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## THE GOLD DECISIONS

JOHN DICKINSON †

The *Gold Decisions*,<sup>1</sup> so far as their major holding is concerned, are more significant from the standpoint of popular interest and the financial magnitude of the issues involved than from the standpoint of constitutional law. The earlier cases decided fifty years ago as a result of the Civil War legislation had narrowed to a comparatively fine point the legal and constitutional issues still remaining open in the private bond cases. Indeed some lawyers would have said that the exhaustive opinion in the last *Legal Tender Case*,<sup>2</sup> had foreclosed all the issues, at least so far as issues can be foreclosed by *dicta* of our highest Court. It is not going too far to say that on the precedents and from the standpoint of constitutional law, it would have been far more revolutionary for the Supreme Court to have decided against the validity of the recent legislation than as they did decide. The decision in the private bond cases was distinctly conservative in the sense of following out the logic of the earlier cases.<sup>2a</sup>

No doubt the reason why the reverse has seemed true to a considerable number of members of the profession, as well as to journalists and publicists, is because in the field of constitutional law many lawyers often permit themselves to indulge in a type of reasoning which they are not in the habit of applying in the field of private law. To take a private law example, it is an elementary principle, which laymen readily grasp, that in testamentary dispositions effect should be given to the intention of testators. Lawyers, however, realize, as laymen usually do not, that, without in any way under-

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† A. B., 1913, Johns Hopkins University; A. M., 1915, Ph. D., 1919, Princeton University; LL. B., 1921, Harvard University; author, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (1927); Assistant Secretary of Commerce; Professor of Law, University of Pennsylvania.

1. *Norman v. Baltimore & Ohio R. R.*, 55 Sup. Ct. 407 (1935); *Nortz v. United States*, 55 Sup. Ct. 428 (1935); *Perry v. United States*, 55 Sup. Ct. 432 (1935).

2. *Juilliard v. Greenman*, 110 U. S. 421 (1884).

2a. See Collier, *Gold Contracts and Legislative Power* (1934) 2 GEO. WASH. L. REV. 303.

taking to deny the general proposition, there are numerous instances where legally the testator's intention cannot be given effect because of some failure to comply with the forms of expression which are required in the interest of protecting the intent of all testators in the long run. The situation is substantially the same in connection with the equally elementary principle that contracts should be performed according to their tenor. Here again the layman does not always perceive that there are many contracts which the law does not and cannot recognize and enforce, because, in one way or another, to do so would be inconsistent with that good ordering of society upon which in the long run the security of all contracts depends. This is obviously true of gambling contracts, contracts to commit crimes and contracts based upon an immoral consideration. So stated, the qualification of the general principle would be recognized by every lawyer, but obviously, if such a qualification is recognized, we can no longer seek to draw any conclusions directly from a supposedly absolute premise that contracts ought to be given effect according to their tenor, or to argue, on that ground alone and without more, that the so-called "gold clause" in private contracts ought legally to be enforced in spite of contrary legislation. Rather, the question is whether such a clause is or is not in conflict with a duly exercised legislative power, existing as part of the machinery of government for the promotion of the common good.

Every lawyer is familiar with a variety of cases where, in spite of the obligation of contracts clause, contracts have been held to be constitutionally invalidated even by a subsequent exercise of legislative power. Leaving out of account the cases where as in the *Mississippi Lottery Case*,<sup>3</sup> this subsequent exercise of power has been based on professedly moral grounds, a familiar type of purely economic regulation which has always been held to invalidate prior inconsistent contracts is illustrated by the regulation of public utility rates. Where, in the absence of such regulation, contracts have been entered into for the purchase of the utility's service, and subsequently rate regulation is introduced, the contracts fall before the regulation.<sup>4</sup> Various other types of cases, where the same result was reached, are cited in Mr. Chief Justice Hughes' majority opinion in the *Baltimore & Ohio Bond Case*,<sup>5</sup> notably the so-called "free pass" cases.<sup>6</sup>

From this standpoint, the question involved in the so-called gold clause cases was simply whether or not the effect of such a clause inserted in con-

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3. *Stone v. Mississippi*, 101 U. S. 814 (1879).

