

CHAPTER XIV

The Legal Tender Cases

WE COME TO ONE of the most controverted matters in the history of the Court. The controversy, however, must yield to the facts—when at length they have been laid out for candid examination.

On February 7, 1870, the Court held the Legal Tender Act of 1862 unconstitutional as applied to preexisting debts. The case was *Hepburn v. Griswold*.¹ Chief Justice Chase wrote the opinion, and Nelson, Clifford and Field, JJ., joined with him, Justice Miller wrote a dissenting opinion in which Swayne and Davis, JJ., concurred.

On the same day and at about the same hour, President Grant nominated William Strong of Pennsylvania and Joseph P. Bradley of New Jersey to be Justices. When they had been confirmed and had taken their seats, they joined with the three dissenters to grant Attorney General Hoar's motion for a further argument of the constitutional question, in cases still awaiting decision.

In the outcome, on May 1, 1871, in the *Legal Tender Cases*² the statute was sustained by a division of five to four.

Add to this that Chief Justice Chase, spokesman for those deeming the Act invalid, had when Secretary of the Treasury in 1862 advised Congress that reluctantly but decidedly he had come to "the conclusion that the legal tender clause is a necessity" and that he supported it "earnestly."³

¹ 8 Wall. 603.

² 12 Wall. 457.

³ Letter of Feb. 3, 1862, to Rep. Elbridge G. Spaulding, in charge of the bill. Spaulding, *History of the*

Legal Tender Paper Money Issued During the Great Rebellion, 2d ed. (Buffalo: Express Printing Co., 1875), 59.

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The Court's authority as expositor of the Constitution was seriously impaired by this unfortunate business. The present chapter will trace what happened and assess responsibility.

CIVIL WAR FINANCE

THE EMISSION OF a forced paper currency was the most questionable expedient of Chase's administration of the Treasury—as the creation of the national banking system was his most impressive accomplishment.

When Chase came to the Department in March 1861 he found that the treasury was empty, and that in the latter part of Buchanan's Administration the Government's credit had been shattered. Six percent bonds had fallen to 84; outgo exceeded income in the ratio of 4 to 1. To meet expenses until the new Congress met in special session on July 4, the Secretary managed with sixty-day loans.

In his first report to the Congress, the Secretary estimated that expenditures for the fiscal year ending on June 30, 1862, would be 320 millions. (As it turned out, the figure was 475.) He recommended that this be met by 80 millions from internal taxes and new customs duties, and 240 millions from loans. Congress responded with authority to borrow 250 millions: by 7 percent twenty-year bonds to be sold not below par, or by 7.3 percent three-year notes, or by demand notes (not to exceed 50 millions) issued as money and bearing no interest. To produce revenue it took these measures: a direct tax of 20 millions; an income tax, to be levied in April 1862; and higher duties on coffee, tea, sugar, and the like, expected to yield 22.5 millions. These measures were slow and inadequate. Of the direct tax, of course only that portion that fell on the loyal States could be realized—12 millions, minus the cost of collection.⁴ The levy of a flat 3 percent on the excess of incomes over \$800 would not take hold until almost the end of the fiscal year. The actual intake from customs and internal revenue proved far below expectations—only 52, not 80 millions.

“The striking feature of the plan of finance thus recommended at the commencement of the war by the secretary of the treasury, and adopted by Congress, was the reliance upon borrowing to meet all extraordinary military and naval expenditures.” So wrote Wesley Clair

⁴ Apprehension among the Founders led to the constitutional requirement that no direct tax be laid unless in proportion to the census. Art. I, Sec. 9, cl. 4. It now resulted that the people of Missouri must con-

tribute almost as much as the people of Massachusetts, although they possessed only half as much property. Vermont, with far less wealth than Rhode Island, must yield almost twice as great a tax.

