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DAMAGES — APPLICABILITY OF GOLD CLAUSE RESOLUTION TO OBLIGATION TO DELIVER GOLD BULLION — PROOF OF DAMAGES — Defendant lessors and plaintiff realty company entered into a 99-year lease in 1890. The yearly rental was stipulated to be “grains of pure unalloyed gold,” provided however, that in lieu thereof the lessors at their option could require the delivery of its value (\$6,000) in such lawful currency as they designated. In 1933, upon the devaluation of the dollar and the regulation of gold by the Federal Government, the lessors gave the right to lessee to pay the amount of dollars the government was paying for newly-mined gold of the stated quantity

(10,158.75). Plaintiff paid that amount in excess of \$6,000 under protest. Subsequently it made a demand for the return of said sum. Defendant then demanded either payment in gold in London or forfeiture of the lease. Plaintiff filed bill in equity to enjoin the collection of the amount requested, and any attempted forfeiture of the lease on the part of the lessors in the event such sum is not forthcoming. *Held*, the government resolution abrogating gold clauses affected only obligations payable in money and not those payable in gold bullion. The provision in the lease for payment does not give the lessors a choice between gold and currency, but the obligation of the lessee is fixed absolutely, the lessors having merely a supplemental right. In response to the plaintiff's argument that the defendants suffered no damages because the government had requisitioned gold bullion, and therefore payment for the stipulated quantity would amount to but \$6,000, the court said that the intention of the parties when they contracted was that gold would be at its intrinsic value and not some artificial value subsequently placed upon it. Gold bullion is not liable to any greater limitations than other forms of property and, therefore, although subject to eminent domain proceedings, just compensation must be paid. *Emery Bird Thayer Drygoods Co. v. Williams*, (D. C. Mo. 1936) 15 F. Supp. 938.

This case presents for the first time the question whether the Gold Clause Resolution of June 5, 1933,¹ meant to apply to the situation where gold bullion was specified as the mode of payment.² The court declares that even in the absence of express language precluding application to obligations not payable in money, such a limitation is implied in the language of the resolution to the effect that "every obligation shall be discharged upon payment dollar for dollar." There is language which goes still further to support the court's position in the express definition of "obligation" as an obligation "payable in money." The contract in the instant case deals with a stipulated quantity of gold bullion, gold as a commodity; and the objectives of the legislation were to attain a more complete parity between different kinds of currency and to preserve equality in debt-discharging power.³ It has been argued in connection with stipulations for payment in foreign currency that despite the language of the resolution such stipulations will be declared invalid as an attempted evasion and contrary to the "spirit and intent" of the legislation.⁴ But such argument

¹ 48 Stat. L. 112, 31 U. S. C., §§ 462, 463 (1934).

² In the case of *Norman v. Baltimore & Ohio R. R.*, 294 U. S. 240, 55 S. Ct. 407, 95 A. L. R. 1352 (1935), the Court was careful to explain that the gold claims were not "contracts for payment in gold coin as a commodity or bullion, but were contracts for the payment of money." *Perry v. United States*, 294 U. S. 330, 55 S. Ct. 432, 95 A. L. R. 1335 (1935), deals with the ordinary gold coin clause, "payable in United States gold coin of the present standard of value."

³ See Dawson, "The Gold Clause Decision," 33 MICH. L. REV. 647 at 669, 677, 678 (1935).

⁴ See *City Bank Farmers Trust Co. v. Bethlehem Steel Co.*, 244 App. Div. 634, 280 N. Y. S. 494 at 496, 497 (1935) (also dissent by Justice Morrell). *Contra: McAdoo v. Southern Pac. Co.*, (D. C. Cal. 1935) 10 F. Supp. 953. For a discussion of the interpretation of statutes in regard to the evasion doctrine, see 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, 2d ed., § 580 (1904).

has been aptly described as an emotional approach on the part of the courts.⁵ The decisions handed down by the state courts after the Civil War in regard to the operation of the Legal Tender Act,⁶ on payment stipulations set out in gold bullion, were decided in the same way as was this case.⁷ However, if the practice of expressing debts in this manner became widespread, the court would probably find it to be an interference with the power of Congress to "regulate the value of currency." The court effectively disposes of the argument that this is a contract in the alternative and therefore when one alternative becomes impossible of performance the other will be enforced.⁸ The court declares that the whole object of the gold bullion clause should not be defeated by this reservation of an additional right. *Quaere*: Admitting that the reservation does not set up alternatives, does it not indicate that the parties intended the gold bullion clause as a stable measure of value in terms of currency rather than as a commodity?⁹ The last question discussed in the court's opinion raises the further problem: Did the defendants suffer any damages? The court held that the principal case does not come within the doctrine enunciated in *Perry v. United States*.¹⁰ Even if we assume that the court is right

⁵ See Nussbaum, "Multiple Currency and Index Clauses," 84 UNIV. PA. L. REV. 569 at 573 (1936). See opinion of Judge Hand supporting views set forth in that article in *Anglo-Continental Treuhand A. G. v. St. Louis Southern Ry.*, (C. C. A. 2d, 1936) 81 F. (2d) 11 (involving a foreign holder of an American bond). See discussion of this case in 84 UNIV. PA. L. REV. 661 (1936).

