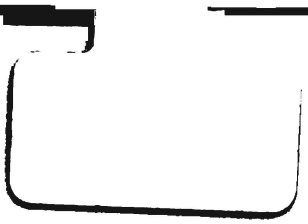
A treatise on proceedings in rem

Rufus Waples



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TREATISE

ON

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BY

RUFUS WAPLES.

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CHAPTER XXVII.

FORFEITURE FOR NON-PAYMENT OF TAXES.

§ 232. **The Right to Collect Taxes is not jus in re but ad rem.** Several of the States have enacted laws authorizing the forfeiture of property for failure to pay taxes; and it is the practice, under such statutes, to divest the titles of real estate owners of their lands when delinquent as to their tax assessments. Under cover of such statutes, executive and mere ministerial officers, without any judicial action whatever, take possession of lands under those circumstances, and hold them for the State or sell them as forfeited forever, unless redeemed by the delinquents.

What is the right of a government, with regard to property liable for taxes?

The right is not *jus in re.* It is only *jus ad rem.* It is a right *in* the property to the amount of an ascertained sum of money. It is not a right *to* the property; not title to, and ownership of, the property. It is a charge upon the property without reference to the matter of ownership.[1] Every State in the Union holds that tax is a lien upon the property taxed; that it is a *jus ad rem* and nothing more.[2]

[1] Dunlap *v.* Gallatin Co., 15 Ill. 7; Dennis *v.* Maynard, Ib. 477.

[2] As all the courts, State and Federal, are uniform in this, it would be

What is the *status* of property delinquent for not having paid the assessment upon it?

It is not a thing guilty. It is not a thing hostile. It is a thing indebted. By legal fiction, it owes the tax, but it is not an offending thing: no offense has been committed *in*, *with* or *by* it. It has not been made the instrument of the contravention of a law having forfeiture for the sanction, but it is, precisely like all other property upon the assessment roll, subjected to a certain sum as a contribution for the support of the government, and it simply becomes *indebted* by reason of the imposition of the tax; and delinquently indebted, when it does not pay its debt within the required time.

What must be the character of an action *in rem* to vindicate a tax lien, if courts were resorted to for the purpose?

It must be a civil proceeding, to enforce a *jus ad rem* against an indebted thing, to have it condemned to pay the debt and satisfy the lien: not to have it condemned *in toto* as in the case where a *jus in re* is vindicated against a guilty or hostile thing to have it condemned absolutely and in entirety as forfeited or confiscated.

What greater effect can government produce by the avoidance of the courts?

None greater, if, indeed it thus constitutionally produces any legal effect at all upon the *status* of the property.

1. An indebted thing cannot be condemned beyond its indebtedness.

2. Failure to pay does not convert a thing indebted to a thing guilty.

3. Forfeiture, under the tax laws, is necessarily predicated upon the false assumption that failure to pay is an offense.

4. The tax statutes have not created such an offense, if, indeed, such an offense could be created by statute.

5. Courts therefore cannot condemn a *res* for non-payment of taxes; and, for the same reason that the court cannot, *in personam*, decree forfeiture as a penalty.

6. Nor can there be forfeiture without judicial action.

a work of supererogation to cite all authorities holding that the tax creditors' right is *ad rem*. There is not one decision which holds it to be *in re*.

§ 233. **Property can only be Condemned to Pay what it Owes.** In support of the first proposition, it may be confidently said that there is no imputed, primary responsibility of the thing beyond the debt. The removal of that incumbrance, leaves it free from any liability, whether the removal be voluntary or forced. Beyond that, the libellant cannot go without intrenching upon the right *in re* of the owner.

The debt may be large, approaching the saleable value of the property; it may be small, not exceeding one *per centum* of such value. The principle is the same, in either case. We will illustrate by the latter, since the wrong of forfeiting property for a debt is more apparent in such case.

Property assessed at a thousand dollars could, in such case, be forfeited for the non-payment of a debt of ten. Nine hundred and ninety dollars are taken from its owner without right; without cause of action. How clearly would the wrong appear, were a private citizen thus to take land without giving a *quid pro quo?* If government does so there is this difference: what would be fraud in the citizen is tyranny in the government.

It is well settled that a thing, for debt, cannot be condemned beyond its indebtedness, when the libellant is a private person, as will be fully seen in our fourth book, in which indebted things are treated. It will also be seen, that in all cases discussed or cited in which the government proceeds upon a lien, condemnation is limited to the satisfaction of the lien. The postulate, however, goes further than this, and asserts that it cannot be that condemnation go beyond. Happily, we are saved from argument to sustain such broad ground, since the constitution establishes the proposition. The fourth and fifth amendments inhibit unreasonable seizures, inhibit warrants without cause of action against the particularly described thing to be seized, and forbid the deprival of any person of property without due process of law, and the taking of private property for public use without just compensation. These inhibitions are undoubtedly applicable, if the property be considered as an indebted thing, with the *jus in re* vested in a person behind it; for, if so considered, the seizure of it for condemnation as a whole as forfeited, when the lien covers but a part, is unreasonable as to

the major portion; the warrant for the purpose of forfeiture would be without cause of action even of a probable character, and the forfeiture itself would be deprival of the owner of his property without due process, as well as it would be the taking of his property without any compensation whatever beyond having his one *per centum* tax debt satisfied. And, where the courts are avoided, the articles distributing the powers of the government among the three departments would be disregarded by the executive forfeiture for taxes.