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Mitchell in his monumental *History of the Greenbacks*,⁵ adding, “Nothing shows more forcibly the inadequacy of this policy than the quickness with which the necessity for increased taxation made itself apparent.” “In the development of a tax system appropriate to the events and conditions of the war, Chase took no leadership”: so wrote Professor Davis R. Dewey in his standard *Financial History of the United States*.⁶ The Secretary, like most others, erred in counting on a short war. Accordingly he favored three-year notes over long-term bonds. James G. Blaine, explaining in retrospect the “inadequate” and “laggard” action taken at the special session, recalled that

There was a wide-spread opposition among the strongest advocates of the war, to all measures which would, at an early stage, render the contest pecuniarily oppressive, and hence make it unpopular. . . . As the struggle proceeded, it was demonstrated that those calculated most justly who relied most completely on the popular purpose to make every sacrifice to maintain the national integrity. This was however the period of depression after the first battle of Bull Run, of hesitation before casting every thing into the scale for patriotism.⁷

When, in the light of that reverse, Justice Grier wrote that it would be “a *long war*,” and added, “We must conquer this rebellion . . . if it should cost 100,000 men & 1000 millions of money,”⁸ he supposed he was expressing the highest measure of determination and sacrifice; yet by the tally of 1865 the cost in lives and treasure exceeded three times Grier’s brave figures.

“After the disastrous battle of Bull Run, and when Washington was closely beleaguered, and the avenue thence to New York through Baltimore was intercepted by the enemy, Mr. Chase, then Secretary of the Treasury, came to [New York] via Annapolis, and immediately invited all persons . . . who were supposed to possess or to control capital to meet him on the evening of August 9th, at the house of John J. Cisco, Esq., then Assistant Treasurer of the United States in New York.” So recalled George S. Coe, president of the American Exchange Bank, a leading figure in Civil War finance.⁹ In a letter of October 8, 1875, to Elbridge G. Spaulding, he was tracing in detail events, as he had seen them, leading to the resort to legal tender paper in 1862. The

⁵ (Chicago: University of Chicago Press, 1903), 18.

⁶ (New York: Longmans, Green, 1934), 300.

⁷ *Twenty Years of Congress*, 2 vols.

(Norwich, Conn.: Henry Bill Publishing Co., 1884, 1886), I, 403.

⁸ Letter of July 24, 1861, to Justice Clifford. Clifford Papers, Me. Hist. Soc.

⁹ On Coe (1817–96), see D.A.B.

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addressee, a banker at Buffalo, New York, had been a member of the 37th Congress and chairman of a subcommittee of Ways and Means charged with currency legislation; the name of “father of the greenbacks” had been fastened upon him. Spaulding published in 1869 a *History of the Legal Tender Paper Money*. In 1875 he was preparing a second edition, to which Coe’s letter became an appendix.¹⁰

The position of Cisco, Assistant Treasurer in charge of the New York Sub-Treasury, should be explained. The Act of August 6, 1846,¹¹ had established an “Independent Treasury” with a Sub-Treasury in designated cities. “Moneys received from whatever source for the use of the United States” went, under further legislation, into the Government’s vaults at the Treasury or a Sub-Treasury; the Government did not entrust its money to any bank. (However, by a Supplementary Act of August 5, 1861,¹² the Secretary was permitted “to deposit any of the moneys obtained on any of the loans now authorized by law . . . in such solvent specie-paying banks as he may select . . .”)

Chase’s call to the meeting on August 9 “drew together a large number” of financiers. Coe’s account continues:

During the discussion which ensued, I suggested the practicability of uniting the banks of the North by some organization that would combine them into an efficient and inseparable body, for the purpose of advancing the capital of the country upon government bonds in large amounts, and . . . to distribute them in smaller sums among the people This suggestion met the hearty approbation of the assembled company, and arrested the earnest attention of the Secretary. At his request it was presented to the consideration of the banks at a meeting called . . . on the following day

A plan prepared by a committee led to an undertaking by the banks of New York, Boston, and Philadelphia in concert¹³ to take 50 millions in three-year 7.3 percent notes, with a promise to take like amounts in October and December; they would resell to the public without charge. The associated banks, with a capital of 120 millions, in mid-August had over 63 millions in coin. Thus at the moment they were in a strong position. To make the plan effective and to preserve the specie standard, it was essential that coin paid out would quickly flow back to the banks.

¹⁰ App., pp. 89–96. On Spaulding (1809–97), see D.A.B.

¹¹ 9 Stat. 59.

¹² 12 Stat. 313.

¹³ “It was greatly desired to include also the banks of the West, but it was

found impracticable to secure the co-operation of the state banks of Ohio and Indiana, and the state banks of Missouri, the only other organization under a compacted system, were surrounded by combatants.”