4. *San Antonio v. San Antonio Pub. Serv. Co.*, 255 U. S. 547 (1921); *Fort Smith Spelter Co. v. Clear Creek Oil & Gas Co.*, 267 U. S. 231 (1925). Cf. also the following, cited in the Chief Justice's opinion: *New York v. United States*, 257 U. S. 591 (1922); *United States v. Village of Hubbard*, 266 U. S. 474, 477 (1925).

5. *Norman v. Baltimore & Ohio R. R.*, 55 Sup. Ct. 407, 416, 417 (1935), cited note 1, *supra*.

6. *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467 (1911).

tracts is subject to the constitutional power of Congress to regulate the value of money, or whether, by means of such a clause, the parties can remove their transactions from the reach of that constitutional power. The issue was placed clearly in this light in the opinion of the Court in *Juilliard v. Greenman*,<sup>7</sup> decided more than fifty years ago, and the argument was shortly afterward elaborated by a distinguished occupant of the Chair of Constitutional Law at the University of Pennsylvania, the late Judge J. Clark Hare, in his lectures on the Constitution. This argument had been previously forged upon the bench of the Pennsylvania Supreme Court<sup>8</sup> by Judge Strong, who afterwards was the spokesman for the Supreme Court of the United States in the *Legal Tender Cases*.<sup>9</sup> As stated by Judge Hare, the argument is as follows:

"The federal government has in general no power under the Constitution to vary a contract, or substitute a different mode of performance for that which the contract prescribes . . . Congress could not, for example, provide that a contract for merchandise might be satisfied by the delivery of kine . . . But when the act to be performed by the terms of a contract is the payment of money, the United States may say how and at what rate the payment shall be made.

"This results, first, from the authority which the Constitution has conferred upon Congress 'to coin money and regulate the value thereof;' and next, from the terms of the contract itself, which, in stipulating for money, must be understood as meaning . . . such money as shall be lawfully issued by the only power which has authority to issue money under the Constitution. An agreement to pay in silver dollars may, accordingly, be fulfilled by a payment in gold, because gold dollars are by the law of the land, for all the purposes of payment, equivalent to silver [citing *Mervine v. Sailor*, 5 Phila. 422, 426 (1864)] . . .

"It results from these considerations that the power of Congress over the currency is supreme. It has no limit, because none is set to it in the Constitution . . .

"That the discretion thus conferred on Congress may be exercised unwisely . . . cannot be denied; but it results from the necessity of having a means of interchange which shall be so fixed and certain that its legal value can be ascertained . . . without pausing to examine what it is intrinsically worth. And as this object cannot be attained without some common arbiter whose authority is recognized by all, the sovereign is everywhere entitled to declare what shall be money, and at what rate it shall be taken . . . Contracts for money must be presumed to be made with the full knowledge that this power exists and may be exercised . . .

"The parties might have placed themselves beyond the reach of Congress by stipulating for payment in wheat or bullion, . . . and submitting to the uncertainty, delay, and other inconveniences inseparable from such a course.

7. 110 U. S. 421 (1884).

8. In *Shollenberger v. Brinton*, 52 Pa. 9 (1866).

9. See note II, *infra*.

arable from such a mode of contracting; among which may be mentioned . . . the necessity for calling a jury to assess the damages . . . . If the question of value is left to the government by bargaining for money, . . . the parties must submit . . . This will be true, even when a particular kind of money is contracted for, so long as the contract is for lawful money of the country, *because the limitation will be rejected as inconsistent with the general design of the contract.* That a particular must yield to a general intent, when both cannot stand consistently with each other, or with the law, is a well-settled rule in the construction of grants and contracts; and no repugnancy can be greater than that which must result from an attempt to unite the different and irreconcilable attributes of money and merchandise, of bullion and coin . . . . [citing *Shoenberger v. Watts*, 5 Phila. 51, 56 (1862)].”<sup>10</sup>

