*FEBRUARY TERM, 1796.

On the 4th of February, a commission, bearing date the 27th of January 1796, was read, appointing Samuel Chase, one of the justices of the supreme court.

On the 8th of March, a commission, bearing date the 4th of March 1796, was read, appointing Oliver Ellsworth, Chief Justice.

Hylton, Plaintiff in error, *v.* The United States.

Direct taxes.

A tax on carriages is not a direct tax, such as is required by the constitution to be laid according to the census.

An annual tax on carriages may be considered as within the powers granted to congress to lay duties. Chase, J.

"I am inclined to think, that the direct taxes contemplated by the constitution, are only two, to wit, a capitation or poll tax, and a tax on land." Chase, J.

Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point. Paterson and Iredell, JJ.[1]

This was a writ of error directed to the Circuit Court for the district of Virginia; and upon the return of the record, the following proceedings appeared: An action of debt had been instituted to May term 1795, by the attorney of the district, in the name of the United States, against Daniel Hylton, to recover the penalty imposed by the act of congress of the 5th of June 1794 (1 U. S. Stat. 373), for not entering, and paying the duty on, a number of carriages for the conveyance of persons, which he kept for his own use. The defendant pleaded *nil debet*, whereupon, issue was joined. But the parties, waiving the right of trial by jury, mutually submitted the controversy to the court on a case, which stated "that the defendant, on the 5th of June 1794, and therefrom to the last day of September following, owned, possessed and kept one hundred and twenty-five chariots, for the conveyance of persons, and no more; that the chariots were kept exclusively for the defendant's own private use, and not to let out to hire, or
*172] for the conveyance of persons for *hire; and that the defendant had notice according to the act of congress, entitled 'An act laying duties upon carriages for the conveyance of persons,' but that he omitted and refused to make an entry of the said chariots, and to pay the duties thereupon, as in and by the said recited law is required, alleging that the said law was unconstitutional and void. If the court adjudged the defend-

[1] This question was finally put at rest by the case of Springer *v.* United States, 102 U. S. 586, where it was formally decided, Judge Swayne delivering the opinion of the court, that direct taxes, within the meaning of the constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate. And accordingly, it has been held, that an income tax is not a direct tax within the meaning of the constitution. Pacific Ins. Co. *v.* Soule, 7 Wall. 433; Springer *v.* United States *ut supra*. Nor a succession tax: Scholey *v.* Rew, 23 Wall. 331. Nor a tax upon the circulation of the state banks: Veazie Bank *v.* Fenno, 8 Ibid. 533. And of the same opinion are all the text-writers on constitutional law. Rawle 30; Sergeant 305; Kent, vol. 1, p. 257; Pomeroy 157; Cooley, Taxation, p. 5, note 2; 1 Sharswood's Blackstone 308 n.

ant to be liable to pay the tax and fine for not doing so, and for not entering the carriages, then judgment shall be entered for the plaintiff for $2000, to be discharged by the payment of sixteen dollars, the amount of the duty and penalty; otherwise, that judgment be entered for the defendant."[1] After argument, the court (consisting of WILSON and ———, Justices,) delivered their opinions; but being equally divided, the defendant, by agreement of the parties, confessed judgment, as a foundation for the present writ of error, which (as well as the original proceeding) was brought merely to try the constitutionality of the tax.

The cause was argued at this term by *Lee*, the attorney-general of the United States, and *Hamilton*, the late secretary of the treasury, in support of the tax; and by *Campbell*, the attorney of the Virginia district, and *Ingersoll*, the attorney-general of Pennsylvania, in opposition to it. The argument turned entirely upon this point, whether the tax on carriages for the conveyance of persons, kept for private use, was a direct tax? For, if it was not a direct tax, it was admitted to be rightly laid, within the first clause of the 8th section of the 1st article of the constitution, which declares "that all duties, imposts and excises, shall be uniform throughout the United States." But it was contended, that if it was a direct tax, it was unconstitutionally laid, as another clause of the same section provides, "that no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration of the inhabitants of the United States."