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Accordingly it was at once proposed to the Secretary that he should suspend the operations of the Sub-Treasury Act in respect to these transactions, and following the course of commercial business, that he should draw checks upon some one Bank in each city representing the Association, in small sums as required, in disbursing the money thus advanced. By this means his checks would serve the purpose of a circulating medium, continually redeemed, and the exchanges of capital and industry would be best promoted. This was the more important in a period of public agitation when the disbursement of these large sums exclusively in coin, rendered the reserves of the Banks all the more liable to be wasted by hoarding. To the astonishment of the committee, Mr. Chase refused. Notwithstanding the act of Congress of August 5th,¹⁴ which it seemed to us was passed for the very object then presented, . . . he declared upon his authority as finance minister, and from his personal knowledge of its purpose, had no such meaning or intent. This issue was discussed from time to time with much zeal, but always with the same result. . . . In the light which has since been shed upon the act of Congress referred to, it is evident that undue weight was given to the views of the Secretary, and that the Banks would have conferred an incalculable benefit upon the country, had they adhered inflexibly to their opinions. But the pressure of startling events required prompt decision, and the well known intelligence and patriotism of the Secretary, gave his judgment overwhelming power. . . .

In consequence, the banks' coin reserves were dissipated. "This first great error . . . certainly precipitated the adoption of that most unhappy expedient"—legal tender notes.

A further adverse effect upon the coin reserves resulted from the Secretary's decision to act under the grant of authority to issue up to 50 millions in demand notes bearing no interest. They were issued in small denominations—\$5, \$10, and \$20—and were used, for example, to pay the troops. By November 30 Chase had put out 24 millions. The banks, as Coe recalled, "could not decline them without diminishing public confidence in the Government credit [nor could they] give them currency without impairing their own specie strength. . . . As soon as these notes thus appeared the reflux of coin to the banks at once sensibly diminished. . . ."

The Trent Affair—growing out of the seizure of Mason and Slidell, Confederate envoys, from the British steamer of that name—threatened in December to lead to hostile action by the British Government. The resulting strain, before the seizure was disavowed, impaired the government's credit.

¹⁴ *Supra*, p. 680.

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Another shock came with the publication of the Secretary's report to the incoming session of Congress. Revised estimates put revenue 25 millions below what had been expected, expenditures 214 millions higher. He asked for further taxes to produce 50 millions, and submitted with deference to Congress the question how further borrowing was to be effected. He drew attention to the weakness of the system whereby the country depended for currency upon the notes emitted by a multitude of State-chartered local banks of unknown solvency. He urged instead a system of national banks which would make large purchases of United States bonds, using them in turn as security for the issue of national bank notes. This would give the Treasury a market for its bonds, and give the country a uniform and secure currency. The plan was sound, but obviously would meet stiff opposition from the State banks. (Presently Congress did adopt it, by a statute of February 25, 1863; then by a statute of March 3, 1865, it suppressed the issue of State bank notes by striking them with a 10 percent tax.¹⁵) What was needed in December 1861, however, was a program immediately effective, adequate for financing a great war, and such as would satisfy the people that the government was firmly set on a sound course. In that respect the Secretary's report was a failure, and actually had an adverse effect.

"Taxation, heavy and universal, is felt to be the only solution of our present difficulties . . ." So wrote Charles F. Dunbar, the able commentator on economic topics, in the *Boston Advertiser* of January 11, 1862.¹⁶ "He recommends himself most to the public who grapples with questions like this boldly and confidently, and who dares to say to the people that the time has come when they must consent to feel the pressure of the war . . ." On February 4 the *Advertiser* commented that "the country presents the spectacle of a people praying to be taxed."¹⁷ Appleton's *Annual Cyclopaedia* for 1861 recorded the following as the reaction to Chase's statement to Congress:¹⁸

It was supposed that the annual report of the Secretary would present some practical and well-digested plan of finance that would restore confidence. When the document appeared, however, public expectation was disappointed at a moment when the greatest anxiety prevailed in respect to the relations with England, growing out of the capture

¹⁵ *Veazie Bank v. Fenno*, 8 Wall. 533 (1869). *Infra*, p. 711.

¹⁶ Dunbar (1830–1900), trained in the law, was then associate editor and part owner of the *Advertiser*. In 1869, when President Eliot came to Harvard, Dunbar was made professor of political economy, in which post he served for thirty years.

¹⁷ Mitchell, *History of the Greenbacks*, 18–19, and Don C. Barrett, *The Greenbacks and Resumption of Specie Payments, 1862–1879*, (Cambridge, Mass.: Harvard University Press, 1931), 36–39, cite a range of contemporary comment to that effect.

