took from its character as an arbitrary edict of despotic power.

The position that the judgment of the Provost Court was validated by article 149 of the constitution of Louisiana of 1868, does not seem to me to merit any consideration.* The article requires for the validation of the judgment that it must have been rendered *in accordance with existing laws in the State*, and the assertion that any laws of the State at the time authorized the establishment of a provost court, or that such court should rehear a case upon the mandate of a commanding general of the United States, is a proposition which needs only to be mentioned to be answered.

Besides, it is a novel doctrine in this country, that a judgment affecting private rights of property, not merely defective for want of compliance with some matter of form, but absolutely void for want of jurisdiction in the court to render it, can be validated by subsequent enactment, legislative or constitutional. I know of no judicial determination recognizing any such doctrine or even looking that way.

Mr. Justice BRADLEY was not present at the argument of this case, and took no part in its decision.

GAVINZEL *v.* CRUMP.

In November, 1863, during the rebellion, Confederate notes being then so much depressed in market value that in Richmond, Virginia, $3260 of them were worth but $204 in gold coin, G., a Swiss, at the time resident in Richmond, but desirous to go to Europe—to escape to which through the rebel lines was then extremely difficult—agreed to lend C., an American, resident in Richmond, the said sum of $3260 in the Confederate notes above mentioned, and C. borrowed the said sum in such notes. C. executed his bond to G., by which it was agreed that the money was not to become due and payable until the civil war should be ended (during which no interest should be chargeable), nor become

* See the 149th article in the statement of the case, *supra*, 281.

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payable then unless demand was made for it; and, moreover, that if C. was not at that time prepared to pay the said sum, he should have a right to retain it for two years longer, when it should become absolutely payable. The bond continued:

"And upon this further condition, that at any time after the 1st day of April, 1864, and during the continuance of said war, if the said G., or any attorney in fact duly authorized by him to receive payment of said sum, shall be present *in person* in the city of Richmond, I shall have the right (if I elect to do so) to tender said sum, without interest thereon, to said G. *in person*, or to his said attorney in fact *in person*, in said city, in current bankable funds; and upon such tender being made the said G. or his said attorney in fact shall be bound to receive the same in full payment and satisfaction of this obligation, and thereupon the said obligation shall be surrendered and cancelled. But said tender is not to be made except to said G. or his said attorney in fact in person, in the city aforesaid."

G. went to Europe after the execution of the bond, and did not return till after the war was ended, that is to say, not until June, 1865. He then demanded payment of the $3260 in lawful money of the United States. C. set up and proved that at all times after the 1st of April, 1864, he had $3260 "current bankable funds" on hand, to pay to G. or to any attorney in fact authorized by G. to receive them, but that neither G. nor any such attorney in fact was ever present in Richmond until after the war was ended, at which time the said funds were worthless. His position thus was that the bond was discharged by his readiness to tender; and that this readiness of his had been rendered of no effect by the fault of G. in not being in Richmond, or having an attorney in fact there to receive the money. *Held*,

1st. That there was nothing in this above-quoted paragraph of the bond which impliedly obliged G. either to be himself in Richmond at any time after the 1st day of April, 1864, and during the continuance of the war, or to have an attorney in fact there to receive the money due on the bond.

2d. That there was no ambiguity in the written contract, and, therefore, no occasion to introduce parol evidence to show that it was part of the contract that after the 1st of April, 1864, the war then continuing, G. should be in Richmond or have an attorney in fact there to receive payment for him of the money due on the bond.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia.

George Gavinzel, M.D., a Swiss, resident in Richmond, Virginia, on the 20th of November, 1863, the rebellion being then flagrant, and "Confederate notes," as they were called—that is to say, notes issued by the rebel confederacy—being the only currency common in Richmond, agreed to lend to

Robert Crump, a resident, like himself, of Richmond, and whose family physician he was, the sum of $3260 in the said notes; the notes, at the time, having become so far depreciated that the $3260 lent in them were worth in gold but $204. Gavinzel was at this time contemplating leaving the country for Europe, it being, however, a matter of extreme difficulty to pass through the rebel lines.

