Congress should not, in so legislating, withhold from them the right to issue the well-known judicial writ of *habeas corpus*, except, &c.

But there is no express delegation of power in the Constitution to Congress to legislate for state courts, and none ought to be delegated incidentally.

The Constitution, in sec. 8, delegates to Congress the power

to lay and collect taxes, duties, imposts, and excises; but no direct tax shall be laid unless in proportion to the census, and duties, imposts, and excises must be uniform, &c.

The Constitution seems to contemplate three kinds of taxes as within the power of Congress, viz.:

1. Direct taxes.
2. Duties or imposts.
3. Excises.

Such taxes Congress may lay and collect; and it certainly is not clear that it can any other: 1 Story on Const., §§ 950, 951, *et seq.* The stamp tax upon legal documents does not fall within either of these classes. It is a tax on the right to justice: See Smith's Wealth of Nations, p. 371; Say's Pol. Economy, 6th Am. ed., p. 460, note; New Am. Cyclopedia, vol. 7, p. 365. John Stuart Mill, in his late work on Political Economy, classes this description of tax under the head of, "some other taxes," vol. 2, p. 460; and on p. 465 of the same volume he says: "In the enumeration of bad taxes, a conspicuous place must be assigned to law taxes, which extract a revenue for the state from the various operations involved in an application to the tribunals. Like all needless expenses attached to law proceedings, they are a tax on redress, and therefore a premium on injury." He says they have been mostly abolished in England, since their injustice was so clearly demonstrated by Bentham: See Say, *supra.*

But conceding for the purposes of this case that Congress may lay and collect stamp taxes, we hold that they cannot be laid by that body on proceedings in the State Courts. This question is not entirely new. In 1797 Congress passed a stamp act. The point was then made, that Congress could not even require a license from attorneys to practise in state courts, but might to practise in the United States courts; and the law then enacted respected the rights of the states in these particulars: Bent. Deb., vol. 2, p. 155; Story's Laws of United States, vol. 1, p. 466.

State governments, as we have seen, are to exist with judicial tribunals of their own. This is manifest all the way through the Constitution. This being so, those tribunals must not be subject to be encroached upon or controlled by Congress. This would be incompatible with their free existence. It was held when Congress created a United States bank, and is now decided when the United States has given bonds for borrowed money, that as

Congress had rights to create such fiscal agents and issue such bonds, it would be incompatible with the full and free enjoyment of those rights to allow that the states might tax the bank or bonds; because, if the right to so tax them was conceded, the states might exercise the right to the destruction of congressional power. The argument applies with full force to the exemption of state governments from federal legislative interference.

There must be some limit to the power of Congress to lay stamp taxes. Suppose a state to form a new or to amend her existing constitution, could Congress declare that it should be void unless stamped with a Federal stamp? Can Congress require state legislatures to stamp their bills, journals, laws, &c., in order that they shall be valid? Can it require the Executive to stamp all commissions? If so, where is he to get the money? Can Congress compel the state legislatures to appropriate it? Can Congress thus subjugate a state by legislation? We think this will scarcely be pretended. Where then is the line of dividing power in this particular? Could Congress require voters in state and corporation elections to stamp their tickets to render them valid?

Under the old confederation Congress legislated upon states, not upon the citizens of the state. The most important change wrought in the government by the Constitution was that legislation operated upon the citizens directly, enforced by Federal tribunals and agencies, not upon the states.

Another established constitutional principle is that the Government of the United States, while sovereign within its sphere, is still limited in jurisdiction and power to certain specified subjects: See *Hopkins* vs. *Jones*, decided at this term.

Taking these three propositions, then, as true:

1. States are to exist with independent powers and institutions within their spheres.

2. The Federal Government is to exist with independent powers and institutions within its sphere.

3. The Federal Government operates, within its sphere, upon the people in their individual capacities, as citizens and subjects of that government, within its sphere of power, and upon its own officers and institutions as a part of itself.