I have quoted this argument of Judge Hare’s at length, because it seems so completely to anticipate the position taken by the Supreme Court in the *Baltimore and Ohio Bond Case*. In substance it amounts to this, that if the parties contract not for the delivery of a thing or a commodity, but for money, as they must do, for example, if they wish their contract to enjoy the legal incidents of negotiability, then they contract subject to the power of Congress to fix the value of money; and they cannot remove their contract from the exercise of this power by seeking to give their own definition of money, because to do so would be repugnant and inconsistent with the very nature of a contract for money, in the same way, for example, that it would be inconsistent with the nature of a contract of marriage to provide that the contract might be voluntarily terminated by either of the parties.<sup>11</sup>

The Supreme Court in its opinion refrained from examining the considerations affecting the economic wisdom or inexpediency of the recent gold legislation,—it accepted the full and untrammelled power of Congress to regulate the value of money. No doubt the Court, had it so desired, could have taken the position, as it has so frequently done in the case of regulatory legislation, both state and national, in recent years, that an admittedly existing power to be validly exercised must be exercised in a

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10. 2 HARE, AMERICAN CONSTITUTIONAL LAW (1889) 1233-1239. (Italics are the writer’s.)

11. In *Bronson v. Rodes*, 7 Wall. 229 (U. S. 1868), and *Trebilcock v. Wilson*, 12 Wall. 687 (U. S. 1871), together with a number of other cases decided about the same time, the Court had held that in spite of the Legal Tender Acts contracts to pay in gold coin were enforceable. This was explained in the opinions on the ground that those acts, by providing that certain classes of debts, *e. g.*, customs duties on imported goods, were not payable in legal tender notes but only in gold or silver coin, had in effect established a *dual system of two different currencies*, leaving parties free to choose in which they would conduct their transactions. This fact was pointed out both by Judge Hare (*op. cit. supra* note 10, at 1234, n. 1) and by Chief Justice Hughes in the majority opinion in *Norman v. Baltimore & Ohio R. R.*, 55 Sup. Ct. 407 (1935). The Chief Justice stated that those decisions “did not deal with situations corresponding to those now presented. . . . The rulings . . . were made when gold was still in circulation and no act of the Congress prohibiting the enforcement of such clauses had been passed.” At 412.

manner and within limits which the Court itself chooses to regard as reasonable. In the *Gold Cases* the Supreme Court has not taken that position, and instead has followed Marshall's test of simply asking whether the legislation has a reasonable relation to an end within the admitted power of Congress. "If," says Mr. Chief Justice Hughes, "it is an appropriate means to such an end, the decisions of the Congress as to the degree of the necessity for the adoption of that means, is final."<sup>12</sup> The wisdom of this course on the part of the Court seems obvious. The opposite course would not merely have required the Court to pass on the merits of competing economic considerations, a task which in many types of cases it can no longer avoid, but would have gone farther and in substance would have required it to make a choice between competing governmental policies of the utmost magnitude and in a field where policy and immediate expediency are far more controlling than any well-settled or accepted economic principles. The Court does point out, however, the injustice and economic dislocation which would result from enforcing the gold clauses in an economy where the debtor's receipts would come into his hands in the form of new dollars with a low gold content, while he would still be compelled to make payment of his gold clause obligations in old dollars with high gold content.<sup>13</sup>

12. *Norman v. Baltimore & Ohio R. R.*, 55 Sup. Ct. 407, 417 (1935).