⁶ 12 Stat. L. 345, 532, 709 (1862). This act made the United States notes legal tender for all debts, public and private, within the United States except duties on imports and interest on government notes and bonds. However, the state courts held these "gold clauses" were invalidated by implication. For a comprehensive collection of these cases, see the annotation in 84 A. L. R. 1499 at 1503 (1933).

⁷ *Essex Co. v. Pacific Mills*, 14 Allen (96 Mass.) 389 (1867); *Sears v. Dewing*, 14 Allen (96 Mass.) 413 (1867); *Mather v. Kinike*, 51 Pa. 425 (1866); *Dutton v. Pailaret*, 52 Pa. 109, 91 Am. Dec. 135 (1866); *Frank v. Colhoun*, 59 Pa. 381 (1868); *Christ Church Hospital v. Fueschel*, 54 Pa. 71 (1867); *Bank of Commonwealth v. Van Vleck*, 49 Barb. (N. Y.) 508 (1867) (this case involved an agreement to repay a loan in gold by delivery of gold). Subsequently the Supreme Court arrived at the conclusion that gold clauses were not prohibited by implication from the Legal Tender Acts and were enforceable whether calling for gold coin or gold bullion. *Bronson v. Rodes*, 7 Wall. (74 U. S.) 229, 19 L. Ed. 141 (1868); *Butler v. Horwitz*, 7 Wall. (74 U. S.) 258, 19 L. Ed. 149 (1868).

⁸ There is substantial authority for the proposition enunciated by plaintiff that in the event a contract may be performed in one of two ways, and afterwards performance of one option becomes unlawful through no fault of the parties, then the contract is to be interpreted as though the forbidden alternative were never in it. See 3 WILLISTON, CONTRACTS, § 1961 (1931). CONTRACTS RESTATEMENT, § 469 (1932), limits the rule to those situations where "no contrary intention is manifested."

⁹ See Dawson, "The Gold Clause Decisions," 33 MICH. L. REV. 647 at 673 (1935): "the resolution invalidates all reference to 'gold' as a standard value and thus includes gold bullion as well as United States gold coin. The broad sweep of its provisions at this point is justified by the fact that gold, whether in form of coin or bars, is still the basic monetary medium and standard of reference of most of the world's currency systems."

¹⁰ 294 U. S. 330, 55 S. Ct. 432, 95 A. L. R. 1335 (1935). Plaintiff sued on

in its conclusion, that the Federal Government has the power to redeem gold coins in legal currency at their face value, but that gold bullion had to be redeemed at its intrinsic value,¹¹ we are still faced with the second argument of *Perry v. United States*, to the effect that, although a gold coin clause contains by implication a stipulation for gold value, nevertheless the bondholder failed to show a loss in purchasing power. Can it not be said that the contract in the principal case was not one to maintain the stability of the debt in terms of gold, but rather in terms of other commodities? A refusal to measure the value of gold in terms of purchasing power is justified by the practical consideration that in order to determine variations in purchasing power the courts would find themselves in what was not only a novel situation but one whose complexities and intricacies would be almost impossible of determination by judicial methods.¹² Relief Act of March 9, 1933 (48 Stat. L. 1) and the executive orders thereunder. in terms of purchasing power and encounter these difficulties, the court adopted the price offered by the secretary of treasury for newly-mined gold as a conclusive determination of the value.¹³

a Liberty Loan bond payable "in United States gold coin of the present standard of value." He demanded delivery of equivalent value of the quantity of gold represented by \$10,000 at the time the bond was issued. The Court held that there were no substantial damages and the case could not be maintained in the Court of Claims. The power to withdraw gold bullion from circulation and prohibit the domestic possession or the export and possession thereof is contained in the Emergency Banking Relief Act of March 9, 1933 (48 Stat. L.) and the executive orders thereunder.

¹¹ See *United States v. Campbell*, (D. C. N. Y. 1933) 5 F. Supp. 156, discussed in 47 HARV. L. REV. 479 (1934) and 32 MICH. L. REV. 405 (1934).

¹² See Dawson, "The Gold Clause Decisions," 33 MICH. L. REV. 647 at 660 (1935).

¹³ By § 8 of the Gold Reserve Act of Jan. 30, 1934 (48 Stat. L. 337) the Secretary of Treasury was authorized, with the approval of the President to purchase gold with coin or currency of the United States on terms and conditions fixed by him. Whether the government has under the power of eminent domain the power to requisition gold bullion at any price it might determine has not been decided. See 47 HARV. L. REV. 479 (1934), in which *United States v. Campbell*, (D. C. N. Y. 1933) 5 F. Supp. 156, is discussed.