Taking these propositions as true, we say, it seems to result as necessary to harmony of operation between the Federal and state governments, that the Federal Government must be limited, in

its right to lay and collect stamp taxes, to the citizens, and their transactions as such, or as acting in the Federal Government, officially or otherwise; and cannot be laid upon and collected from individuals on their proceedings when acting, not as citizens, transacting business with each other as such, but officially, or in the pursuit of rights and duties in and through state official agencies and institutions. When thus acting, they are not acting under the jurisdiction nor within the power of the United States; not acting as subjects of that government, nor within its sphere of power over them; and neither they nor their proceedings are subject to interference from the United States. Can Congress regulate or prescribe the taxation of costs in a state court? The Federal Government may tax the governor of the state, or the clerk of a state court, and his transactions, as an individual, but not as a state officer. This must be so, or the state may be annihilated at the pleasure of the Federal Government. The Federal Government may, perhaps, take by taxation most of the property in a state, if exigencies require, but it has not a right, by direct or indirect means, to annihilate the functions of the state government.

PER CURIAM.—The judgment below is reversed with costs. Cause remanded, &c.

AMERICAN CONSTITUTIONAL LAW.

We have received, in addition to the above case, a large number of decisions of the highest judicial tribunals of different states, upon different and highly important constitutional questions, affecting the functions and powers of the National and State Governments, and their relations to each other under the present Federal Government, all of which we should be glad to give at length in our pages, but that would so far occupy our space as to exclude everything else. We have only the choice left, of wholly omitting all reference to them, or of attempting to make an intelligible abstract of the points decided, and the course of argument resorted to by the courts. Notwithstanding the labor and difficulty attending the latter course, we have, after considerable hesitation, attempted it.

1. In regard to the question of the right of soldiers to vote, while beyond the limits of the several states to which they belong, there have been a considerable number of decisions made in the different states, to which we have not before alluded.

The question was very extensively and learnedly discussed by the Supreme Court of California, SHAFTER, J., delivering the leading opinion, which contains a very creditable amount of research and learning upon the general question of the propriety of the courts of last resort declaring acts of the legislature unconstitutional, on the ground of supposed conflict with either the letter, or the constructive import, of the organic law of the state or gov-

ernment, and reaching the very obvious conclusion that this may and must be done, in all cases of obvious and satisfactorily established conflict. The majority of the court here held, that where the constitution required the elector to be a resident of the county "in which *he claims his vote*," this necessarily implied that he could only *cast his vote in the county of his residence;* that the phrase "in which he *claims* his vote," upon any fair, manly, and sensible construction, must mean the same as, in which he *offers* his vote, or in which *he votes*, or any similar form of expression.

It seems to us that the conclusion of the court here is most unquestionable, and that the decisions of some of the other state courts, wherein a different conclusion is reached, are not maintainable upon any fair and just ground of argument, as is very clearly shown in the very learned and lawyerlike exposition of the question in the elaborate opinion of Mr. Justice SHAFTER, to which we beg to refer the profession, as containing a large amount of the most valuable matter, presented in the most perspicuous and unexceptionable form.

The Supreme Court of Vermont, in a very carefully prepared and satisfactory opinion, held, that where the restriction of the state constitution in regard to voting within the precinct of the residence of the elector, was, in terms, limited to the casting of votes for state officers, and no such provision was found in that instrument in regard to voting for electors of President and Vice-President and members of Congress, that it was competent for the legislature to provide for taking the votes of the electors for such offices without the limits of the state. And subsequently, the Supreme Court of the state of New Hampshire adopted the same view in regard to the constitution of that state, partly upon the authority of the decision in Vermont.

2. The Supreme Court of California, at the July Term, 1864, made two very important decisions affecting questions of currency, in both of which very able and learned, and, to our mind, satisfactory opinions, were delivered by Mr. Justice CURREY.

The first of these opinions recognises the validity of the Act of Congress of the 25th February, 1862, making the paper issued from the Treasury of the United States, a legal tender for all debts, public and private, whether created before or after the date of the Act. This is certainly a very important and difficult question, and one in regard to which there exists great contrariety of opinion, both as to its policy, justice, and validity.

We could do nothing more here than to indicate the course of argument adopted by the court, and in regard to which the different members seem to have concurred. The right of the United States Government to declare their own paper a currency, and a legal tender upon all private contracts, whether created before or after such declaration, is here attempted to be vindicated upon the ground that the right and the power to create and to control the currency of the country, is one of those functions delegated by the people of the several states in the United States Constitution. This is argued, with great force and ingenuity, both from the necessity of such a provision, in order to the successful carrying out and accomplishment of its other expressly delegated powers; and also from the fact that certain analogous acts bearing upon this governmental function are expressly prohibited from being exercised by the several states.