§ 234. **Failure to Pay Does Not Convert a Thing Indebted to a Thing Guilty.** Does failure to pay taxes operate upon the property taxed so as to change its *status* to that of a forfeited, guilty thing? An offending thing is already forfeited: the decree of the court against it is a mere pronouncement of the *status*. Does non-payment *ipso facto* make a debtor-thing an offending one, already forfeit? If it is not at the particular moment when property becomes delinquent, (by the imputation of its owner's delinquency,) that it changes its status, ceasing to be merely indebted and becoming guilty, ceasing to be the property of any private owner and becoming vested in the government by forfeiture, when is the moment of transition? It must be *eo instanti* or not at all.

At such an instant, it must be that the owner's title is divested, if the new title from forfeiture is then vested in the State. That owner's rights are as sacred, when his property is proceeded against *in rem* as when there is a suit against him in person with the view of taking his title. He knows that there is a tax lien against his property, but he knows, too, that it is limited to one *per centum* of the property's value. Now, if his failure to pay is an act of forfeiting, on his part, the indebted thing must thus have been converted into a guilty thing, which would be impossible in the absence of statute provision to that effect, if such provision could, indeed, be made.

Retroaction, under the law of relation, must have some distinct time to reach back to, when the forfeiting occurred; when the divesting of one owner and the investing of another, took place. It may be said that such time was not necessarily fixed to be when the tax became due and was not paid, since statutes

usually give grace. That is true, but it does not alter the case; for, when the days of grace expire, then the forfeiting occurs, if at all. It may be said that the statutes usually require some act of the tax collector, or transfer in some title office, or conveyance office. True, there may be preliminaries. As, under some revenue laws, the government must elect between libelling for forfeiture or some other remedy, as has been shown, so, under the tax laws, there may be discretion allowed the lienholder: yet must there be a distinct time when a taxed thing changes from an indebted to an offending and forfeited thing—a moment not fixed by the seizure unless the statute should so expressly declare, and certainly not by the judicial condemnation, since a *jus in re* to justify the proceedings must previously have existed, and could not possibly exist so long as the libellant held only a right *ad rem.*

In Ohio, the moment of transition seems to be that when the property, offered for sale as an indebted thing, fails to get a bidder.[1]

How can an offense be committed by use of the property, so as to render it forfeited to the State, because of the failure of the public to bid?

If it be thought hypercritical to insist upon this necessary change of *status*, one might answer the objector by saying that it is better to err on the side of precision, than on that other side where great looseness is the fashion. Those who are impatient of legal restraints when tax questions are discussed, especially when collection from delinquents is the question, seem to think that government, in its necessity of being supported, may resort to the most illegal inventions of means. Some of their extraordinary positions will be noticed later in this chapter.

The tax collector should be held to the law—nothing more. Neither he, nor the State behind him, can effect the forfeiture of a thing in debt for taxes, nor legally declare the forfeiture to have been made by the owner, unless there has been a trans-

[1] Stambaugh v. Carlin, 35 Ohio St. 209; Magruder v. Esmay, Id. 221; Rhodes v. Gunn, Id. 387.

ition from *indebted* to *guilty*, on the part of that thing; and unless there has been a time when such transition was effectuated. And as there can be found no such epoch, there is no transition. The property remains a thing indebted, liable to have the debt collected of it even if it should take the whole to pay; but it is not an offending thing to be condemned as forfeited irrespective of the amount of the debt.

§ 235. **Delinquency Not an Offense.** Is delinquency an offense?

Not *per se*. There may be moral turpitude in failure to pay what one owes, but there is no legal turpitude.

May delinquency be made an offense, *malum prohibitum?*

Not unless there is some element of fraud in such delinquency. Non-payments, under the laws of the United States prescribing and regulating the collection of duties, etc., are, under certain circumstances, made offenses by statute, so as to render goods forfeit upon which such unpaid duties are due; but it is where duties are evaded or withheld in fraud of the government. Goods are easily spirited away, and the fraud conveniently consummated, unless there can be speedy seizure of them as offending things.

If failure to pay a tax could, in any case, be treated as a fraud upon the State, it would be where personal property is delinquent, since it is susceptible of removal; but when we come to real property, no such reason for the presumption of fraud exists; yet it is that class of property which is sought to be treated as an offending thing for delinquency.

Delinquency cannot be made an offense, *malum prohibitum*, so far as land is concerned. It is immovable property, as the civil law styles it. It can easily be proceeded against as an indebted thing, and, therefore, there is no reason, to be drawn from the necessity of the case, for making it by statute, a guilty thing.

Besides, the elèment of fraud is wanting. It is impossible that the owner can so dispose of the land as to get rid of the tax. The lien follows it everywhere. The proper enforcement of constitutional laws cannot fail to secure the satisfaction of the lien. The legislator cannot create an offense in such case,

where there is no legal turpitude, no necessity in the nature of the case, and no element of fraud, and no possibility of evasion.

It is no answer to say that many taxes remain upon assessment rolls uncollected; for the fault in such case is always either in the statute or in the bad execution of it. The power of the government is sufficient to collect its dues for taxes which always should be a mere *minimum* of the value of the land taxed.

Since forfeiture for the non-payment of taxes is predicated upon *the offense of delinquency;* and since the predicate is a false assumption it follows that there can be no forfeiture of property for failure to pay taxes, especially, in the absence of any statute creating such an offense.