¹⁸ At p. 66, in its article on Banks.

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of the Trent. The Secretary had no plan, a foreign war threatened, and the banks were loaded with securities they could not sell. . . .

By December the participating banks had resold scarcely more than a third of the notes they had purchased. Their specie during that month fell from 42 millions to less than 24 millions. On December 30 the New York banks suspended specie payments; banks throughout the country followed.

It is no reproach to Chase to say that he was not a master of finance. In ordinary times it had required no special competence to be head of the Treasury in a country where customs duties and receipts from the sale of public lands produced a surplus, so that the people paid no visible taxes to the national government. Chase had been brought into Lincoln's Cabinet because of his position in the Republican party. His patriotism and intelligence commanded respect; as Hugh McCulloch recalled, "he had few equals in analyzing difficult questions."¹⁹ But his efforts were diffused. He was concerned with the general direction of the war. With a high sense of his own ability and a rather poor opinion of those about him, he extended himself to compensate for their shortcomings. Meanwhile the Administration's financial operations went badly, as its early military operations went badly, because those in charge were unequal to their task.

The House Committee on Ways and Means referred the Secretary's recommendation for a national currency to Spaulding's subcommittee. The Treasury had not drafted a bill to effect its proposal; Chase asked Spaulding to prepare one. This was done: the bill was framed by late December. The chairman saw that so important and detailed a measure could be passed, at best, only after months of debate. Then to organize national banks, and to bring their notes into use, would take more time. Spaulding concluded that provision must be made for the immediate needs of the Government, while the national bank plan went forward. (The Government was then spending nearly one and a quarter millions a day.) On December 30—the day the New York banks suspended specie payments—he introduced a bill to authorize the issue of another 50 millions of treasury notes. These, however, were to be a legal tender in payment of all debts, public and private. It was a stopgap measure.

The lack of integrated governmental effort at this critical juncture is illustrated by the following circumstance. Attorney General Bates gave an informal opinion that the bill was constitutional, on the evening of January 6, 1862, in response to a request Spaulding had made "this afternoon." "I have given the subject such attention as the very brief

¹⁹ *Men and Measures of Half a*

Century, (New York: Charles Scribner's Sons, 1888), 181.

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interval afforded” He gave his opinion “as a private man, and a professed constitutional legist”; in official counselling he was confined to requests within the Executive Branch of the Government. Certainly Chase should have prepared legislation adequate to his Department’s needs, and should himself have obtained all the assistance the Attorney General had to offer. As it was, a Treasury measure, momentous in its economic consequences and dubious as to constitutionality, was launched with an unofficial opinion written “with all brevity and without argument, for the time does not allow elaborate consideration.”²⁰ A striking contrast is to be marked between this skimpy attention when the currency was about to be put upon a paper basis, and the arduous disputation over the question, between 1868 and 1871, within the Court over which Chase had come to preside. A contrast is also to be drawn between the aloofness with which Chase as Secretary left it to Congress to bear the responsibility for meeting the crisis in the field of public finance, and the intrusion of Chase when Chief Justice into Executive and Congressional handling of Reconstruction—even going as far as to draft a Supplementary Reconstruction Bill.²¹

THE FIRST LEGAL TENDER ACT

BY ITS FIRST Coinage Act in 1792²² Congress established a mint and provided that the gold and silver coins therein authorized—these and these alone—would be “a lawful tender in all payments whatsoever.” That bimetallic standard had remained, although in 1834 Congress debased the gold dollar by about 6 percent, and after the discovery of gold in California depreciated the silver coins. The proposal now for the first time to give the Government’s paper notes the quality of a tender which in law would discharge a debt ran counter to deep convictions. The Ways and Means Committee stood evenly divided; then one member withdrew his opposition in order that a bill might go to the House. H.R. 240, introduced on January 22, called for the issue of 100 millions, in addition to the 50 millions of notes authorized in July 1861.

Debate lasted a month. Was it within the concluding clause of the Constitution’s grant of legislative power—“To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers”—such as to raise and support armies, to provide and maintain a navy, to borrow money on the credit of the United States, and to regulate commerce? As a matter of policy, was there no better way to

²⁰ Bates to Spaulding, Cong. Globe, 37–2, 525; Spaulding’s *History of the Legal Tender Paper*, 15.

²¹ *Supra*, pp. 324–27.

²² 1 Stat. 246.