The court delivered their opinions *seriatim*, in the following terms: (*a*)

CHASE, Justice.—By the case stated, only one question is submitted to the opinion of this court—whether the law of congress of the 5th of June 1794, entitled, "An act to lay duties upon carriages for the conveyance of persons," is unconstitutional and void?

The principles laid down, to prove the above law void, are these: that a tax on carriages is a direct tax, and, therefore, by the constitution, must be laid according to the census, directed *by the constitution to be taken, to ascertain the number of representatives from each state. [*173 And that the tax in question on carriages is not laid by that rule of apportionment, but by the rule of uniformity, prescribed by the constitution in the case of duties, imposts and excises; and a tax on carriages is not within either of those descriptions.

By the 2d section of the 1st article of the constitution, it is provided, that direct taxes shall be apportioned among the several states, according to their numbers, to be determined by the rule prescribed.

By the 9th section of the same article, it is further provided, that no capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration before directed.

By the 8th section of the same article, it was declared, that congress shall have power to lay and collect taxes, duties, imposts and excises; but

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(*a*) The Chief Justice, ELLSWORTH, was sworn into office in the morning; but not having heard the whole of the argument, he declined taking any part in the decision of this cause.

[1] This appears to have been a fictitious case, gotten up for the purpose of obtaining a decision of this court, as sixteen dollars was the tax and penalty for one chariot.

all duties, imposts and excises shall be uniform throughout the United States.

As it was incumbent on the plaintiff's counsel in error, so they took great pains to prove that the tax on carriages was a direct tax; but they did not satisfy my mind. I think, at least, it may be doubted; and if I only doubted, I should affirm the judgment of the circuit court. The deliberate decision of the national legislature (who did not consider a tax on carriages a direct tax, but thought it was within the description of a duty), would determine me, if the case was doubtful, to receive the construction of the legislature; but I am inclined to think, that a tax on carriages is not a direct tax, within the letter or meaning of the constitution.

The great object of the constitution was, to give congress a power to lay taxes adequate to the exigencies of government; but they were to observe two rules in imposing them, namely, the rule of uniformity, when they laid duties, imposts or excises; and the rule of apportionment, according to the *census*, when they laid any direct tax.

If there are any other species of taxes that are not direct, and not included within the words duties, imposts or excises, they may be laid by the rule of uniformity or not; as congress shall think proper and reasonable. If the framers of the constitution did not contemplate other taxes than direct taxes, and duties, imposts and excises, there is great inaccuracy in their language. If these four species of taxes were all that were meditated, the general power to lay taxes was unnecessary. If it was intended, that congress should have authority to lay only one of the four above enumerated, to wit, direct taxes, by the rule of apportionment, and the other three by the rule of uniformity, the expressions would have run thus: "Congress shall have power to lay and collect direct taxes, and duties, imposts *and excises; the first shall be laid according to the *census;* and the last three shall be uniform throughout the United States." The power, in the 8th section of the 1st article, to lay and collect taxes, included a power to lay direct taxes (whether capitation or any other), and also duties, imposts and excises; and every other species or kind of tax whatsoever, and called by any other name. Duties, imposts and excises were enumerated, after the general term taxes, only for the purpose of declaring, that they were to be laid by the rule of uniformity. I consider the constitution to stand in this manner. A general power is given to congress, to lay and collect taxes, of every kind or nature, without any restraint, except only on exports; but two rules are prescribed for their government, namely, uniformity and apportionment: Three kinds of taxes, to wit, duties, imposts and excises by the first rule, and capitation or other direct taxes, by the second rule.

*174]

I believe some taxes may be both direct and indirect, at the same time. If so, would congress be prohibited from laying such a tax, because it is partly a direct tax? The constitution evidently contemplated no taxes as direct taxes, but only such as congress could lay in proportion to the *census*. The rule of apportionment is only to be adopted in such cases, where it can reasonably apply; and the subject taxed, must ever determine the application of the rule. If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice,

it is unreasonable to say, that the constitution intended such tax should be laid by that rule.

