Washington University Law Review

Volume 18 | Issue 4

January 1933

Contracts—Impossibility of Performance—Gold Payment Clauses

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Recommended Citation

Contracts—Impossibility of Performance—Gold Payment Clauses, 18 St. Louis L. Rev. 346 (1933).
Available at: http://openscholarship.wustl.edu/law_lawreview/vol18/iss4/7

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Comment on Recent Decisions

CONTRACTS—IMPOSSIBILITY OF PERFORMANCE—GOLD PAYMENT CLAUSES.—As a result of the issuance of paper money during the Civil War and the fear of greenback or free silver legislation, it has long been customary to insert in all bond issues a provision that they are payable in gold coin of the United States. A recent decision of the New York Supreme Court enunciates a principle which would make all these clauses meaningless. The bonds of the Libby's Hotel Corporation were payable "in gold coin of the United States of America of not less than the present standard weight and fineness as now fixed by law (notwithstanding any law which may now or hereafter make anything else legal tender for the payment of debts)." The property involved had been condemned by the City of New York, and the trustee under the bonds requested instructions whether it could accept payment in legal tender paper money in satisfaction of the mortgages. The case arose when there was an embargo on the export of gold, and when a presidential proclamation had withdrawn all gold and gold certificates from circulation, imposing heavy penalties on those who possessed more than $100 in gold and did not exchange it for paper money. *Held*, the bonds may be paid in any legal tender money. *Irving Trust Co. v. Hazlewood* (N. Y. 1933) 136 Commercial and Financial Chronicle (May 27, 1933) 3636.

Under the Civil War Legal Tender Acts the same question arose. The great majority of the state courts held that the United States, acting under the war power and the power "to coin money, regulate the value thereof", might validly provide that any legal tender money might be used to pay bonds or other obligations which were stipulated to be paid only in gold. *Appel v. Woltman* (1860) 38 Mo. 194; *Whetstone v. Colley* (1865) 36 Ill. 328; *Thayer v. Hedges* (1866) 26 Ind. 116; *Wood v. Bullens* (Mass. 1863) 6 Allen 516; *Rodes v. Bronson* (1866) 34 N. Y. 646; *Mervine v. Sailor* (1866) 52 Pa. 9; note (1896) 29 L. R. A. 512; note (1933) 84 A. L. R. 1499. Most of the state cases which denied the existence of the power in Congress did so on the basis that the particular contract which they were construing provided for the payment in gold coin (or gold) as a commodity rather than for payment in money. *Essex Co. v. Pacific Mills* (Mass. 1867) 14 Allen 389 (contract provided for the payment of a specific number of ounces of gold or silver as rent); *Dutton v. Pailaret* (1866) 52 Pa. 109 (gold coin of a specified weight and fineness specifically excluding legal tender). This dispute was settled by the decision of the Supreme Court of the United States in *Bronson v. Rodes* (1869) 7 Wall. 229 that the Legal Tender Acts were not meant to apply to such contracts. It must be admitted that the tone of the opinion is such that it would seem that the majority thought that Congress did not have the power to pass a statute which should apply to contracts providing for payment in gold which were made before the statute was passed. One justice concurred specially because he was in disagreement with this attempt to limit the power of Congress. Justice Miller filed a strong dissenting opinion. The majority went on the theory that such a gold clause made the contract really one for the delivery of a commodity

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rather than for the payment of money. The court did not realize that any such construction must result in rendering the instruments non-negotiable for they do not then possess the essential attribute of being payable in money. In reading this opinion it must be remembered that it was rendered by the same court which was soon to hold the Legal Tender Act unconstitutional as applied to prior existing contracts. *Hepburn v. Griswold* (1870) 8 Wallace 603. This decision was overruled in the *Legal Tender Cases* (1871) 12 Wall. 457. Since *Juilliard v. Greenman* (1884) 11 U. S. 421, the power of the United States even in times of peace to issue legal tender paper money cannot be doubted.

In the instant case the New York court distinguishes *Bronson v. Rodes* by pointing out that it applied to a situation in which two types of money were legally in circulation, while this is now no longer true. The Court chiefly relied on the very recent English case of *In Re Societies Intercommunale Belge d'Electricite-Fiest v. The Company* (Ch. Div. 1932) 174 Law Times 367, aff'd (Ct. of App. 1933) 148 Times Law Reports 344. This is unfortunate. In the first place the gold clause in that case was so badly drawn that the courts could and did construe it not to require payment in gold as a mere matter of construction of the language used. Secondly, the English Parliament is not hampered by any constitutional restrictions on its powers.

Under the law as it existed at the time the principal case was decided, it would seem that the New York Court could have obtained very nearly the same result by treating this as a case where performance of the terms of a contract was made impossible by subsequent legislation, giving the obligee a mere right to damages. Restatement of the Law of Contracts sec. 458. This right to damages would be valueless, since there was no legal use to which the gold might be put by which it would command more than the stipulated parity in paper money.

Congress has recently regularized this situation by passing a joint resolution specifically providing that paper money may be tendered in payment of all public and private debts whether or not they are so worded as to require payment in gold alone. However much one may quarrel with the economic wisdom or ethical morality of such a policy of national repudiation of contract rights, its legality would seem clear. The clause forbidding the impairment of the obligation of contracts only restricts state action. The due process clause of the Fifth Amendment cannot restrict Congress in the reasonable exercise of its powers granted by the Constitution. G. W. S., '33.

INTERNAL REVENUE—INCOME TAX—LIFE INSURANCE TRUSTS.—The settlor took out several policies of life insurance in favor of trustees. These trustees were to hold the proceeds of the policies for named beneficiaries. At the same time the settlor transferred certain securities to the trustees which they were to use as far as necessary to pay the premiums on the insurance policies and to distribute, in their discretion, any surplus to the beneficiaries of the policies. The trusts were irrevocable and no part of the proceeds of the policies could become part of the estate of the settlor. The settlor had waived all his rights to change the beneficiary of the policy. Subsequent to the creation of these trusts Congress enacted a statute which purported to re-

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