In adjusting the terms of the loan, the only difference between the two parties was as to the time when the money should be returned. Gavinzel, though he *expected* that the war would be ended by the spring of 1864, was desirous of postponing the time of payment till the close of the war, whenever that close might take place. Crump wished to have the privilege, in case the war lasted after April, 1864, of making payment at any time after that day and during its continuance. However, after having discussed the matter for a certain time, one Cannon, an attorney, employed by Gavinzel, drew up a bond in these words, the part in brackets at the close of the instrument being the part on which the question in this suit chiefly arose:

"Know all men by these presents, that I, Robert Crump, of the county of Henrico, and State of Virginia, am held and firmly bound unto George Gavinzel, M.D., of the city of Richmond, in the said State, in the sum of $3260, for the payment of which sum, well and truly to be made to the said Gavinzel, his heirs, assigns, and personal representatives, I bind myself, my heirs, executors, and administrators firmly by these presents, as witness my hand and seal, this 20th day of November, 1863.

"The foregoing obligation is made subject to the following terms and conditions, to wit:

"That the said sum of $3260 is to be retained by me, and is not to become due and payable until the close of the present war between the Confederate and the United States of America, during which time the said sum shall not bear any interest whatever, nor shall the same become due and payable after the close of the said war until demand for the same shall be made by the said Gavinzel or his legal representatives upon me or my legal representative; and as soon as the war shall have

closed, and said demand shall thereafter have been made, the principal sum of $3260, without interest thereon, shall be paid. But if at that time I shall not be prepared to pay the said sum, I shall have the right to retain the same in my hands for the space of two years from and after the time when such demand is made, I paying legal interest thereon from such time until the said principal sum is paid; and after the expiration of said two years the said principal sum, with such interest as may have accrued thereon after such demand as aforesaid, shall be absolutely due and payable; and the said Gavinzel, his heirs, assigns, and personal representatives, shall have the right to enforce the payment of the same.

"[And upon this further condition, that at any time after the 1st day of April, 1864, and during the continuance of the war, IF the said Gavinzel, or any attorney in fact duly authorized by him to receive payment of said sum, shall be present *in person* in the city of Richmond, and State of Virginia, I shall have the right (if I elect so to do) to tender said sum, without interest thereon, to said Gavinzel *in person*, or to his said attorney in fact *in person*, in said city and State, in current bankable funds; and upon such tender being made the said Gavinzel or his said attorney in fact shall be bound to receive the same in full payment and satisfaction of this obligation; and thereupon the said obligation shall be surrendered and cancelled. *But said tender is not to be made except to said Gavinzel or his said attorney in fact in person, in the city and State aforesaid.*]

"Witness my hand and seal this November 20th, 1863."

The instrument having been read over to both parties in the presence of each other, and no objection being made by either party to its terms, nor any alteration being asked for by either, it was executed by Crump on the day on which it was dated.

At the same time with the execution of this obligation, and according to previous agreement, Crump executed a deed of trust to Cannon of valuable real estate near Richmond, to become void provided "that he, the said Crump, should well and truly pay and satisfy to the said Gavinzel the said sum of $3260, according to the terms and conditions in the said obligation set forth."

Soon after this—that is to say, on December 20th, 1863—Gavinzel got out of Richmond and went to Europe; his escape through the rebel lines having been, according to his own account, almost impossible; attended with greater difficulties than anything which he had ever in his life done.

He left behind him no attorney in fact to collect this debt, but during his absence was wholly unrepresented.

On the 1st of April, 1864, *the war then continuing*, Crump provided himself with $3260 current funds, bankable at Richmond, to pay the loan; but found neither Gavinzel nor any attorney in fact of his to receive them. He had these funds in his possession from the date mentioned until the close of the war, by which time they had lost all value.

On the 2d of June, 1865, the war being now ended—and not till then—Gavinzel returned from Europe, went to Richmond, and demanded payment in lawful money of the United States of the sum named in his bond, $3260; which payment Crump refused to make.

Gavinzel thereupon filed a bill in the court below, praying a sale of the property conveyed in trust, and a payment to him out of the proceeds of the amount which he claimed.