§ 236. **No Statute Creating Such an Offense.** No such offense is created by any statute; at least, not in terms. No such offense, subjecting the owner of property to accusation of crime or misdemeanor, has been enacted, certainly; but that would not be necessary. A thing may be rendered guilty by an act of its owner done by its instrumentality, though the owner be not rendered an indictable offender. The revenue laws are full of illustrations of this, as we have seen. But no statute has been enacted rendering property an offending thing by reason of its owner's failure to pay his taxes upon it—which is more to our purpose.

True, there are statutes providing that in case of non-payment, under certain circumstances, land shall be forfeited; and doubtless there are creations of offenses by the revenue and navigation laws in terms not more comprehensive. But there is this marked difference: the revenue and navigation laws, as a system, deal in forfeitures and always couple the element of fraud or design to defraud, expressly or impliedly, with the non-payment, and submit the adjudication of offending things to the courts; while, on the other hand, tax laws do not, as a system, embrace forfeiture as a subject, never connect non-payment with fraud, and, though they not unfrequently require judicial action against taxpayers personally, the statutes which provide for forfeiture always steer clear of the courts. It is as evident, on the one hand. that when the former laws provide, in

the general terms we have mentioned, for forfeiture in case of non-payment, that they mean to make the property, for which the payment should have been made, an *offending thing*, as it is, on the other, that when the latter laws provide for forfeiture in like terms, they do not mean to create an offense chargeable against property as an offending thing. The intent of the legislator in the former case is manifestly very different from his intent in the latter. His idea, with regard to forfeiture of the property of delinquent tax debtors, is based upon the vague theory that government has some right to property under the doctrine of eminent domain. He proceeds as though all property-rights in real estate were traceable primarily to the government. He confounds the police power of our government with the power of eminent domain. If such, or like considerations do not control him, when providing for the forfeiture of non-offending lands, why not trust the courts?

A fair interpretation of the statutes providing for such forfeiture, by the received rules of construction; and a fair inquiry into the intention of the legislator, where there is ambiguity requiring such inquiry, lead to the conclusion that those statutes have not created the *offense* of delinquency.

§ 237. **There Can Be No Forfeiture.** Courts, therefore, cannot condemn lands as forfeited for the non-payment of taxes, even did the statutes refer indebted property to the courts for such purpose, since, in the absence of the creation of an offense, there is no right to the property vested in the goyernment by reason of the delinquency of the debtor-owner. No one would contend, for a moment, that an action *in personam* would lie against the delinquent to have his land forfeited in penalty for not paying a tax amounting to a hundredth part of the land's value, in the absence of express statute authorization; and the *jus in re* of the owner is just as sacred when attacked by another form of action. It need not be discussed whether courts could recognize as constitutional, any statute that should presume to go so far. With no statute at all creating forfeiture for an offense, the courts can no more pronounce condemnation *in rem* than they could, with like lack of authorization, adjudge forfeiture against a debtor in a suit *in personam*.

Were the forfeiture for an offense committed through the instrumentality of the land, there would be no limit to the amount of real estate thus forfeitable as an offending thing; since, if a large tract should all be thus used in offending, all would be forfeitable; but it has been held that a large tract cannot be forfeited when less would be sufficient to satisfy the tax.[1] This clearly shows that the proceeding is really upon a lien for a tax debt, and not upon a *jus in re* for forfeiture for an offense. The tax is a lien at law.[2]

§ 238. **Absence of Judicial Action.** Can there be any such forfeiture then? Can there be any, without judicial action? Evidently the authors of certain statutes have meant that there should be. Their intention is easily gathered; but, whatever it may be, their enactments are plain upon the face, and need no inquiry into the intent. They seek virtually to forfeit by bill. They seek at least to reach the results of judicial action without resort to judicial action. The statutes do not name persons and pronounce their lands forfeited, but might as well do so.

Take any case, in which land has been forfeited for taxes. Between the date of the State's acquisition of its right to the tax-money, and the date of the forfeiture of the land for non-payment; between the date when the citizen owned the land and that upon which the State finds itself the owner, something must have intervened. That something must have been judicial action. There could have been no avoidance of it. Who exercised such action? It ought to have been a court, but it was not. It was the tax collector, who returned the land as forfeited; or the State auditor, who received the return and acted upon it; or the recorder of deeds or conveyances, who erased one title and substituted another; or it must have been somebody else, who was not a judge: such person or persons as the statute of any particular State required to do the work.

Whence did such a person acquire jurisdiction—the power

[1] French *v.* Edwards, 5 Sawyer, 266; Whitman *v.* Learned, 70 Me. 276.

[2] People *v.* Biggins, 96 Ill. 481; Union Trust Co. *v.* Weber, 96 Ill. 346. See the case of People *v.* Smith, 94 Ill. 226.

to hear and determine? It is hardly advisable to pursue this line of thought any further. The necessary judicial action could not have been constitutionally performed by non-judicial persons.

This subject has been here discussed under the application of the principles which govern proceedings *in rem;* for, though the statutes authorizing forfeiture of land for taxes do not provide for judicial proceedings directly against the property itself, they do provide for executive action directly against the property itself: and the argument proving that there can be no judicial proceedings *in rem* to declare property forfeited, in the absence of *jus in re*, is applicable to executive proceedings *in rem* where that right is wanting, even if judicial functions were not inhibited the executive department of government. In a word, if courts cannot be constitutionally empowered to pronounce the forfeiture of land, by action against itself, for its non-payment of taxes, tax-collectors cannot be so empowered, for the same reason; and also, for the further reason, that they are not judges.

