

8845

No. _____

Supreme Court of Illinois

Nathaniel O. Stewart

vs.

Napoleon J. Bond

Supreme Court of Illinois.

First Grand Division.

NATHANIEL O. STEWART

vs.

NAPOLEON J. BOND.

} Appeal from Clinton.

Page 6
1 This was a bill in Chancery, filed by appellee against appellant, in the Clinton Circuit Court, on the 23d March, 1863. The bill alleges that on the 20th of February, A.D. 1863, Stuart was indebted to Bond in the sum of \$1123.60, secured to be paid by a certain promissory note of that date, payable to the order of said Bond in United States coin, due and payable twelve months after said date, for value received, with interest at the rate of ten per cent. per annum after its maturity. That to secure the payment of said promissory note, Stuart executed and delivered to said Bond a mortgage deed of the same date on certain lands lying in said county. That it was provided in said mortgage that if Stuart should pay or cause to be paid to said Bond "the aforesaid sum of money," with such interest thereon, at the time and in the manner specified in said promissory note, then said mortgage to be void; but in case of default, then said Bond, after having advertised such sale thirty days in a newspaper published in Clinton county, Illinois, or by posting up written or printed notices in four places in said county, might sell said premises, or any part thereof, and all right and equity of redemption of Stuart therein, at public vendue, to the highest bidder, "for cash," at the front door of the Court House in Carlyle, in said county, at the time appointed in such advertisement, or might adjourn the sale from time to time at discretion; and upon making such sale or sales, execute and deliver deeds for the conveyance in fee of the premises sold, and apply the proceeds to the payment of expenses of selling, &c., including attorneys' fees, and the amount due on said note, and the overplus to Bond, at his office in Trenton, &c.: which mortgage is acknowledged and recorded. That after said note had become due—to wit, on the 23d of February, 1863—Stuart, by his agent, tendered
4 said Bond the amount due upon said promissory note—to wit, \$1123 60—in lawful money of the United States, being legal tender for the payment of said debt; and the said Bond then and there and ever since refused to receive the same; "and said Stewart ever since has been and is now ready and willing to pay said money to said Bond, and here offers to bring the same into Court to be disposed of as to your Honor may seem meet." The bill then alleges that Bond, combining and confederating to defraud Stewart of his legal right in the premises, and to extort from him United States coin, which can only be obtained at an enormous sacrifice, and to transfer the title of Stewart to said lands, and to prevent competition at the sale of the same, caused to be published, &c., a notice that on the 8th of April, 1863, he would sell said lands, &c., under said mortgage, and that "the purchaser or purchasers would be required to pay their bids in United States coin at the close of bidding, when a deed or deeds would be executed to them," &c. Bill charges that by virtue of the express condition of said mortgage the same is made void on the payment by Stewart of the "sum of money" due therein, &c., and in case of default said Bond is expressly required to sell said lands "for cash," and has no right or authority to demand United States coin in defiance of the laws of the United States and in violation
6 of the rights of Stewart. Bill prays that Bond may be enjoined from selling said lands until further order, that Stewart may be allowed to bring said money heretofore tendered into Court to be disposed of by the Court, and that Bond may be perpetually enjoined from selling said lands, &c., and for general relief.
23 On the 5th of August, 1863, Bond filed his demurrer to said bill, and on the same day the demurrer was argued and sustained by the Court, and said injunction dissolved, and said bill dismissed at the cost of Stewart. The errors assigned are in dissolving the injunction and in dismissing the bill.

B R I E F .

The fact that this note was payable in United States coin is wholly immaterial, for that was the legal effect of all promissory notes of that date under the then existing laws of legal tender. Story on Prom. N. Sec. 389; Edwards on Bills, 550.

Suppose Bond had sued on this note, the Court could only render a judgment for the amount due in dollars and cents, for the Court could not tell whether Stewart would pay the same in gold or other legal tender funds.

The deed of trust did not authorize Bond to sell the land for coin only, but for "cash." Cash means whatever passes as money, including bank bills. Bouvier's L. D. Title Cash; also Webster's Dic.

T E N D E R .

Under the statute of 1861, page 119, sec. 1, this note was entitled to days of grace. The bill alleges that the sum due was tendered. The amount due is under a videlicet, and was not traversable. 1 Chitty's P. 318. A party refusing a tender for one reason is not allowed afterwards to change his ground, as where bank notes are tendered, for the objection if made then could have been obviated. Gould vs. Banks et al, 8 Wend. R. 562; 9 Bacon's Abr. Title Tender, 317.

If a contract is to pay one hundred pounds in a foreign coin, a tender of that amount in any current coin of the Kingdom is good. Id. 317.

In courts of equity less strictness is required than in a court of law in matters of tender, as this Court has finally determined. 11 Ill. R. 277; 22 Id. 657; 27 Id. 63, 93.

CONSTITUTIONALITY OF LAW.

The question of whether a law be void for its repugnancy to the Constitution, says Chief Justice Marshall, is at all times a question of much delicacy, which ought seldom if ever to be decided in the affirmative in a doubtful case, &c. The opposition between the Constitution and law should be such that the judge feels a clear and strong conviction of their incompatibility with each other. *Fletcher vs. Peck*, 2 U. S. Cond. R. 315; 12 Peters R. 76; 1 Gil. R. 689.

While Mr. Jefferson maintained that each department of the Government has an equal right to determine its powers, the question is at last settled that the Supreme Court of the United States is the final and common arbiter provided by the Constitution itself, to whose decisions all others are subordinate. 1 Story on Con. Sec. 374, 375, &c., and notes to 396.