Crump set up in his answer two defences—

1st. That the said $3260 had no reference to lawful money of the United States; that the loan was made in "treasury notes of the Confederate States;" that those notes were issued to sustain a rebellion against the United States, and illegal.

2d. That it was part and parcel of the contract between the parties at the time of the loan and the execution of the bond, that the obligor should be at liberty at any time during the continuance of the said war, after the 1st day of April, 1864, to discharge said debt and said bond for $3260, by repayment of that sum, without interest, *in current bankable funds* to the said Gavinzel, or to his agent; and that without such understanding the obligor would not have received the said $3260, or any part of it in the said Confederate currency, from the said Gavinzel.

The answer further alleged that the respondent had such

Statement of the case.

money on the 1st of April, 1864, and at all times afterwards till the close of the war, ready to pay; but that neither Gavinzel nor any agent of his was at Richmond to receive them.

Both Gavinzel and Crump were examined, but while both agreed in swearing that at the time when the loan was made, Gavinzel was getting ready to go to Europe if possible, they flatly contradicted each other as to what Gavinzel prior to or at the execution of the bond and deed of trust, said about the fact or the time of his coming back.

Gavinzel was thus examined and thus answered:

"Q. When you left Richmond on the 20th of December, 1863, did you not then expect to return in the spring or summer of 1864?

"A. I did not expect to live that long, much less to return. I had a severe hæmorrhage.

"Q. At the time of the loan to Crump what was your estimate of the duration of the war?

"A. I expected that the war would last till the commencement of the next spring, and then be ended.

"Q. Did you intend to be here if the war lasted at that time?

"A. I did not.

"Q. Did you agree to be present in the city of Richmond or to have an agent to act for you in the city of Richmond after the 1st of April, 1864?

"A. I did not.

"Q. Was there at the time of the execution of Crump's bond or since, any different agreement in any respect from that contained in the bond?

"A. Never."

Crump was thus examined and thus testified:

"Q. At the time of your *negotiation* with Dr. Gavinzel was anything said by him, and if so what, in regard to his departure from Richmond to Europe?

"A. He said he was getting ready to go. He said that he would *certainly* be back in April, 1864; and, if not, he would have some one here to act for him."

The court below decreed that the trust-deed should stand

as a security for Crump's paying to Gavinzel $204, lawful money of the United States, with interest, &c. (which said sum of $204 was the value in gold of the $3260 Confederate notes when lent), and that if the said $204 were not paid in two months, with interest, as aforesaid, the property conveyed should be sold. From that decree Gavinzel took this appeal.

Mr. H. H. Wells, for the appellant:

The substantial question presented in this cause is, whether the principal sum of $3260, mentioned in the bond and deed of trust, can be discharged by the payment of the sum of $204, the value in gold on the 20th of November, 1863, of $3260 in Confederate notes.

If the large sum may be satisfied by the smaller amount, it is only because by the agreement of the parties the appellee had an absolute right to tender payment to the appellant after the 1st of April, 1864, and during the war, in Confederate money, or in what was equivalent thereto, money then bankable in the city of Richmond, independent of the fact of whether or not Gavinzel was in Richmond, or had an agent there duly authorized to receive payment of the bond.

The bond itself neither shows any such agreement nor gives color to the idea that any such did in fact exist.

And the testimony, taken together, fails to establish any agreement or understanding different from that contained in the bond itself. Even if it were competent to contradict the bond or waive its terms by an antecedent parol agreement or understanding between the parties, this evidence would be ineffectual for that purpose, because—

1st. There is no concord or agreement between the witnesses as to what the conversation in this particular was.

2d. Because the testimony of Crump, taken to be true precisely as he states it, does not amount to either a contract, agreement, or understanding of the parties. It was a statement made at the time of the "negotiation" for the loan, at a time antecedent to the making of the writing, and it was therefore presumed to be embodied in the writ-

ing. It was not an undertaking to be in Richmond nor to have an agent there, but only an expression of an opinion as to what was likely to occur.