It is a mere corollary that with regard to the action *in personam*, the same constitutional inhibitions exist. By neither form of action can government take land without the right to take it; and certainly the avoidance of any judicial action at all does not better the State's position.

§ 239. **Conflict of Decisions.** It will be objected that the tax collector's seizure is to coerce the payment of taxes; that the sale is subject to redemption; that the forfeiture is not necessarily final; and that rigorous measures are justified by the necessity of the support of government.

These, and other objections will be noticed in connection with judicial expositions of tax laws authorizing forfeiture. It is not proposed to mention and discuss the many decisions, in the different States, upon this subject, but to draw fair samples embracing all the arguments used in support of such statutes. Many of the decisions are confined to the exposition of acts without reference to the right of the legislature to enact them; and it will not be necessary to follow the niceties of construction in such cases, where the constitutionality is assumed.

Both sides of the question have been stoutly championed; and the result has been that some of the States maintain the forfeiture while others do not: Maine and Virginia being illustrative of the former;[1] and Kentucky, Minnesota and Mississippi, of the latter.[2] Virginia, however, was formerly against the constitutionality of such forfeiture.[3]

The case of *Griffin* v. *Mixon*, with the dissenting opinion of Mr. Justice HANDY therein, presents both sides of the question as fully, perhaps, as do the other cited cases *pro* and *con.;* so some space will here be devoted to that. The court hold forfeiture of land for taxes unconstitutional, but with no arguments additional to what we have herein substantially advanced, and without express mention of the want of the *jus in re:* it is, therefore, to the dissenting opinion that we turn to find stated the objections to the position herein-above taken.

Not quoting Judge HANDY's language, let us merely take up the general objections ably stated by him and frequently urged by others; not confining ourselves to his argument, but trying to answer the usual arguments in favor of the forfeiture, and thus meet his.

§ 240. **Distraint.** The law of distraint is urged, with the addition that if a State may distrain without previous judgment, and sell the assessed property to make the tax, there is little difference between thus selling it and forfeiting it subject to redemption, since little is ever bidden beyond the amount of the tax claim. The answer is, Whatever the practical result of vindicating a *jus ad rem* by sale, the difference in principle between that and forfeiture is as wide as possible. The difference would be so apparent as to immediately shock the judicial

[1] Hodgden *v.* Wight, 36 Me. 326; Adams *v.* Larrabee, 46 Me. 516, 519; Statts *v.* Board, 10 Grattan, 400: Allen, J.; Wild's Lessee *v.* Serpell, Id. 405: Lee, J.; Hale *v.* Branscum, Id. 418: Allen, J.; Flannagan *v.* Grimmet, Id. 421: Allen, J.; Usher's Heirs *v.* Pride, 15 Id. 190: Allen, J.; Bennet *v.* Hunter, 18 Id. 100.

[2] Barbour *v.* Nelson, 1 Litt. 60; Robinson *v.* Huff, 3 Id. 38; Currie *v.* Fowler, 5 J. J. Marsh. 145; Harlan's Heirs *v.* Seaton's Heirs, 18 B. Monroe, 312; The Anthony Falls Co. *v.* Greely, 11 Minn. 321; Baker *v.* Kelly, Id. 480; Hill *v.* Lund, 13 Id. 451; Griffin *v.* Mixon, 38 Miss. 424.

[3] Kinney *v.* Beverley, 2 H. and M. 318.

sense, were a private creditor to take the whole of a thing to satisfy a claim amounting to a small percentage of its value.

Distraint by the State, for the purpose of collecting a given sum due for the support of government, bears no analogy perceptible to forfeiture of the whole for non-payment of that sum. Distraint, even for the collection of the given sum, is of questionable constitutionality, when we consider that the State's lien for taxes is a lien without possession. The courts exemplify the State's distraining for taxes by the landlords for rent. But the landlord's lien is accompanied with a sort of possession of the property upon which the lien lies. At least, such property is in a house or on premises owned by him, and he may prevent their removal while his lien remains unsatisfied. So of many lien holders under the common law, tailors, who may retain the coats they have made till payment, etc. But the State has no sort of possession of land on which its tax lien lies. Its lien is sufficient to justify judicial seizure, but is it not at least questionable whether the ancient law of distraint will cover the case of a State's executive seizure, even in vindication of its *jus ad rem*?

Distraint by the landlord does not cut off the tenant from his legal rights; it merely shifts the *onus* of prosecution and proof. Replevin is a remedy available by the latter. Action for damage is his right, if injured. But the State cannot be sued. Though the tax-payer may have a receipt, and may desire to recover the money which has been collected by coercion and distraint after lawful payment had been once made, he cannot sue the State. It is no answer to say that he may obtain damages of the oppressive tax collector. What may work no harm in case of distraint by the landlord, may prove something of no milder name than oppression in case of distraint by the State. However, if the State may lawfully and constitutionally distrain for the amount of the assessment, such right is no argument in favor of forfeiture.