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meet the Government's pressing needs? Admittedly gold could be obtained for bonds if they were sold for what they would bring; but that went against the dogma that the United States ought never to sell its bonds below par. The laying of vigorous taxes would in time produce money and would immediately show the Government's determination and thus would strengthen its credit. Congress adopted a resolution declaring its purpose to impose taxes to yield a total of not less than 150 millions a year;²³ but it was not until July 1 that a tax bill became law. The minority in the Ways and Means Committee urged a substitute: issue 100 millions in 3.65 percent notes to be paid in two years, receivable for internal taxes and debts to the United States, and fundable in 7.3 percent bonds on which the interest would be in coin and which would be redeemed at the pleasure of the Government after ten years. In denominations not less than \$5, they would circulate as money. In the outcome, this alternative was rejected.²⁴ There was much uncertainty about the relative efficacy of notes with and notes without the quality of legal tender.

Chase was opposed in principle to legal tender paper: but so was everyone else. The question was, what to do to meet the exigency of January and February 1862. The Secretary had remitted the problem to Congress, and Spaulding's bill was the result. It gathered support because a majority came to believe that it could not be avoided. Chase, touching up the bill, returned it on January 22, "regretting exceedingly" that it was found necessary, "but heartily desiring to co-operate with the Committee . . ."²⁵

On the twenty-ninth he committed himself more unreservedly, in a letter to Thad Stevens, chairman of the Ways and Means Committee:

The provision making United States notes a legal tender has doubtless been well considered by the committee, and their conclusion needs no support from any observation of mine. I think it my duty, however, to say, that in respect of this provision my reflections have conducted me to the same conclusions they have reached. It is not unknown to them that I have felt, nor do I wish to conceal that I now feel, a great aversion to making anything but coin a legal tender in payment of debts. . . .

It had, however, become "indispensably necessary" that there be a further issue of United States notes and unavoidable that they be given the quality of legal tender.²⁶

²³ Passed, 133 to 6, in the House on Jan. 15; in the Senate, 30 to 1, on Jan. 17.

²⁴ The House voted 95 nays to 55

yeas—and then passed the legal tender bill by 93 to 59.

²⁵ Spaulding, *History of the Legal Tender Paper*, 27.

²⁶ Cong. Globe, 37–2, 618.

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Then on February 3 he wrote urgently to Spaulding:

Mr. Seward said to me on yesterday that you observed to him, that my hesitation in coming up to the legal tender proposition embarrassed you, and I am very sorry to observe it, for my anxious wish is to support you in all respects.

It is true that I came with reluctance to the conclusion that the legal tender clause is a necessity, but I came to it decidedly, and I support it earnestly. I do not hesitate when I have made up my mind, however much regret I may feel over the necessity of the conclusion to which I have come. . . .

Immediate action is of great importance. The Treasury is nearly empty. I have been obliged to draw the last installment of the November loan; so soon as it is paid, I fear the banks generally will refuse to receive the United States notes. You will see the necessity of urging the bill through without more delay.²⁷

It had been the Secretary's responsibility all along to point to a better way if he knew one. Now he not only asked—he was importunate: "The Treasury is nearly empty."

On February 6 the House passed the bill,²⁸ amended to make the issue 150 millions and to retire the 50 millions of notes authorized in July 1861. Of the 59 who voted against the bill, a score were Republicans—among them Roscoe Conkling and his brother Frederick, a New York banker; Owen Lovejoy of Illinois, whose zeal was tempered with wisdom; and Justin S. Morrill of Vermont, a specialist in finance, who said that the measure was "not blessed by one sound precedent." George H. Pendleton, anti-war Democrat, argued that the bill had "no solid foundation in the Constitution": by 1867 he had become the great Greenbacker, and in 1868 his view was imposed on the Democratic National Convention. Of the majority of 93, only half a dozen were Democrats.

On February 12 the Senate passed the bill by vote of 30 (of whom 5 were Democrats) to 7 (of whom 3 were Republicans).²⁹

Differences were resolved in conference, and on February 25, 1862, the bill became law.

In a letter of February 4, 1862, Chase had explained his position to William Cullen Bryant:

Your feelings of repugnance to the legal tender clause can hardly be greater than my own; but I am convinced that, as a temporary measure, it is indispensably necessary. From various motives—some

²⁷ Spaulding, *History of the Legal Tender Paper*, 59-60.

²⁸ Cong. Globe, 37-2, 695.

²⁹ *Ibid.*, 37-2, 804.