The transaction is not void because based on Confederate money. Such transactions have been sustained in this court in more cases than one, their purposes not having in any way been to promote the rebellion.*

It is obvious, from the very great difficulty which existed when the bond was given, of a person's getting through the rebel lines, and out of Richmond, that the bond was in fact a wager upon two things:

1st. The issue of the rebellion.

2d. Whether Gavinzel could get out of Richmond and through the rebel lines.

The last matter was one in contemplation of the parties just as much as the first. Gavinzel, plainly, was convinced,—

1st. That the Confederacy would go to pieces, and probably by April, 1864, and that its notes would be, as they soon did prove to be, absolutely worthless.

2d. That he could execute his purpose of getting through the rebel lines, out of Richmond, and of keeping away until the war was ended (if he should so long live); when, of course, a tender in any money but lawful money of the United States would be no tender at all.

Crump, on the other hand, appears to have been uncertain as to the issue of the rebellion, but to have rather thought,

1st. That if the Southern Confederacy did not achieve a triumph by the 1st of April, 1864, its resources would be exhausted, and that it would have to succumb.

2d. That Gavinzel would not be able to get through the rebel lines out of Richmond before that time.

And on the basis of these, their respective beliefs or speculations, they made these contracts. Which belief was right was a matter which nothing but actual result could decide.

* Delmas *v.* Insurance Co., 14 Wallace, 661; Planters' Bank *v.* Union Bank, 16 Id. 483.

But if the case, as we above suppose, was the true one, there is no difficulty of seeing how naturally the contract, as expressed in the clause of the bond within brackets, might be made, without any circumvention by Gavinzel of Crump, the obligor.

The only difficulty with the case of Crump is, that like many other people in the Southern Confederacy, he did not judge the signs of the times, and the state of things around him, aright; while his opponent, Gavinzel, a cool, observing, and sagacious Swiss, who saw things as a looker on, and without prepossessions or political aspirations, did.

Mr. S. F. Beach, contra:

1. Although there was not in the bond any *express* undertaking by Gavinzel to be present in Richmond after the 1st of April, 1864, in case the war lasted, or if he should not be personally present then to have an attorney in fact there to receive the money for him, yet such an undertaking is implied by the bond. Unless we so admit, the last clause of the bond* would be without any effect whatever on the contract.

It is not to be believed that Gavinzel supposed Crump understood the privilege of the tender as depending upon whether or not Gavinzel *chose* to be represented in Richmond when the 1st of April arrived; that was to suppose that Crump understood his right of tender as depending on whether Gavinzel should, when the time arrived, be willing to accept it.

It must have been known to Gavinzel that Crump understood this provision of the bond as securing something more to him than would have been secure to him without it.

Stipulations are not needed and are not inserted in contracts for securing a future privilege to one party, provided the other, when the time comes, shall then be willing to

* The clause on page 311, *supra*, containing fourteen lines within brackets. The brackets are the reporter's, and, of course, not on the original instrument.—REP.

allow it. Such privileges are, of course, secure without any contract.

The testimony of Crump is thus supported by circumstances, and so outweighs the testimony of Gavinzel, which is unsupported by any.

If, then, the only fact on which depended the right to discharge the bond of the tender, was *the duration of the war after April 1st*, 1864, that fact having occurred and the defendant having been always ready at the place designated to make the tender, and the actual tender having been prevented by an omission which it was in the power of Gavinzel alone to supply (so known and understood at the making of the contract), to wit, the omission of the plaintiff to appoint an attorney to represent him, the effect of all this was to discharge the bond, as completely as if the tender had been actually made and accepted.

2. This contract was plainly a contract of hazard, and, just as plainly, the only matter of hazard in the contemplation of the parties was, *the duration of the war*. The parties did not contract with reference to the hazard of Gavinzel's being represented or unrepresented in Richmond by an attorney in fact after the 1st of April, 1864. That was a matter of no hazard; hazard could not be predicated of it, because it was a matter entirely under the control of Gavinzel.

The essence of the agreement was, that Crump might pay back the loan in the currency in which he received it, if the war lasted, and so long as it lasted, after April 1st, 1864. If the war terminated sooner, he was to repay it in the currency which that termination should bring with it. Each party took a risk, and each received a consideration for the risk.