241 §. **Coercion.** Again: it is said that the forfeiture is not final, since it leaves the land subject to redemption, and that, therefore, it is justifiable as a means of coercing the landowner to bear his part of the public burden in supporting the

government. But coercion is oppression in cases where the person coerced has a good defense which he is precluded from asserting. He may be prepared successfully to plead payment; his lands may be exempt, because devoted to education, charitable or religious uses, as provided in some of the State constitutions; he may have other good defenses. The argument for coercion is based upon the unwarrantable assumption that delinquency has been judicially ascertained, and that nothing remains to be done but execution. It is a begging of the question. Certainly, where the land owner has the legal defense of payment, exemption, etc., coercion without giving him opportunity to defend, is oppression. If, in such case, it is so, then, in all cases; for, by what right may the tax collector, or any other executive or ministerial or even judicial officer, be authorized to say arbitrarily who shall be allowed to to plead and who shall not? And, if coercion of any sort were allowable, the forfeiture of land would not be justifiable on the plea that it is subject to redemption, and that therefore the forfeiture is only a means of coercion; for, as we have seen, the means are unconstitutional if it is really a forfeiture without *jus in re.* Is it really such? Susceptibility of redemption does not alter the case. The wronged owner may not be able to pay the sum necessary to the redemption. He may think the requirement unconstitutional and oppressive; and, he may not willingly submit to the requirement. It is no answer to say that he would be foolish thus to let his interests suffer; for the question is one of right; and, though he might better allow himself to be wrongfully coerced to pay the tax, than to suffer more loss through sentiment, is the State right in thus driving him to the wall?

Susceptibility of redemption does not make the forfeiture any the less a forfeiture; and does not make it legal, if otherwise illegal, whether the land-owner redeems or not. For, in the absence of *jus in re*, the land cannot be contingently forfeited, subject to redemption. All the argument based upon the want of the State's *right to* the land, applies with full force whether the privilege of redemption be considered or not. The privilege can make no possible difference in the argument.

Government cannot condemn as forfeited a guilty thing or a hostile thing without previously having *jus in re*, even if the privilege of redemption were accorded the offender or the enemy, as the case might be. Certainly, it cannot have greater power over an indebted thing, to collect taxes of it where there cannot be any *jus in re* whatever possessed by the State—the creditor.

§ 242. **Eminent Domain.** The argument so frequently and so vaguely drawn from the government's right of eminent domain, does not support the forfeiting of land to collect a sum due by it; for, whatever that right may be in a government constituted like ours, it is certain that the constitution inhibits the taking of private property for public use, (and, impliedly, for any use,) without adequate compensation previously made; and, beyond the amount of the tax, the forfeiture of land would be such a taking.

The government has no latent title or ultimate right to land in this country. The owner's right to it is as absolute as his right to personal property.[1] There is no knight-service due especially from free-holders as where feudal tenures prevail; the duty of allegiance has here no more reference to land than to any other property.[2] Allegiance is the correlative of protection, whether the citizen owns any property or not. There is governmental jurisdiction over property as well as persons; there is authority over it to control or destroy it, under the police power, for the purpose of promoting and preserving the public health and public order.[3] But such authority does not reduce the ownership of land to a mere "tenancy" of any kind.

§ 243. **Necessity.** The necessity of supporting government, is made the *dernier* resort. In nine cases out of ten, where

[1] Van Rensellaer *v.* Smith, 27 Barb. 157; Van Rensellaer *v.* Dennison, 35 N. Y. 400; Cook *v.* Hammond, 4 Mason, 478; New Orleans *v.* United States, 10 Pet. 717; Desilver's Estate, 5 Rawle, 111–113: Matthews *v.* Ward, 10 Gill. & J. 443; Wallace *v.* Harmstad, 44 Penn. St. 500; Arrowsmith *v.* Burlington, 4 M'Lean, 497.

[2] Cornell *v.* Lamb, 2 Cow. 652; Van Rensellaer *v.* Hayes, 19 N. Y. 91–2; Coombs *v.* Jackson, 2 Wend. 155. For pro and con.: 1 Washburn's Real Property, 63–67.

[3] Commonwealth *v.* Alger, 7 Cush. 92–102; Taylor *v.* Porter, 4 Hill, 143; Commonwealth *v.* Tewksbury, 11 Met. 57; People *v.* Salem, 20 Mich. 479–482.

courts in passing upon tax titles, support the forfeiture, this argument lies at the bottom of the decisions. One is reminded of the answer which Dr. Johnson gave to a man whom he had upbraided for pursuing an unlawful means of livelihood, and who had attempted to justify himself by saying that he must live: "I deny the necessity sir."

It might plausibly be questioned whether a government which, having lawful means of vindicating a *jus ad rem*, resorts to the unlawful assumption of a *jus in re*, takes private property without right, denies legal defense, and attempts to justify itself on the plea of necessity, is not liable to a like retort.

The necessity of supporting government is admitted; but the necessity of forfeiting property because of a per centage due by it, must be denied.

Tax is a contribution to support government; and it differs from an ordinary debt in that it is not subject to off-set, since it is of higher privilege than any ordinary debt, or any other privileged debt. But the amount of the contribution assessed upon one's property, does not differ from any other property debt so far as concerns the forced contributor's right of defense against the forfeiture of the *res* on which rests the debt secured by lien. Nor is the government's right to collect from the property different from its right to collect any debt secured by lien, so far as concerns the distinction between *jus ad rem* and *jus in re*. It follows, clearly enough, that the right of forfeiting, either absolutely or contingently, cannot arise upon the non-payment of an assessed contribution. The necessity cannot be maintained, if the contribution can be lawfully and effectually collected without the forfeiting of the property. The right and power are in the State to make its percentage of the value of the property without taking the whole. The courts are open to government for the collection of its dues, as they are to a private creditor. The judges and officers, appointed by the government or elected by the people, are not presumed prejudiced against the source of authority. States can get justice in their own courts. Nor is it to be presumed that the required contribution is so great that it cannot be easily realized out of the property upon which it is assessed. It cannot truth-

fully be said, therefore that, *ex necessitate rei*, the State must forfeit lands to get its tax.