The same view has been maintained

in the New York Court of Appeals, in the case of Meyer *vs.* Rosevelt, and in other causes; and the question is now pending, we believe, in the Supreme Court of the United States, where it will be likely to receive an authoritative determination in the course of its approaching session.

We desire here to call attention to a recent decision of the Supreme Court of Indiana, in the case of Thayer *vs.* Hedges, May Term, 1864, where the following points were ruled:—

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. 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. The power to coin money is one power, and the power to declare anything a legal tender is another and different power; both were possessed by the states severally at the adoption of the Constitution; 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 shall 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 cannot 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. 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.

5. The power to declare paper a legal tender is not incidental to any power delegated by the Constitution.

It is not important here to discuss the comparative soundness of these conflicting decisions. If we were to express an opinion, we might feel compelled to dissent, in some particulars, from both the views thus presented.

1. It seems difficult to argue, with much apparent fairness or plausibility, that it could have been the purpose, either of the framers of the United States Constitution or of the conventions of the people by which it was adopted, that the question of currency should not have been exclusively conferred upon the National Government. And at the same time the form of expression used in the prohibition to the states seems to imply, that but for the prohibition it might be claimed that the several states had power to "emit bills of credit," and "to make anything but gold and silver coin a tender in payment of debt;" and it may, therefore,

be argued, with some plausibility, that the general power over the question of what shall be a tender in payment of debts, with the limitation that it shall not extend to any thing but "gold and silver coin," was still retained by the states.

2. But when it is considered that from the first the construction has been otherwise, and all tenders in payment of debts have been regulated by the Acts of Congress upon that subject, and the states have all acquiesced in yielding that function of government to the National Legislature, it must have great weight against the soundness of a contrary claim at this late day.

3. It may also be added, with equal force and plausibility, we think, that from all the provisions contained in the United States' Constitution, both positive and negative, as well in regard to the state as the National Government, it appears very certain that at the time of the adoption of the United States Constitution, no one would ever have dreamed or imagined that the National Government would ever have attempted to create any currency, and to make the same a legal tender for debts, even those existing at the time, except gold and silver coin. But the power to do a thing, and the probability of its being done, are very different matters. And when this awful crisis, as unforeseen as it was incomprehensible, came, and the National Legislature made this desperate resort in the public finances to sustain the public credit, we cannot affect to deny, that we expected the courts, both state and national, would feel compelled to sanction its legality, from the mere fact that it was nowhere expressly prohibited to the National Government, and that it did come within the general scope of other functions constructively given. But while it seems to us that upon any ground of *à priori* reasoning, fairly conducted, it was very obvious, no such power as to create a legal currency and a legal tender out of their own bills of credit was given; still, having been assumed and acted upon to such an overwhelming extent, there does seem to be a kind of necessity of maintaining its legality, the same as of prescriptive rights, which have been maintained for centuries, in order to escape the shaking of the very property foundations of society. The very extent of this currency making it equally indispensable that its validity be maintained as if it had existed and been recognised for centuries; the very magnitude of the interest supplying, in some sense, the want of the lapse of time.

We desire here to say, too, that it seems to us that the Supreme Court of the United States, in the case of The Bank of Commerce *vs.* The City of New York, 2 Black R. 620, in holding that the states cannot tax the owner of United States stock for its amount, as a source of income, in common with his other sources of income, have assumed a position which is not maintainable, either upon the ground of necessity or policy, and one from which they will be compelled to recede ultimately, unless they are prepared to extinguish the chief source of taxation in the states at one blow. That court has sometimes been suspected of leaning too much in favor of the vindication of state rights. But whatever offences they may have heretofore committed in that direction, we think, whether ignorantly or not, they have here assumed a proposition altogether unimportant to the vindication of the extremest prerogatives of the powers and functions of the National Government, but which lays the axe, fatally and irrevocably, at the very root of all vitality in state sovereignty. We must say that, for one

we were amazed to find that court reversing the decision of the New York Court of Appeals upon this ground, notwithstanding the earlier cases upon the question contained some intimations in that direction.