Crump took the risk of being compelled to pay back good money for bad, and the consideration to him was exemption from interest.

Gavinzel took the risk of losing interest, and of being compelled to take worse money for bad, the consideration to him being the chance of converting his Confederate notes

into gold; and that he considered this chance valuable may be gathered from the opinion which he entertained, that the war would last till the commencement of the spring of 1864, and then be ended.

Mr. Justice DAVIS delivered the opinion of the court.

The main question in the case arises on the construction of the bond.

The bond is peculiar in its character and unusual in its terms. It is not due until the close of the war of the rebellion, and not even then until specific demand is made for the money. Two things must concur to give the obligee or his representative a right of action: the termination of the war and demand for the money. On demand, if the war has closed, the bond can be discharged by the payment of the principal sum, without interest, but the borrower, if he chooses, can retain the money two years longer by paying legal interest. On the expiration of these two years the principal sum and accruing interest is absolutely due and payable. So far the terms of the bond, it is admitted, are plain enough, but there is still another condition on which the chief controversy in the case depends. It is in the concluding words of the instrument.*

It is proved in the case that the money lent was Confederate notes, although the fact is not so stated in the bond, and that after the 1st of April, 1864, the war then continuing, Crump provided himself with the funds for the return of the loan, but found no one in Richmond who was authorized to receive them, and he kept them ready to pay till they lost all value by the termination of the war.

And it is contended by him, as the tender was prevented by the omission of Gavinzel to appoint an attorney in fact to represent him in his absence, the bond is discharged as completely as if the tender had been actually made and accepted.

*. The concluding words here referred to are the clause on page 311, *supra*, containing fourteen lines within brackets.—REP.

This would be so if Gavinzel was in default for not appointing an attorney. But the bond does not require him to make the appointment, nor to remain in Richmond. It gives Crump the right to make the tender, if the war continued after the 1st of April, 1864, but the tender could only be made in Richmond, and only to Gavinzel or to an attorney in fact in person who was authorized to receive payment. In other words, the money was payable, if Gavinzel was in Richmond, or had an agent there to receive it, but was not payable if he was not there, or had no agent in the city. Crump may have understood that his right to discharge the bond by the tender was to become absolute if the war lasted (and so long as it lasted) after April 1st, 1864, but the contract does not admit of a construction consistent with that understanding. And the court cannot, without evidence authorizing it to be done, import words into the contract which would make it materially different in a vital particular from what it now is. There is no occasion to introduce parol evidence to explain anything in the contract, because there is no ambiguity about it, and it is not competent by this sort of evidence to alter the terms of a contract, by showing that there was an antecedent parol agreement or understanding between the parties different in a material particular from that which the contract contained. But if it were competent, the evidence fails to establish any such antecedent agreement. Gavinzel and Crump are the only witnesses, and their statements are inconsistent one with the other. In view of this difference in the recollection of the parties—to use no harsher term—how can the court say that Gavinzel agreed either to be in Richmond or to have an agent there to represent him? Both parties were present when the bond prepared by Cannon on the direction of Gavinzel was read to them, and there does not seem to have been any objection to it, or any alteration proposed in the draft of it. Nor is there anything in the record to show that the parties did not, in this transaction, stand on equal ground, with equal intelligence and equal opportunities of judging of the hazard incurred. If so, hard as the bargain is, there is

no good reason in the state of the pleadings why it should not be enforced. The answer sets up only two defences, the illegality of a contract based on Confederate notes, and the inability of Crump to discharge the debt, according to the last condition of the bond, by the neglect of Gavinzel on his departure to Europe, to appoint an attorney in fact to receive the money. But the last defence, as we have seen, is not sustained, and in regard to the first, this court has held substantially that contracts, based on Confederate currency, will be enforced when made in the usual course of business between persons resident in the insurgent States, and not made in furtherance of the rebellion.

Whether or not this was a wagering contract, and therefore void, is not a question in the case, as no objection to it on that ground was taken in the answer or on the argument.