It appears to me, that a tax on carriages cannot be laid by the rule of apportionment, without very great inequality and injustice. For example: suppose, two states, equal in census, to pay $80,000 each, by a tax on carriages, of eight dollars on every carriage; and in one state, there are 100 carriages, and in the other 1000. The owners of carriages in one state, would pay ten times the tax of owners in the other. A. in one state, would pay for his carriage eight dollars, but B. in the other state, would pay for his carriage, eighty dollars.

It was argued, that a tax on carriages was a direct tax, and might be laid according to the rule of apportionment, and (as I understood) in this manner: Congress, after determining on the gross sum to be raised, was to apportion it, according to the *census*, and then lay it in one state on carriages, in another on horses, in a third on tobacco, in a fourth on rice; and so on. I admit, that this mode might be adopted, to raise a certain sum in each state, according to the *census*, but it would not be a tax on carriages, but on a number of specific articles; and it seems to me, that it would be liable to the same objection of *abuse and oppression, as a selection [*175
of any one article in all the states.

I think, an annual tax on carriages for the conveyance of persons, may be considered as within the power granted to congress to lay duties. The term *duty*, is the most comprehensive, next to the generial term *tax;* and practically, in Great Britain (whence we take our general ideas of taxes, duties, imposts, excises, customs, &c.), embraces taxes on stamps, tolls for passage, &c., and is not confined to taxes on importation only. It seems to me, that a tax on expense is an indirect tax; and I think, an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumable commodity; and such annual tax on it, is on the expense of the owner.

I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the constitution, are only two, to wit, a capitation or poll tax, simply, without regard to property, profession or any other circumstance; and a tax on land. I doubt, whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax.

As I do not think the tax on carriages is a direct tax, it is unnecessary, at this time, for me to determine, whether this court, constitutionally possesses the power to declare an act of congress void, on the ground of its being made contrary to, and in violation of, the constitution; but if the court have such power, I am free to declare, that I will never exercise it, but in a very clear case. I am for affirming the judgment of the circuit court.

Paterson, Justice.—By the second section of the first article of the constitution of the United States, it is ordained, that representatives and direct taxes shall be apportioned among the states, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and including Indians not taxed, three-fifths of all other persons. The eighth section of the said article, declares, that congress shall have power to lay and collect

taxes, duties, imposts and excises; but all duties, imposts and excises shall be uniform throughout the United States. The ninth section of the same article provides, that no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration before directed to be taken.

Congress passed a law, on the 5th of June 1794, entitled, "An act laying duties upon carriages for the conveyance of persons." *Daniel Law-
*176] rence Hilton, on the 5th of June 1794, and therefrom to the last day of September next following, owned, possessed and kept one hundred and twenty-five chariots for the conveyance of persons, but exclusively for his own separate use, and not to let out to hire, or for the conveyance of persons for hire.

The question is, whether a tax upon carriages be a direct tax? If it be a direct tax, it is unconstitutional, because it has been laid pursuant to the rule of uniformity, and not to the rule of apportionment. In behalf of the plaintiff in error, it has been urged, that a tax on carriages does not come within the description of a duty, impost or excise, and therefore, is a direct tax. It has, on the other hand, been contended, that as a tax on carriages is not a direct tax, it must fall within one of the classifications just enumerated, and particularly, must be a duty or excise. The argument on both sides turns in a circle; it is not a duty, impost or excise, and therefore, must be a direct tax; it is not tax, and therefore, must be a duty or excise. What is the natural and common, or technical and appropriate, meaning of the words, duty and excise, it is not easy to ascertain; they present no clear and precise idea to the mind; different persons will annex different significations to the terms. It was, however, obviously the intention of the framers of the constitution, that congress should possess full power over every species of taxable property, except exports. The term taxes, is generical, and was made use of, to vest in congress plenary authority in all cases of taxation. The general division of taxes is into direct and indirect; although the latter term is not to be found in the constitution, yet the former necessarily implies it; indirect stands opposed to direct. There may, perhaps, be an indirect tax on a particular article, that cannot be comprehended within the description of duties, or imposts or excises; in such case, it will be comprised under the general denomination of taxes. For the term tax is the *genus*, and includes: 1. Direct taxes. 2. Duties, imposts and excises. 3. All other classes of an indirect kind, and not within any of the classifications enumerated under the preceding heads.