How much litigation, uncertainty of tax titles, diversity of decisions, disturbance of public tranquility, and confusion generally, would be avoided, were it always borne in mind that the State's right upon property for tax-contribution is a mere *jus ad rem* upon which forfeiture, either absolute or contingent, cannot be predicated!

§ 244. **Power "To Lay and Collect Taxes."** It has been seriously argued that because Congress has power "to lay and collect taxes,"[1] and "to make all laws which are necessary and proper for carrying into execution" this power,[2] it has authority to forfeit property for the non-payment of tax dues thereon. This argument pervades not only the dissenting opinion of Mr. Justice HANDY in *Griffin* v. *Nixon*, above cited, but it is found frequently in reported briefs of counsel, if not in opinions of courts.

If the power of our legislators "to collect taxes" has been rightfully construed to enable them to avoid the courts when making such collection, still that power does not enable them to forfeit the property on which taxes rest, without resort to the courts; nor, even with such resort, to take it in vindication of a mere *jus ad rem*, unless, indeed, in their unlimited rein as to rates, (consulting the opinion of C. J. MARSHALL,[3] followed by others, that "the power to tax involves the power to destroy,") they should levy a tax upon property at the rate of one hundred *per centum*. Annual assessment to the amount of the annual income, would practically amount to the taking of property for taxes. Doubtless there are limitations to the taxing power of Congress, found in many implications of the Constitution, and especially, in its spirit, which so forbids the neglect of the public welfare as to inhibit taxing to the point of destruction. The exact limit cannot be defined; but it certainly lies within the average income of property. In time of war, the rule may be relaxed; but, in ordinary times, to tax property annually

[1] Constitution, Art. 1, § 8, Clause 1.
[2] Id., Clause 18.
[3] McCulloch *v.* Md., 4 Wh. 316.

beyond the average annual income from such property; to tax money, for instance, beyond the legal rate of interest, would be practically to destroy rather than to tax. And, (though against high counter opinion,) it must be held unconstitutional for Congress to "lay and collect taxes" to the point of destruction. In speaking of the average annual income of property, it would be wrong to say that property which yields no income at all is not to be taxed at all. Vacant lands are not to be exempt. Taxes should be levied upon property *ad valorem:* not according to the usufruct. But, by qualifying income with the words "average annual," the meaning sought to be conveyed is, that when property taken altogether—all the property of the country, is annually taxed beyond the rental or other profit that it is capable of yielding the owners, it is taxed to the point of destruction; and that this is not only without constitutional warrant but is violative of the spirit of the Constitution; is against the "public welfare" instead of being promotive of it; is in contravention of several implications of the Constitution, and is subversive of the very article invoked to sustain it, since the destruction of property would cut off the power to "lay and collect taxes" upon it subsequently.

§ 245. **Similar Grants Limited.** If there is no limit to the amount of tax that may be laid; if property may be taxed annually at the rate of one hundred *per centum;* if Congress has the right and power to destroy values by taxation; if it has the right and power to forfeit a *res* to vindicate a *jus ad rem,* (which is the same as destroying it *quoad* the owner,) then, under the same article and section of the Constitution, there is no limit to the other grants of power, except where there is express qualification. Money may be borrowed on the credit of the United States, to the point of the destruction of that credit; money may be coined, and its value regulated, without limit as to the character of the metal or its intrinsic value, etc., all of which seems very absurd.

If the judiciary had jurisdiction over the question, whether paper could be made money and become legal tender, would it not have like jurisdiction, should Congress attempt to coin pewter and to give it the value and the paying power of gold? If

so, how is the coining power limited, yet the taxing power unlimited, when the grant is in precisely the same terms? Why may the judiciary declare unconstitutional the congressional converting of paper or pewter into money, yet not have jurisdiction to pass upon the tax power?

The great jurist, whose name and *dictum* have been so often cited to sustain the unlimited power of Congress to tax so far as to destroy, did never decide that property could be forfeited to collect a *minimum* of its value. He did never decide that to collect a tax lien upon property anything more than the tax, costs, etc., could be collected from the property. Even if he held that the rate of taxation might be without limit, he did not hold that the non-payment of an ordinary tax, (say one per centum,) might constitutionally be made ground for forfeiting the indebted thing as though it were a guilty or hostile thing. But if the last word of the clause, "Congress shall have power to lay and *collect*," is still thought to justify the forfeiture of taxed property as a means of coercing the collection of the tax due upon the property, the last clause of section eight may be invoked, where the *collecting* power is expressly limited to what is "necessary and proper." "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." If, therefore, it is not necessary to forfeit land to collect a small percentage due by it, when it may be seized and sold as an indebted thing and the percentage easily taken from the price, Congress has no power to make a law authorizing such forfeiture. If it is not "necessary" it certainly is neither "proper" nor honest; nor is it an "appropriate" means. So there is absence of grant thus to legislate. And, beyond the sum due for the tax, costs, etc., the forfeiture of the property is inhibited by the amendment which forbids the taking of private property for public use, (and, impliedly, for any use,) without adequate compensation, as shown above.

