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Outline of the Gold Clause Cases

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The Gold Clause Cases, four in number, consumed three days in argument, January 8, 9 and 10, 1935, and were decided on February 18, 1935. Two of them,[1] decided together, the Norman case, which came from the Court of Appeals of New York, and the Missouri Pacific case, which the Supreme Court, on the Government's petition, took directly from the District Court in Missouri without awaiting decision by the Circuit Court of Appeals—a procedure rarely adopted—involved the gold clause in private obligations; specifically, in the Norman case, a coupon for $22.50 attached to a bond issued by the Baltimore & Ohio Railroad, and in the Missouri Pacific case, in which the Government intervened, an issue of bonds by the St. Louis, Iron Mountain and Southern Ry., part of the Missouri Pacific system. The other two, the Perry[2] and Nortz[3] cases, involved the gold clause in government or national obligations, or payment in gold coin or its equivalent; in the Perry case, a Liberty Loan Bond for $10,000, and in the Nortz case, "yellow backs" or gold certificates for $106,300. These two suits were instituted against the United States in the Court of Claims at Washington and the controlling questions in them were certified by that Court to the Supreme Court for answer, a practice permitted when the question is of sufficient importance. All four cases, and others similar in different parts of the country which never reached the Supreme Court, arose out of Public Resolution No. 10 of the 73d Congress, entitled "Joint Resolution to assure uniform value to the Coins and Currencies of the United States"[4] and certain other legislation, Executive orders, proclamations and Treasury rulings or regulations relating to legal tender, the hoarding and surrender of gold and gold certificates, and kindred subjects.

This Joint Resolution, approved June 5, 1933, not only declared all gold clauses to be void, but enlarged the legal tender provisions of

* Mr. MacLean supervised the preparation of the Government's briefs in all of the Gold Clause Cases. The principal argument in the Missouri Pacific Case was made by Attorney General Homer Cummings, with Mr. Stanley Reed assisting for the Reconstruction Finance Corporation. The Perry and Nortz cases were argued by Mr. MacLean. He also argued the Government's intervention in the Missouri Pacific Case at St. Louis, and prepared the petition to have the case brought directly to the Supreme Court. He was at that time Assistant Solicitor General of the United States.

[1] Norman v. Baltimore & Ohio Ry., U. S. v. Bankers' Trust Co., 294 U. S. 240, 55 Sup. Ct. 407, 79 L. ed. 885 (1935).

[2] Perry v. U. S., 294 U. S. 330, 55 Sup. Ct. 432, 79 L. ed. 912 (1935).

[3] Nortz v. U. S., 294 U. S. 317, 55 Sup. Ct. 428, 79 L. ed. 907 (1935).

[4] 48 Stat. 113 (1933), 31 U. S. C. A. §§462, 463 (1936).

the Agricultural Adjustment Act of May 12, 1933, so as to make them inclusive of all coins and currencies of the United States and of all kinds of debts and obligations, public and private.

It is said that gold clauses, such as we are considering here, have been in use for many years, and grew out of the differences in value of different kinds of money circulating at the same time, but the legal tender acts of the Civil War period, which made greenbacks or paper money legal tender for all purposes, with certain immaterial exceptions, stimulated their use and made it general.