The contract was plainly a contract of hazard, mutual hazard. Each party took risks, and each received a consideration for the risk thus taken. Manifestly, the leading object Gavinzel had in the transaction was to lend his money, so that it would not be repaid until the war closed, whether this event occurred before or after the 1st of April, 1864; and this object, on the contingency of his being able to go to Europe, the terms of his contract enabled him to accomplish. If the war ended by April, 1864, as he swears he thought it would, his purpose was attained, whether he went to Europe or not. But if the war continued longer, and he was able to get out of the Confederacy, he was in as good condition as if the war had terminated when he expected it would. There were, however, difficulties to be encountered in getting through the lines, represented by Gavinzel in his testimony "as the greatest he ever met with in his life." If unable to overcome these difficulties he would be obliged to stay in Richmond, and Crump would have the opportunity, if he chose to avail himself of it, of paying back the loan in the currency in which he received it.

The inducements to Crump to enter into the contract were the present use of the money and exemption from interest, with favorable terms of repayment. Besides this, there was

the chance that he might be able to repay the loan in Confederate money. Both parties not only ran the risk of the war closing before or after the 1st of April, 1864, but also of the value of money whenever the war did close, be that sooner or later, and of the ability of Gavinzel to leave the Confederacy. Certainly the wisdom of Crump in entering into a contract which contemplated such hazards cannot be commended, but if parties make contracts where there is no fraud, upon contingencies uncertain to both, with equal means of information, the courts cannot undertake to set them aside.

Confederate currency was a commodity in trade, and the parties risked their judgment upon the future value of it, as they might have done upon any other commodity for sale in the community. But if it be treated in this case as a loan of money, Crump agreed to repay it by a certain time after the termination of the war, in the currency which that termination should bring with it, and onerous as the condition is, he must abide by it.

The views we have taken of this case are sustained by the decision in *Brachan* v. *Griffin*.* In that case Griffin agreed, in consideration of £25,000 paper money, to be paid him by Willis in the years 1780 and 1781, to pay the latter £2500 in specie in 1790. Griffin brought his bill in chancery for relief against Brachan, the assignee. Fleming, J., denying the relief, said: "The contract in this case was founded upon speculation on both sides. Griffin thought the present use of the money would be advantageous to him; and Willis, that it would be more beneficial to him to receive the specie at a distant day. The contract seems to have been fully understood by the parties, and to have been fairly entered into upon both sides." The language used by this judge is applicable to this contract, which, after all, was a mere speculation upon the paper currency of the Confederacy. Besides this case from Virginia, decided in 1803, there are recent decisions in that State and Maryland which

* 3 Call, 375.

uphold contracts of hazard similar in many respects to the one in this case.*

DECREE REVERSED, and the cause REMANDED to that court, with instructions to enter a decree for the complainant,

IN CONFORMITY TO THIS OPINION.

RAILWAY COMPANY *v.* RAMSEY.

Although consent of the parties to a suit cannot give jurisdiction to the courts of the United States, the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission.

Where the statutes of the United States authorizing a removal into the Circuit Court of the United States, of a cause brought originally in the courts of a State, require that the parties to the suit shall be citizens of different States, and where a cause has been removed from a State court to a Circuit Court, and all the papers in it have been afterwards destroyed by fire, and the parties then, by writing filed in the Circuit Court, admit that the cause was brought to the Circuit Court by transfer from the State court, *in accordance with the statutes in such case provided*, and—being now anxious apparently only to get to trial—simply ask and get leave to file a declaration and plea as substitutes for the ones originally filed and now destroyed,—in such case this court will, in the absence of all proof to the contrary, presume that the citizenship requisite to give the Circuit Court jurisdiction was shown in some proper manner; though it be not apparent on the mere pleadings.

ERROR to the Circuit Court for the Northern District of Illinois; the case being thus:

Several statutes authorize, as is known, the transfer or removal of causes, commenced in the State courts, to those of the United States.

First. Where the amount in dispute, exclusive of costs, exceeds $500, and when the suit is *against an alien*, or is *by a citizen of the State where it is brought, and against a citizen of*

* Boulware *v.* Newton, 18 Grattan, p. 708; Taylor *v.* Turley, 33 Maryland, p. 500.