The other question to which we referred, as having been decided by the California Supreme Court, had reference to specific contracts payable in gold or silver coin. The legislature of that state passed a statute, April 27, 1863, upholding this class of contracts, and providing that the judgment and execution thereon should require payment specifically in the kind of money specified in the contract. The contract in suit was dated April 2, 1864, and provided for payment in United States gold coin. The defendant refused payment in that mode, but tendered payment in United States tender notes.

The leading question made in the case was in regard to the validity of the California statute requiring payment in coin, whenever the parties so stipulated. The court found their opinion, upholding the validity of the statute, mainly upon the argument that gold coin is a commercial commodity, always bought and sold in the market, or liable to be so bought and sold, when for any cause the currency of the country is depreciated and the rate of foreign exchange proportionally enhanced; and that in such cases a specific contract for coin is not adequately compensated by a judgment for damages, payable in such depreciated currency, thus bringing this class of contracts within the principle of that class in which courts of equity decree specific performance, because the thing contracted for possesses an artificial value to the payee above the amount of pecuniary damages, which a court of law can award for its breach. And it seems to us this argument is unanswerable. In Wood *vs.* Bullens, 6 Allen 516, the Supreme Judicial Court of Massachusetts held, that upon a contract payable in specie the payee could recover no more at law than the sum specified in the contract, whatever premium specie bore at the time. This will surely afford very good ground for the interposition of a court of equity to decree specific performance. And the California statute, in effect, only provides for doing this at law by the form of awarding execution.

We have extended these discussions so far that we can devote but little space to the principal case to which this note is appended.

It has seemed to us most unquestionable, from the very first, that Congress could not impose a specific tax of any kind upon any of the indispensable governmental functions of the states, whether by way of license to the attorneys and counsellors practising in state courts, or of stamp duties upon their processes. This would be, in effect, to recognise in the National Legislature the power of prohibition. The power to tax or to license implies the power to carry such taxation to the extent of prohibition, or to annex such conditions to the license as will amount to a virtual prohibition. This is a familiar rule in the decisions of the National tribunal of last resort. McCullough *vs.* Maryland, 4 Wheat. R. 316; Redfield on Railways 526, and cases cited in note.

This is the only principle upon which that court attempt to vindicate the stock of the United States, or of the United States Bank, from taxation by the states. And, to be consistent, they must extend, and we have no doubt they will extend, the same exemption to all the instruments of the state governments. And to be entirely consistent with the rule which they have attempted to apply to United States stock, by de-

nying the right to the states to tax it, as a source of income merely, they should not only exempt the instruments of the state administration from specific taxation, by way of stamp or license duties, but they should not allow the National Government to impose a tax upon income arising from state salaries or from practice in the state courts, or from interest on money loaned the states, and various other sources analogous. But we do not think all this is demanded in order to create the practical independence of the state governments. And we look confidently for the ultimate adoption of a similar rule in regard to the right to tax the income from National stocks. I. F. R.

Supreme Court of Pennsylvania.

M'ENROY ET AL. *vs.* DYER.

It is too late to object to the competency of a witness after his testimony has been given and commented on to the jury by the party objecting.

In an action of trespass *de bonis asportatis*, the general rule for the measure of damages is the value of the goods at the time of the taking, or their highest value between that time and the trial, with interest and damages for any acts of outrage or oppression that may have accompanied the taking.

But where there has been a redelivery of the goods to the owner or a reacquisition by him, as by purchase at a sale, &c., the measure of damages is what it has cost him to regain possession, what he has lost by the temporary deprivation of the use of the goods, and such other damages as will make compensation for the injury.

Laying out of view what may be recovered in trespass for outrage or oppression in the taking, there is no difference in the measure of damages whether the action be trespass or trover.

The opinion of the court was delivered by

STRONG, J.—We do not perceive that the witness, Simon Barnes, had any interest such as to disqualify him from testifying in behalf of the plaintiff. If the property levied upon and sold under the execution against Barnes and Jennings was a part of the realty on the 29th day of May, 1855, when the assignment of the mills, buildings, and improvements was made to Dyer, clearly there was no warranty of title, and therefore no interest. If the articles levied upon had been detached before the assignment, and had become personalty, they were not embraced in the assignment, and in that case there was no implied warranty. In any aspect of the case the interest of the witness is not apparent. But were it not so, it was too late to ask the court to withdraw his testimony from the jury after it had been received

without objection, used by the plaintiffs in error and commented upon by them to the jury: *Rees* vs. *Livingston*, 5 Wright 119.