This Resolution also, it will be noticed, not only declared gold clauses contrary to public policy, but prohibited their further use, a prohibition, it turns out, which has not been strictly observed. On that point, which is beside our present discussion, it is interesting to learn that some recent issues were found to contain such clauses—due to an oversight of the lawyers, it was said—and Wall Street was puzzled to know what to do about them, wondering whether their insertion would make the bonds invalid, but concluded that it would be sufficient to add a clause or rider calling attention to the prohibition. Although not disturbing to many of us, some idea of the potential significance of these clauses may at once be gathered from the fact that the total of private obligations containing them was estimated at 75 to 80 billion dollars and of public or government obligations at 20 to 25 billion, a conservative aggregate of one hundred billion, while gold coin, in which they were all payable, was actually 4 billion in this country, much of it in hiding, and eleven billion in the world. Devaluation of the dollar or reduction in its gold content to the extent proposed by the President meant in effect that every dollar of indebtedness payable in gold, or its equivalent, would be increased to $1.69, if gold clauses were maintained, and practically this meant bankruptcy on a national scale. This was the situation which impelled Congress, confronted by a deep depression, a banking collapse and a money panic, to adopt the Joint Resolution annulling all such clauses. It was also the background of the Government's legal position. Its brief, while strongly supported by authority, reviewed the economic and monetary crisis and to an unusual extent employed graphs and tables to demonstrate that complete financial disaster was likely to ensue unless the Resolution was upheld, not only to strengthen the presumption of constitutionality by showing that the action of Congress was not capricious, but to establish affirmatively a reasonable basis for Congressional determination that the gold clause is contrary to public policy, inconsistent with our present monetary system, under which all coins and currency are legal tender and of relatively equal value, and an obstruction to the exercise by Congress of its monetary and other powers. So impressive were the facts and figures that I convinced myself, at any rate, that the Supreme Court was virtually obliged to sustain the action of Congress, if adequate legal ground could be assigned, in order to save the country; and, from the narrow decisions in the Nortz and Perry cases, adopting the Government's secondary rather than its primary position, I am satisfied the argument *in terrorem* to some extent prevailed. This is by no means to admit, however, that the Government's position did not rest on broad constitutional and legal ground. In these cases, the attack on the Resolution did not deny the power of Congress to control the currency, to declare what should be legal tender, to call in the gold, to prevent hoarding in the flight from the dollar by prohibiting its export; but those who attacked the Resolution contended that they were entitled to be paid in lawful money the equivalent in value of what their contracts called for, and that the Resolution denied them due process, took their property without compensation, the right to payment in gold being a property right, and in part impaired the public debt, all contrary to the Constitution, which not only did not authorize, but prohibited these things. It is recognized that these are formidable positions and they were argued with great force and earnestness, particularly in support of the sanctity of the Government's wartime Liberty Bonds. But the Government's main position was stronger, in my opinion. We relied, of course, on a broad interpretation of the power of the Congress to coin money and regulate the value thereof, and of foreign coin, and gathered much support from certain of the Legal Tender Cases, of which there were several and which, in their day, were as important as the Gold Clause Cases became sixty years later. The Legal Tender Acts, which it is said saved the country in the Civil War, when the notion of coin or hard money was much stronger than it is today, made greenbacks legal tender for private debts and other purposes, with some exceptions. We had difficulty in distinguishing the case of *Bronson v. Rodes,*[5] which rested on the difference in the kinds of money then in circulation. This case was followed by *Hepburn v. Griswold,*[6] which held that the Legal Tender Act was invalid as to debts created prior to its passage, but *Hepburn v. Griswold* was overruled by the later Legal Tender Cases,[7] in which the Court fully sustained the Legal Tender Acts and made use of the expression "Whatever power there is over the currency is vested in Congress. If the power to declare what is money is not in Congress, it is annihilated."[8] The distinction was also pointed out that the declara-

[5] 7 Wall. 229, 19 L. ed. 141 (1868).
[6] 8 Wall. 603, 19 L. ed. 513 (1870).
[7] Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287 (1872) Juilliard v. Greenman, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. ed. 204 (1884).
[8] 12 Wall. 545, 20 L. ed. 310.

tion against laws which impaired the obligation of contracts, as the Resolution expressly did, applied only to the States and not to Congress and that the plenary power of Congress over currency could not and should not be diminished by provisions in private contracts; further, that this power could not be curtailed or surrendered by similar provisions in public obligations.

The opinion of the Court by Mr. Justice Strong in the *Legal Tender cases* and the concurring opinion of Mr. Justice Bradley, as well as the later opinion of Mr. Justice Gray in *Juilliard v. Greenman,* suggested that the Government's power in money matters was not only plenary, by virtue of the Constitution, but inherent, and this led to the taking by us of the advanced position that power over coinage and currency is an attribute of sovereignty, as much so in this country as any other.

Secondary positions were also taken, such as impossibility of performance, it being contended that the clauses in suit called for the payment in gold coin, an impossibility—it could not be had, none was available, and its possession would be unlawful since Congress had exercised its undoubted power of calling in all the gold and prohibiting its circulation. In the Nortz and Perry cases, it was also contended that no damage had been sustained or could be shown since legal tender currency would buy just as much and pay as many debts as gold coin—one dollar being equal to every other in value—and if a man had to give up a gold bond or gold certificate for other lawful money he was equally as well off as before, at least in this country, export of gold to any other being prohibited.