The question occurs, how is such tax to be laid, uniformly or apportionately? The rule of uniformity will apply, because it is an indirect tax, and direct taxes only are to be apportioned. What are direct taxes, within the meaning of the constitution? The constitution declares, that a capitation tax is a direct tax; and both in theory and practice, a tax on land is deemed to be a direct tax. In this way, the terms direct taxes, and capitation and other direct tax, are satisfied. It is not necessary *to determine,
*177] whether a tax on the product of land be a direct or indirect tax. Perhaps, the immediate product of land, in its original and crude state, ought to be considered as the land itself; it makes part of it; or else the provision made against taxing exports would be easily eluded. Land, independently of its produce, is of no value. When the produce is converted into a manufacture, it assumes a new shape; its nature is altered; its original state is changed;

it becomes quite another subject, and will be differently considered. Whether direct taxes, in the sense of the constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point. If congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the states in the Union, then, perhaps, the rule of apportionment would be the most proper, especially, if an assessment was to intervene. This appears by the practice of some of the states, to have been considered as a direct tax. Whether it be so, under the constitution of the United States, is a matter of some difficulty; but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt, that the principal, I will not say, the only, objects, that the framers of the constitution contemplated, as falling within the rule of apportionment, were a capitation tax and a tax on land. Local considerations, and the particular circumstances, and relative situation of the states, naturally lead to this view of the subject. The provision was made in favor of the southern states; they possessed a large number of slaves; they had extensive tracts of territory, thinly settled, and not very productive. A majority of the states had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The southern states, if no provision had been introduced in the constitution, would have been wholly at the mercy of the other states. Congress in such case, might tax slaves, at discretion or arbitrarily, and land in every part of the Union, after the same rate or measure: so much a head, in the first instance, and so much an acre, in the second. To guard them against imposition, in these particulars, was the reason of introducing the clause in the constitution, which directs that representatives and direct taxes shall be apportioned among the states, according to their respective numbers.

On the part of the plaintiff in error, it has been contended, that the rule of apportionment is to be favored, rather than the rule of uniformity; and, of course, that the instrument is to receive such a construction, as will extend the former, and restrict the latter. I am not of that opinion. The constitution has been considered as an accommodating system; it was the *effect [*178
of mutual sacrifices and concessions; it was the work of compromise. The rule of apportionment is of this nature; it is radically wrong; it cannot be supported by any solid reasoning. Why should slaves, who are a species of property, be represented more than any other property? The rule, therefore, ought not to be extended by construction.

Again, numbers do not afford a just estimate or rule of wealth. It is, indeed, a very uncertain and incompetent sign of opulence. This is another reason against the extension of the principle laid down in the constitution.

The counsel on the part of the plaintiff in error, have further urged, that an equal participation of the expense or burden by the several states in the Union, was the primary object, which the framers of the constitution had in view; and that this object will be effected by the principle of apportionment, which is an operation upon states, and not on individuals; for each state will be debited for the amount of its *quota* of the tax, and credited for its payments. This brings it to the old system of requisitions. An equal rule is doubtless the best: but how is this to be applied to states or to individuals? The latter are the objects of taxation, without reference to states,