The only important question in the case is, whether the court below applied a correct rule for the assessment of damages. It was an action of trespass against a constable and another for levying upon and selling the plaintiff's goods under an execution against Barnes and Jennings.

The goods had been sold at the constable's sale, and there was some evidence they had been bought in for the plaintiff. The court instructed the jury that the measure of damages was not what had been paid at the constable's sale, but the value of the property at the time the sale was made, with interest thereon from that date. This was a correct enunciation of the rule as applicable to ordinary cases of trespass *de bonis asportatis*, but it is applicable only to cases where the owner has not regained possession of the goods before the trial. If, in this case, the property seized and sold by the constable was bought in by the plaintiff, or for him, at a price less than its value at the time of the seizure or the sale, that value was not in any just sense a measure of the injury caused by the act of the constable. What the law seeks to secure in an assessment of damages to an injured party is compensation. He can ask no more than to be made whole. In most instances a levy and sale of a plaintiff's goods for the debt of another deprives him entirely of the property, and nothing less than its value therefore would be compensation. But if there has been a redelivery to him, or if he has reacquired it, he may be compensated with less. He is then entitled to what it has cost him to regain possession, to what he has lost by the temporary deprivation of the use of the chattels, and to such other damages as are commensurate with the injury. No other rule than this will do complete justice, and it is supported by authority. In actions of trover it has often been held, that though there was a complete conversion, and though the general rule in the measure of damages is the value of the goods at the time of the conversion or the highest value at any time between the conversion and the trial, yet if they have been regained by the plaintiff before the trial, that fact goes in mitigation of damages. In such a case the value of the use of the goods during the period in which the plaintiff was deprived of possession, with any injury to the property itself, and the expense of recovering it, have been declared to be full compensation. In

Cook vs. *Hartle*, 8 Car. & Payne 570, a plaintiff was not allowed to recover the value of the goods which had been converted to the use of the defendant and afterwards returned. The same rule was held in *Moon* vs. *Raphael*, 2 Bingh. N. C. 310. In *Baldwin* vs. *Porter*, 12 Conn. 473, which was trover for saw-logs the defendants had seized in execution, and sold as the property of Birdsey Baldwin, it was held, the fact that Baldwin had bid in the property at the sale for the plaintiffs, who were the true owners, was admissible in mitigation of damages, and the real damages were declared to be the sum paid at the sale. The same doctrine was asserted in *Curtis* vs. *Ward*, 20 Conn. 204, and in Massachusetts in *Pierce* vs. *Benjamin*, 14 Pick. 361, and *Greenfield Bank* vs. *Leavitt*, 17 Pick. 161. So, also, in New York, *Reynolds* vs. *Shuler*, 5 Cowen 323; and in *Ewing* vs. *Blount*, 20 Alabama 694, the principle was asserted in strong terms.

These were actions of trover, it is true; but there is no reason for a different rule in trespass. In both the general principle is that a plaintiff is entitled to such damages as he has actually sustained. In both the value of the property lost by the plaintiff is the general standard of measurement of damages, laying out of consideration what may be recovered in trespass for acts of outrage and oppression accompanying the taking. What will make the plaintiff whole is the same in one form of action as in the other. No distinction is recognised by the courts. In *Baker* vs. *Freeman*, 9 Wendell 36, it was decided that where the goods of a party had been sold under illegal process, and they had been bid off at the sale by an agent of the owner who purchased for the benefit of his principal and paid his bid with the money of the principal, the measure of damages in an action of trespass was the amount of the bid and interest, and not the value of the property sold. And in *Brace* vs. *Head*, 3 Dana (Ky.) Reports 491, which was an action of trespass *de bonis asportatis*, for goods illegally sold on execution, it was holden that if the proceeds of the sale went to the plaintiff's benefit, this would operate to mitigate the damages: See, also, *Clark* vs. *Halleck*, 16 Wendell 607.

Eby vs. *Schumacher*, 5 Casey 40, cannot be regarded as asserting a contrary doctrine. There the goods had been seized *in transitu* to the owner as the property of a third person. An action of trespass was brought, and it was then agreed between the owner and attaching creditor, that the property might be