Among the cases cited against us were the Feist case,[9] decided on appeal by the House of Lords, and the Serbian and Brazilian bond cases,[10] decided by the Permanent Court of International Justice, in which gold clauses were held to require payment of an equivalent in value, but the decisions in these cases, as we pointed out to the Court, turned entirely upon the construction to be placed on these clauses in the absence of any statute intended to abrogate them, it appearing that the parties contracted in terms of a measure of value and not a mode of payment.

It was also pointed out, of course, that these cases conflicted with no legislative policy or prohibition such as that declared in the Joint Resolution of Congress, and that no question of power was involved. It was shown in the Government's brief that since 1928 Great Britain and various other leading countries had gone off the gold standard before this country; that, at the end of 1932, over thirty countries had adopted measures for the control of their foreign exchange, and that

[9] Feist v. Société Intercommunale Belge d'Electricité [1934] A. C. 161.
[10] Serbian and Brazilian Bond Cases, P. C. I. J., series A., Nos. 20/21 (1929).

their power to do so was unquestioned. For what it was worth, we were able to cite later the decision of a Netherlands Court upholding the validity of the Congressional Resolution.

The result has now passed into history, so far as gold clauses are concerned, but the decision of the Court was awaited in Washington and elsewhere with great anxiety. When the opinions were delivered, the famous little Supreme Court room was overflowing with Senators, officials and others interested, and I understand that the President himself, at the White House, followed the opinions closely.

The Chief Justice delivered the majority opinions with great vigor and was followed by Mr. Justice McReynolds, who opened his dissenting opinion with the ominous statement that "The Constitution is gone."

In the Norman and Missouri Pacific cases, the power of Congress to strike down gold clauses was fully sustained, the Chief Justice declaring at the close of the opinion: "We think that it is clearly shown that these clauses interfere with the exertion of the power granted to the Congress, and certainly it is not established that the Congress arbitrarily or capriciously decided that such an interference existed."

In contrast, the dissenting opinion begins with the declaration that "If given effect, the enactments here challenged will bring about confiscation of property rights and repudiation of national obligations."

In the Perry case, however, the Court took a different view as to government bonds, holding that the provision of the 14th Amendment that the validity of the public debt of the United States should not be questioned applied to bonds issued after, as well as before the Amendment, and that the Joint Resolution was unconstitutional as to preexisting Liberty Loan gold bonds. The Court, nevertheless, sustained the Government's secondary position and denied any recovery to the plaintiff, who was seeking, so the Court said, "not a recoupment of loss in any proper sense, but an unjustified enrichment."

A short concurring opinion by Mr. Justice Stone in this case also aroused great interest, because of his statement that it was unnecessary and undesirable for the Court to say that the obligation of the gold clause in government bonds was greater than in the bonds of private individuals, and because of his suggestion that all doubts might be transferred to the realm of speculation if Congress simply exercised its undoubted power of withdrawing the right to sue. This suggestion, it should be added, was soon followed by Bills withdrawing this right, but they evoked much criticism and were so modified as to permit the right if exercised by a set future date.

The main questions having been discussed in the bond cases, the Nortz case, on gold certificates, was disposed of in harmony with the government's contention that since its power of control over coin and currency was admitted and since Nortz had shown no actual damages and the Court of Claims was not authorized to award nominal damages only, he could recover nothing and the demurrer should be sustained; the Court laying aside the questions whether the government had ever consented to be sued upon its own currency as upon an express contract and whether the suit could be maintained in the Court of Claims as a taking of property without just compensation.

Mr. Justice McReynolds concluded his lugubrious dissent in all these cases with the prediction that "Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling." It is too close to the event to appraise future consequences, but so far it can fairly be replied that no such chaos has occurred and that even now the three great democracies of the world have turned toward monetary stabilization. What has been decided is that in a conflict between the obligation of private contracts and the power of Congress over the monetary system of the country, the private right must give way to public policy.