except in the case of direct taxes. The fiscal power is exerted certainly, equally, and effectually on individuals ; it cannot be exerted on states. The history of the United Netherlands, and of our own country, will evince the truth of this position. The government of the United States could not go on, under the confederation, because congress were obliged to proceed in the line of requisition. Congress could not, under the old confederation, raise money by taxes, be the public exigencies ever so pressing and great ; they had no coercive authority—if they had, it must have been exercised against the delinquent states, which would be ineffectual, or terminate in a separation. Requisitions were a dead letter, unless the state legislatures could be brought into action ; and when they were, the sums raised were very disproportional. Unequal contributions or payments engendered discontent, and fomented state jealousy. Whenever it shall be thought necessary or expedient to lay a direct tax on land, where the object is one and the same, it is to be apprehended, that it will be a fund not much more productive than that of requisition under the former government. Let us put the case. A given sum is to be raised from the landed property in the United States. It is easy to apportion this sum, or to assign to each state its *quota*. The constitution gives the rule. Suppose the proportion of North Carolina to be $80,000. This sum is to be laid on the landed property in the state, but by what rule,
*179 and by whom? Shall every acre pay *the same sum, without regard to its quality, value, situation or productiveness? This would be manifestly unjust. Do the laws of the different states furnish sufficient *data* for the purpose of forming one common rule, comprehending the quality, situation and value of the lands? In some of the states, there has been no land-tax for several years, and where there has been, the mode of laying the tax is so various, and the diversity in the land is so great, that no common principle can be deduced, and carried into practice. Do the laws of each state furnish *data* from whence to extract a rule, whose operation shall be equal and certain in the same state? Even this is doubtful. Besides, sub-divisions will be necessary ; the apportionment of the state, and perhaps, of a particular part of the state, is again to be apportioned among counties, townships, parishes or districts. If the lands be classed, then a specific value must be annexed to each class. And there a question arises, how often are classifications and assessments to be made? Annually, triennally, septennially? The oftener they are made, the greater will be the expense ; and the seldomer they are made, the greater will be the inequality and injustice. In the process of the operation, a number of persons will be necessary to class, to value and assess the land ; and after all the guards and provisions that can be devised, we must ultimately rely upon the discretion of the officers in the exercise of their functions. Tribunals of appeal must also be instituted, to hear and decide upon unjust valuations, or the assessors will act *ad libitum*, without check or control. The work, it is to be feared, will be operose and unproductive, and full of inequality, injustice and oppression. Let us, however, hope, that a system of land taxation may be so corrected and matured by practice, as to become easy and equal in its operation, and productive and beneficial in its effects.

But to return. A tax on carriages, if apportioned, would be oppressive and pernicious. How would it work? In some states, there are many carriages, and in others, but few. Shall the whole sum fall on one or two individuals in a state, who may happen to own and possess carriages? The thing would

be absurd and inequitable. In answer to this objection, it has been observed, that the sum, and not the tax is to be apportioned; and that congress may select, in the different states, different articles or objects from whence to raise the apportioned sum. The idea is novel. What? shall land be taxed in one state, slaves in another, carriages in a third, and horses in a fourth? or shall several of these be thrown together, in order to levy and make the quotated sum? The scheme is fanciful. It would not work well, and perhaps is utterly impracticable. It is easy to discern, that great, and perhaps insurmountable, obstacles must arise in forming the subordinate *arrangements necessary to carry the system into effect; when formed, the [*180 operation would be slow and expensive, unequal and unjust. If a tax upon land, where the object is simple and uniform throughout the states, is scarcely practicable, what shall we say of a tax attempted to be apportioned among, and raised and collected from, a number of dissimilar objects. The difficulty will increase with the number and variety of the things proposed for taxation. We shall be obliged to resort to intricate and endless valuations and assessments, in which everything will be arbitrary, and nothing certain. There will be no rule to walk by. The rule of uniformity, on the contrary, implies certainty, and leaves nothing to the will and pleasure of the assessor. In such case, the object and the sum coincide, the rule and the thing unite, and, of course, there can be no imposition. The truth is, that the articles taxed in one state should be taxed in another; in this way, the spirit of jealousy is appeased, and tranquillity preserved; in this way, the pressure on industry will be equal in the several states, and the relation between the different objects of taxation duly preserved. Apportionment is an operation on states, and involves valuations and assessments, which are arbitrary, and should not be resorted to but in case of necessity. Uniformity is an instant operation on individuals, without the intervention of assessments, or any regard to states, and is at once easy, certain and efficacious. All taxes on expenses or consumption are indirect taxes; a tax on carriages is of this kind, and of course, is not a direct tax. Indirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income. In many cases of this nature, the individual may be said to tax himself. I shall close the discourse, with reading a passage or two from Smith's Wealth of Nations.