The Constitution of the United States gives Congress express power to borrow money on the credit of the United States—to declare war—raise and support armies—to provide and maintain a navy—and to make all laws which shall be necessary and proper to carry 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.

Every person who receives a legal tender note from the Government for money advanced to the Government, or a debt due him by the Government, is in effect a lender of so much money to the Government and is its creditor. The acceptance of Treasury Notes as cash by the people is equivalent to their loaning their own Government so much money for its necessary support. Such Treasury Notes have elements of substantial and intrinsic value, for the resources of the Nation are liable for their redemption. The creditors of the Government, and all men who receive this currency, are not prejudiced, for they can pay their debts with it, or use it as money in business operations. Making it a legal tender is therefore a benefit to the Government, its creditors, and all among whom it may circulate; and incidentally we have currency of uniform value all over the United States, equal to gold and silver for most purposes. By this means the Government is enabled promptly and efficiently to perform its duties to the people, and in no other manner could the power to borrow money be so advantageously exercised on behalf of the Government or the people, at a time when its utmost powers are demanded to resist the attempt by force of arms to establish a foreign, hostile and antagonistic Government over one half of our national domain. See 2 Story on Con. Sec. 1055.

Again, the power to raise and support armies and maintain a navy could not now be executed with effect without vast sums of money or its equivalent in the hands of the holders thereof at once. 2 Story on Con. Sec. 1178 to 1192.

Congress must possess a choice of means, and is empowered to use any means which are in fact conducive to the exercise of the power granted by the Constitution. *U. S. vs. Fisher*, 1 Cond. R. 421; *M'Culloh vs. The State of Maryland*, 4 Cond. R. 473 to 482; *Smith's Com.* 363, &c.; *Walker's Am. L.* 167 to 176; 1 Story on Con. Sec. 419, 425, 431, 432, 434.

The argument of the New York Court of Appeals, in the recent case of *Metropolitan Bank et al vs. Superintendent of the Bank Department, &c.*, on the constitutionality of this legal tender act, is overwhelming and unanswerable. And paralyzed be the brain that would weaken the arm of the Government putting forth all its legitimate powers of self-preservation in this crisis!

The National Government, by its legislative department, is not prohibited, like the States, from passing a law impairing the obligation of contracts, while exercising its delegated powers.

It may pass a Bankrupt Law, and thereby relieve creditors on surrendering their property from the further obligation of their prior contracts; but this cannot be done by a State. 4 Cond. R. 409; 6 Id. 523; 2 How. R. 212; 5 Id. 307.

It may pass an Embargo Law, prohibiting trade with foreign nations, and thus prevent our people from performing contracts previously made. 2 Story on Con. Sec. 1290, 1291, 1292.

It may pass a law giving the United States a prior payment over all other creditors of an insolvent person, and by that means postpone his other creditors. 1 Cond. R. 421; 1 Peter's R. 439 to 441.

As a means of performing its functions and borrowing money for that purpose, it may incorporate a National Bank, issuing bills to pass as money. 4 Cond. R. 485 to 491.

To make the securities of the Government the more available, they may be exempt from State taxation. 2 Peter's R. 449, 463 to 469, 453, note a.

The Government may adulterate the coin, or make copper a legal tender, and so affect past contracts. Story on Prom. N. Sec. 390 and notes.

The case of *State Treasurer vs. Collector of Sangamon Co.*, 28 Ill. R. 512, which stretches State Sovereignty to its outer verge short of nullification, does not even moot the point presented in this case. The Legislature of 1863, by an almost unanimous vote, sanctioned the constitutional right of Congress to pass this act, by providing that "all real estate *heretofore sold*," or hereafter to be sold, may be redeemed with Treasury Notes and Postage Currency. See Sec. 2 of said Act.

WM. H. UNDERWOOD,
Atty for Stewart.

In the Supreme Court, State of Illinois,
FIRST GRAND DIVISION, AT MT. VERNON.

NOVEMBER TERM, A. D. 1863.

N. O. STEWART,

vs.

N. J. BOND.

} Def't's Brief.

1. The legal tender law of Congress is unconstitutional.—U. S. Const. Art. 1, Sec. 8, pt. 5, Art. 1, Sec. 10, pt. 1, Art. 9 and 10, Amendments to U. S. Constitution.

I also refer to argument made by H. H. Hargh Esq in the Supreme Court of California on this subject & the authorities therein quoted.

2. The note in this suit is specially payable in U. S. Coin, and is a contract made prior to the passage of the legal tender Law, therefore to compel Bond to receive "Greenbacks" in this case would be to impair the validity of the contract, and also be retrospective in running back and controlling a contract made prior to the passage of the law.—See "Coin", Bonvier's L. Dic. Vol. 1, p 259, Webster's Dic. 222, McCulloh's Com. Dic. Vol. 1, p 382. Validity of contract U. S. Const. Art. 1, Sec 10 pt. 1, 28th Illinois Rep. 512. *Ex Post Facto.* U. S. Const. Art. 1, Sec 10, pt. 1.

3. The tender was not sufficient in amount, as shown by the Bill itself. The tender made was \$1123⁰⁰, when the amount, principal and interest, then actually due, was 1124⁰⁰.—14th U. S. Digest 549 Tender.

SPARKS & BOND, for Def't in Error.

23

N. J. Stewart

to

N. J. Bond

Depts Brief

NOVEMBER 12 1863

Filed Nov. 12. 1863
N. Johnston City