If it be said that Congress is the judge of the necessity and propriety—not the courts—it may be inquired whether Congress may judge it necessary to legislate pewter into gold, or to coin it and fix its value as equivalent to gold, without lia-

bility to have the necessity inquired into by the courts? Should Congress conclude that torture is "necessary and proper" to coerce the delinquent tax debtor, must the judiciary be dumb?

As to the decision of Judge MARSHALL in *McCulloch* v. *Maryland*, above cited, it was not upon the subject of forfeiture to satisfy a lien, but upon the confiscation of property where the government had an undoubted *jus in re:* so, as a decision, the authority is not in point. The expression, that the "power to tax involves the power to destroy," not being necessary to the decree, is *obiter dictum.*

Has it been decided—has it been settled by the courts—that property may be forfeited for the *non*-payment of a tax?

It has been seen that State supreme courts are so divided that they cannot be said to have settled the question so as to enable us to say what is the law; but, in the many States, so few of those courts have held that a *res* may be forfeited in enforcing a lien; and those few have so constantly avoided the distinction between indebted things and things guilty or hostile, that the weight of State judicial authority seems greatly to preponderate in favor of the negative of the proposition.

§ 246. **Can mere Sale Work Forfeiture?** This question was discussed before the United States Supreme Court in a case which had come up from Virginia.[1] It was in exposition of the "Act for the collection of direct taxes,"[2] section four of which provided that the title of land upon which the tax shall not have been paid, "shall thereupon become forfeited to the United States, and, upon the sale hereinafter provided for, shall vest in the United States or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title and claim whatsoever." The sale is to be by the tax commissioners, without resort to the courts for condemnation of the land, or for an order of sale. The forfeiture is to be without any offense creating a *jus in re* in the government; for delinquency is not made such by the act, if, indeed, it could constitutionally have been so made.

Under cover of this act, the United States tax commissioners

[1] Bennett *v.* Hunter, 9 Wall. 326. [2] 12 Stat. at L. 422

had sold land of one Hunter, because a tax upon it was unpaid. The amount realized was eight thousand dollars: the tax was less than one hundred dollars. It was seriously contended that the property had been forfeited by the non-payment of the tax, so that the whole proceeds of the sale would thus belong to the United States. It had been held, in the court below, that as the tax, penalty and costs, had been tendered before the sale, the sale was void; and this the Supreme Court affirmed. But there were opinions expressed by the latter, through the chief justice, on the subject of forfeiture under the act, which should not pass unnoticed.

After showing conclusively that the first clause of the section quoted, could not, *proprio vigore*, work a transfer of the land to the United States; that "the general principles of the law of forfeiture seem to be inconsistent with such a transfer;" that "an act of sovereignty so highly penal is not to be inferred from language capable of any milder construction;"[1] and that there could be no forfeiture without judicial inquiry or office found,[2] the court then made the following remarkable exposition of that clause, coupled with the second:

"It does not direct the possession and appropriation of the land. It was designed rather, we think, to declare the ground of the forfeiture of title, namely, non-payment of taxes; while the second clause was intended to work the actual investment of the title, through a public act of the government, in the United States, or in the purchaser at the tax sale. The sale was the public act, which is the equivalent of office found. What preceded the sale was merely preliminary, and, independently of the sale, worked no divestiture of the title. The title, indeed, was forfeited by non-payment of the tax; in other words, it became subject to be vested in the United States, and, upon public sale, became actually vested in the United States or in any other purchaser; but not before such public sale. It follows that in the case before us, the title remained [in Hunter

[1] Citing Fairfax's Devisee *v.* Hunter's Lessee, 7 Cr. 625.

[2] Citing 3 Black. Com. 258, and United States *v.* Repentigny, 5 Wall. 265.

and his son] * * * at least until sale, though forfeited, in the sense just stated, to the United States."

Either Hunter forfeited his land by not paying the tax when due, or he did not. If he did, he forfeited it to the United States at the time when he should have paid. If so, any subsequent judicial declaration of the forfeiture, or "office found" of any sort, retroacted to that time, as the date of the transfer of the property and title.

On the other hand, if he did not forfeit his land at that time, he did not forfeit it at all; for, if sale was forfeiture, (an impossible supposition,) it was the commissioner or auctioneer who forfeited it—which is absurd. But the court say that the land was not forfeited by Hunter at the time he became delinquent. His non-performance of duty worked "no divestiture of title." The title "became actually vested in the United States or in any purchaser; but not before such public sale."

True, there is contradictory ruling intertwined with the opinion just stated; but, when the court say, "The title, indeed, was forfeited by the non-payment of the tax; in other words, it became subject to be vested in the United States," etc., and also that "what preceded the sale worked no divestiture of the title," it is manifest that both rulings cannot stand together.

The reader must therefore take that which is consonant with the context, with the decree in the case, and with the settled law that forfeiture is not consequent upon the non-payment of a debt. But the court evidently did not mean to pronounce the act of Congress, or section four of that act, to be unconstitutional. On the contrary, they countenanced the section, but looked to the sale as the time of the forfeiting, and even declared it to be "the equivalent of office found."