"The impossibility of taxing people in proportion to their revenue, by any capitation, seems to have given occasion to the invention of taxes upon consumable commodities; the state, not knowing how to tax directly and proportionably the revenue of its subjects, endeavors to tax it indirectly, by taxing their expense, which it is supposed, in most cases, will be nearly in proportion to their revenue. Their expense is taxed, by taxing the consumable commodities upon which it is laid out. 3 Vol. page 331.

"Consumable commodities, whether necessaries or luxuries, may be taxed in two different ways; the consumer may either pay an annual sum, on account of his using or consuming goods of a certain kind, or the goods may be taxed, while they remain in the hands of the dealer, and before they are delivered to the consumer. The consumable goods, which *last a [*181 considerable time before they are consumed altogether, are most properly taxed the in one way; those of which the consumption is immediate, or more speedy, in the other: the coach-tax and plate-tax are examples of the

former method of imposing; the greater part of the other duties of excise and customs of the latter." 3 Vol. page 341.

I am, therefore, of opinion, that the judgment rendered in the circuit court of Virginia ought to be affirmed.

IREDELL, Justice.—I agree in opinion with my brothers, who have already expressed theirs, that the tax in question is agreeable to the constitution; and the reasons which have satisfied me, can be delivered in a very few words, since I think the constitution itself affords a clear guide to decide the controversy.

The congress possess the power of taxing all taxable objects, without limitation, with the particular exception of a duty on exports. There are two restrictions only on the exercise of this authority. 1. All direct taxes must be apportioned. 2. All duties, imposts and excises must be uniform.

If the carriage-tax be a direct tax, within the meaning of the constitution, it must be apportioned. If it be a duty, impost or excise, within the meaning of the constitution, it must be uniform.

If it can be considered as a tax, neither direct, within the meaning of the constitution, nor comprehended within the term duty, impost or excise; there is no provision in the constitution, one way or another, and then it must be left to such an operation of the power, as if the authority to lay taxes had been given generally, in all instances, without saying whether they should be apportioned or uniform; and in that case, I should presume, the tax ought to be uniform; because the present constitution was particularly intended to affect individuals, and not states, except in particular cases specified: and this is the leading distinction between the articles of confederation and the present constitution.

As all direct taxes must be apportioned, it is evident, that the constitution contemplated none as direct, but such as could be apportioned. If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the constitution.

That this tax cannot be apportioned, is evident. Suppose, ten dollars contemplated as a tax on each chariot, or post-chaise, in the United States, and the number of both in all the United States be computed at 105, the number of representatives in congress.

*182] *This would produce in the whole, - - $1050 00
The share of Virginia being $\frac{19}{105}$ parts, would be $190 00
The share of Connecticut being $\frac{7}{105}$ parts, would be - 70 00
Then suppose Virginia had 50 carriages, Connecticut 2,
The share of Virginia being $190, this must, of course, be collected from the owners of carriages, and there would, therefore, be collected from each carriage, 3 80
The share of Connecticut being $70, each carriage would pay - - - - - - - - - - 35 00

If any state had no carriages, there could be no apportionment at all. This mode is too manifestly absurd to be supported, and has not even been attempted in debate.

But two expedients have been proposed, of a very extraordinary nature, to evade the difficulty.

I. To raise the money a tax on carriages would produce, not by laying a tax on each carriage uniformly, but by selecting different articles in different states, so that the amount paid in each state may be equal to the sum due on a principle of apportionment. One state might pay by a tax on carriages, another, by a tax on slaves, &c. I should have thought this merely an exercise of ingenuity, if it had not been pressed with some earnestness; and as this was done by gentlemen of high respectability in their profession, it deserves a serious answer, though it is very difficult to give such a one.

1. This is not an apportionment of a tax on carriages, but of the money a tax on carriages might be supposed to produce, which is quite a different thing.

2. It admits, that congress cannot lay an uniform tax on all carriages in the Union, in any mode, but that they may on carriages in one or more states. They may, therefore, lay a tax on carriages in 14 states, but not in the 15th.

3. If congress, according to this new decree, may select carriages as a proper object, in one or more states, but omit them in others, I presume, they may omit them in all and select other articles.