13. An interesting, and what may possibly become an important, point is raised by the Court's citing as authority the "free pass" case of *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467 (1911), and by the reference in the footnotes of the opinion to the two cases of *New York Cent. & Hudson River R. R. v. Gray*, 239 U. S. 583 (1916), and *Calhoun v. Massie*, 253 U. S. 170 (1920). In the *Gray* case the plaintiff had made a map for the defendant railroad in consideration for which he had agreed to take \$150 in cash and \$600 in transportation. After he had received transportation amounting in value to about \$55, the defendant had refused to furnish further transportation under the contract on the ground that such a contract had become illegal under the amendment of June 29, 1906, to the Interstate Commerce Act [34 STAT. 584, 585 (1906), 49 U. S. C. A. § 1 (7) (1929)]. Plaintiff thereupon brought suit in a state court for the unpaid balance of the agreed price of the map, and the defendant set up the prohibition of the Act. A judgment for the plaintiff was, on appeal, affirmed by the United States Supreme Court, which said: "There is nothing in the Act to prevent or relieve a carrier from paying in money for something of value which it had long before received under a contract valid when made, even though the contract provided for payment in transportation which the passage of the Act rendered thereafter illegal." At 587. The same result was reached by the Court of Appeals of Kentucky in a case where plaintiff had conveyed to the defendant railroad a right of way through his farm in consideration of a free pass for life. *Louisville & Nashville R. R. v. Crowe*, 156 Ky. 27 (1913). After the passage of the 1906 amendments to the Interstate Commerce Act, the railroad refused to honor plaintiff's pass, and he brought this action for damages for the reasonable value of the land conveyed. A judgment for the plaintiff was affirmed on the ground of the "injustice of declaring a forfeiture of the unfulfilled contract by a release and discharge of appellant from all liability thereunder. . . ." At 30. The *Crowe* case has been mentioned with approval by the United States Supreme Court in *Ortega Co. v. Triay*, 260 U. S. 103 (1922) and has been followed in the case of *Bell v. Kanawha Traction Co.*, 83 W. Va. 640, 98 S. E. 885 (1919). An opposite result was reached in *Cowley v. Northern Pac. Ry.*, 68 Wash. 558, 123 Pac. 998 (1912), and in the Missouri case of *Pabst Brewing Co. v. Howard*, 211 S. W. 720 (Mo. App. 1919). In line with these latter cases is the decision of the Supreme Court in *Calhoun v. Massie*, *supra*. There the plaintiff, an attorney, had made a contract to prosecute certain claims of the defendant before the Court of Claims and Congress for a fee of fifty *per cent.* of the amount which should be collected. After plaintiff's services had been completed, Congress passed an act limiting fees in such cases to twenty *per cent.* Defendant refused to pay more than twenty *per cent.*, and plaintiff brought this action in the state court to recover the balance. A demurrer based on the Act of Congress was sustained, and on appeal to the Supreme Court of the United States the judgment was affirmed, the court saying that such

The significant and interesting thing about the *Gold Decisions* is not the holding in the *Baltimore & Ohio Bond Case*, which follows closely in the line of the precedents, but is rather the contrast between that case and the reasoning of the court in *Perry v. United States*,<sup>14</sup> the so-called *Liberty Bond Case*. On their facts, the two cases were substantially alike, in that both were suits by bondholders against the issuer of the bonds, seeking to collect the full gold value of the obligation in terms of present dollars. The difference was simply that in the one case the debtor was a private corporation, in the other it was the United States government. A comparison of the opinions discloses, however, a completely different method of approach on the part of the Court. In the case of the private bonds, the Court approached the issue from the standpoint of the proposition that when parties