If, by sale, title vests "in the United States or any other purchaser," who is the seller? The Tax Commissioners are officers and agents of the United States; and, in selling, either personally or through an auctioneer, they must either sell the defaulter's land, for the United States, *as creditor*, to make the money due on the land; or they must sell land already forfeited, not for the United States as creditor, but *as owner;* not to make the money due on the land for the tax, but to realize the full

price of the land. In Hunter's case, for instance, the commissioners sold, not to get the one hundred dollars tax, but to get the $8,000, as price. Who was the seller? The purchaser might be the United States, who, (the court said,) would then become vested with title. That the United States could be at the same time both seller of what they owned, and buyer of what they owned, is absurd.

How could the government sell to some other purchaser, a title which it had not? Clearly, the government could not as owner convey the *jus in re* by sale, if not entitled to it before; and, it is also clear that the purchaser could not acquire it by sale, when it could not be sold.

As to sale being "equivalent to office found," it need not be discussed. The expression is vague. It must mean that sale is equivalent to a judicial finding of the fact of forfeiture; and such a postulate is wholly untenable and not debatable. Let what has been said against the exercise of judicial functions by executive and ministerial officers, suffice, with increased emphasis, when such officers are mere auctioneers.

§ 247. **Sale Transfers Property, When Condemned to Pay.** Sale by the United States, in the capacity of creditor, may doubtless transfer title to the purchaser, just as any judgment-creditor may cause the judicial sale of the property of a debtor, under execution, with like effect. Granting that distraint for taxes may be made, and the commissioner sell thereupon, the position of the government is that of creditor, selling to satisfy a *jus ad rem*. Under such circumstances, there would be no inconsistency in the government becoming the purchaser at such sale. In other words, the government, as owner, cannot buy and sell the same thing at the same instant; but it may, as judgment-creditor, (or tax creditor) sell what belongs to the delinquent to satisfy the tax, become the purchaser, and get title; paying to the delinquent the price, after deducting the tax.

This was Springer's case,[1] though the price brought at the sale did not exceed the tax. The title of the United States, the purchaser, was not from forfeiture but from purchase. If, at

[1] Springer *v.* The United States, (12 Otto,) 102 U. S. 586.

the instance of the United States, the Tax Collector had the right to seize and sell the indebted land in vindication of a *jus ad rem*, without resort to the courts, (a subject not before us.) there remains no question of the right of the United States to buy. Springer lost his property, but not by forfeiture.

Neither the case of *Bennett* v. *Hunter* nor that of *Springer* v. *The United States*, is authority for the forfeiting of property for taxes either absolutely or contingently, since the remarks favoring it were not necessary to the decision in either instance; nor is there any case in which our highest tribunal has directly decided that there may be forfeiture to satisfy a tax lien against an indebted thing which is not made by statute an offending thing. They have, however, sustained tax forfeiture, without distinctly deciding this point, in terms.[1]

§ 248. **The Act to Collect Direct Taxes.** But it is exceedingly to be deplored that, by any remarks in an opinion, they should have countenanced the section four, quoted from the "Act for the collection of direct taxes," etc., (above cited;) for that section does in terms authorize the forfeiture of land for its tax debt; the transfer of the title in fee simple from the owner, without regard to the relative amount of the *jus ad rem* and the *res;* and the annulling of "all prior liens, incumbrances, right, title and claim whatsoever." It is monstrous. By what right could Congress say that a valid mortgage should be "discharged" or annulled, if the property should be amply sufficient to satisfy the tax lien first, and the mortgage afterwards? By what right could Congress say that the United States, as a creditor, could take a hundred times its due, while lien-holders of inferior rank should get nothing?

Take this very case of *Bennett* v. *Hunter*. The reporter, in his statement of it, says that the "tax, expenses, penalties and costs" were altogether "within $100," while the property sold at the tax sale, for $8,000: Why should the government take $7,900 too much, while the honest lien holders, (had there been any,) could, under the Act, get nothing of their honest and unforfeited claims? And, with the tax paid, (if all other liens

[1] Keely *v.* Sanders, 99 U. S. 441; Sherry *v.* McKinley, Id. 496.

were allowed to be satisfied out of the proceeds,) what justice would there be in withholding any surplus from the lawful owner? Or, if there were no other liens, (as may have been the fact in Hunter's case,) what justice was there in attempting to withhold the surplus from the owner?

The section is monstrous; and it is to be regretted that the court did not declare it unconstitutional; but there is the satisfaction of knowing that the decision turned upon the point whether tender of the tax before sale rendered the sale invalid, and that therefore the remarks favoring the section are not authority in favor of its constitutionality. This point has been since reaffirmed.[1]

This chapter does not treat the subject of the distraint of an indebted thing for the collection of a tax; but the question discussed is whether forfeiture may be declared in case of non-payment. This work, being confined to judicial proceedings *in rem*, avoids the subject of distraint without resort to courts. It might also have avoided *executive* forfeiture; but the reasoning applies to that, showing that neither judicial nor executive forfeiture can be pronounced in the absence of any *jus in re*.

Although the United States no longer collect direct taxes, yet the Act discussed above was found convenient for the presentation of the general principle that property cannot be forfeited in vindication of a mere *jus ad rem*, either by resort to the courts or otherwise; and thus the examination of State statutes subject to the same criticism has been rendered unnecessary. Unhappily, the States which have resorted to the unwarrantable procedure have not repealed their statute authorizations to forfeit indebted property without any *jus in re*, and they may still go on thus breeding litigation and disturbing good titles; but it will be readily perceived that if the argument submitted herein against the Federal law is sound, it must include within its scope all similar State statutes.

[1] Atwood *v.* Weems, 99 U. S. 183.