Suppose, then, a tax on carriages would produce $100,000, and a tax on horses a like sum of $100,000, and $100,000 were to be apportioned according to that mode. Gentlemen might amuse themselves with calling this a tax on carriages, or a tax on horses, while not a *single carriage, nor a single horse, was taxed throughout the Union. [*183

4. Such an arbitrary method of taxing different states differently, is a suggestion altogether new, and would lead, if practised, to such dangerous consequences, that it will require very powerful arguments to show, that that method of taxing would be in any manner compatible with the constitution, with which, at present, I deem it utterly irreconcilable, it being altogether destructive of the notion of a common interest, upon which the very principles of the constitution are founded, so far as the condition of the United States will admit.

II. The second expedient proposed was, that of taxing carriages, among other things, in a general assessment. This amounts to saying, that congress may lay a tax on carriages, but that they may not do it, unless they blend it with other subjects of taxation. For this, no reason or authority has been given, and in addition to other suggestions offered by the counsel on that side, affords an irrefragable proof, that when positions, plainly so untenable, are offered to counteract the principle contended for by the opposite counsel, the principle itself is a right one; for no one can doubt, that if better reasons could have been offered, they would not have escaped the sagacity and learning of the gentlemen who offered them.

There is no necessity or propriety, in determining what is or is not, a direct or indirect tax, in all cases. Some difficulties may occur, which we do not at present foresee. Perhaps, a direct tax, in the sense of the constitution, can mean nothing but a tax on something inseparably annexed to the soil: something capable of apportionment, under all such circumstances. A land or a poll tax may be considered of this description. The latter is to be considered so particularly, under the present constitution, on account of the slaves in the southern states, who give a *ratio* in the representation in the proportion of 3 to 5. Either of these is capable of apportionment. In

regard to other articles, there may possibly be considerable doubt. It is sufficient, on the present occasion, for the court to be satisfied, that this is not a direct tax contemplated by the constitution, in order to affirm the present judgment; since, if it cannot be apportioned, it must necessarily be uniform.

I am clearly of opinion, this is not a direct tax in the sense of the constitution, and therefore, that the judgment ought to be affirmed.

Wilson, Justice.—As there were only four judges, including myself, who attended the argument of this cause, I *should have thought it proper to join in the decision, though I had before expressed a judicial opinion on the subject, in the circuit court of Virginia, did not the unanimity of the other three judges relieve me from the necessity. I shall now, however, only add, that my sentiments, in favor of the constitutionality of the tax in question, have not been changed.

*184]

Cushing, Justice.—As I have been prevented, by indisposition, from attending to the argument, it would be improper to give an opinion on the merits of the cause.

By the Court.—Let the judgment of the circuit court be affirmed.

Hills *et al.*, Plaintiffs in error, *v.* Ross.

Appeal in admiralty.

It is no ground for reversing a decree in admiralty, that the facts do not appear of record.

This was a writ of error directed to the Circuit Court for the district of Georgia. On the return of the record, several errors were assigned; but the only one now relied on stated "that the facts on which the circuit court had founded their decree, did not appear fully upon the record, either from the pleadings and decree itself, or a state of the case agreed to by the parties, or their counsel, or by a stating of the case by the court," as required by the 19th section of the judiciary act.

On examining this record, it was found, that no statement of facts had been made, either by the court or the parties, nor did it appear from the pleadings and decree, upon what facts the decree of the circuit court had been founded. But it appeared, that a nnmber of witnesses had been produced and sworn (the record did not say *examined*), at the hearing before the circuit court, whose testimony had not been committed to writing; while, on the other hand, the depositions of the witnesses who had been examined before the district court, were annexed to the proceedings returned. It was acknowledged by the counsel for the defendants in error, that the testimony of the witnesses produced in the circuit court, had been taken *vivâ voce*, according to the 30th section of the judiciary act, and that their depositions had not been committed to writing. It was conceded by the counsel on both sides, that without other aids than such as were to be derived from this imperfect *record, it would be impossible to obtain a fair view of the proceedings of the circuit court in this cause. But *Cox* and *Du Ponceau*, for the plaintiffs in error, contended for a reversal of the decree. *Reed* (of South Carolina), *E. Tilghman* and *Lewis*, for the defen lants, in-

*185]