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action by Congress might reasonably have been contemplated by the parties at the time of making of the contract, and assent thereto was accordingly an implied term. "Here, unlike *N. Y. C. & H. R. R. Co. v. Gray*, 239 U. S. 583, 587, a performance of a substitute for the obligation undertaken and later prohibited by the statute is impossible, because the act forbids the collection or receipt of any compensation in excess of twenty per cent." At 176. Decisions like that in *Omnia Commercial Co. v. United States*, 261 U. S. 502 (1923) are not directly applicable, since they involved suits against the government and held that where governmental action renders illegal the completion of a contract which one party has already wholly or in part performed, the government is not liable for the resulting loss to that party. Indirectly the decision is in point because it assumed that the plaintiff had suffered a loss which he could not recover from the other party to the contract, and because the opinion cited as authority the numerous English cases so holding. The doctrine of the group of decisions represented by the *Gray* and *Crowe* cases constitutes an effort, supported by Williston on equitable grounds [CONTRACTS (2d ed. 1922) §§ 1972, 1976], to get away from the traditional doctrine of quasi-contracts that where a contract has been performed in whole or in part on one side and performance on the other becomes impossible, there can be no recovery for the value of what has been performed. *Jordan v. McCammon*, 56 Ohio St. 790, *rev'g* *McCammon v. Peck*, 3 Ohio Dec. 232 (1895); *Pinkham v. Libbey*, 93 Me. 575, 45 Atl. 823 (1900), and numerous English cases, including those cited in *Omnia Commercial Co. v. United States*, *supra*. Compare, for example, *Tweedie Trading Co. v. McDonald Co.*, 114 Fed. 985 (1902) with *Fordham v. Cooper*, 70 Colo. 529, 202 Pac. 1086 (1921), and *McGillycuddy v. Los Verjels Land & Water Co.*, 213 Cal. 145, 2 P. (2d) 19 (1931). In the *Tweedie* case, plaintiff had paid defendant a sum of money for the transportation of laborers from Barbadoes to Panama, but before the transportation was performed, it became impossible to carry out the contract because of the issue of a government regulation forbidding the exportation of laborers. Held, that the plaintiff could not recover the amount paid. On the other hand, in *Fordham v. Cooper*, where a tenant performed labor upon a dwelling house belonging to his landlord in consideration of deductions to be made from his future rent, and afterward the health authorities condemned the premises so that the tenant could no longer occupy them, it was held that the tenant *could* recover the reasonable value of his labor. So also in the *McGillycuddy* case, where the plaintiff contracted with the board of directors of the defendant corporation to serve as general manager of the corporation and agreed to take his compensation in new stock of the corporation, and subsequently the state corporation commission refused to permit the corporation to issue the stock, it was held that the plaintiff could recover the reasonable value of his services. Whatever may be thought of the quasi-contractual cases generally, it would certainly seem provocative of litigation and unsettling to the stability of transactions to hold that a subsequent exercise of the police power, while effective to terminate prior contracts, operates to give rise to equitable actions to readjust the position of the parties. The decision in the *Baltimore and Ohio Bond Case* would have little beneficial economic effect if, while holding that the bondholder could not recover the present value of the gold dollars promised him by the contract, he could still recover in an equitable action the difference in present value between what he gave and what, under the new legislation, it is lawful for him to receive. It does not seem likely that the courts will permit themselves to be drawn into any such calculus of relative values. In this connection the passage above quoted from the opinion in *Calhoun v. Massie* would seem to leave the Court a clear way out.

14. 55 Sup. Ct. 432 (1935).

contract for money they do so in contemplation of and subject to the right of Congress to regulate the currency. In the *Liberty Bond Case*, on the other hand, the Court commenced by considering what it called "the binding quality of the obligation" of the debtor, *i. e.*, the government. Admitting, as before, the full power of Congress to determine the currency of the country and therefore to regulate the value of money, the Court at once departed from this method of approach and made nothing of the fact that government bonds, like private obligations, are contracts to pay in money. Instead, it emphasized the fact that they are obligations to pay money of a particular standard and having a particular gold content, and then proceeded to argue that any change in the monetary system by Congress which would permit the government to pay in money of a different standard and having a lower gold content would amount to repudiation of the obligation. In other words, the emphasis of the Court shifted from regarding an obligation as an obligation to pay in money to considering an obligation as one to pay a particular kind of money. From this standpoint, payment in a kind of money having a lower gold content was represented in strong language as repudiation.

The reason for this shift in the Court's position where government bonds were concerned seemed to be a fear that a different holding would open the door to an admission of the government's power to scale down arbitrarily the face amount of its debts. Thus the Court said:

"If the terms of the government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to the amount to be paid may also be repudiated."<sup>15</sup>

It does not seem, however, that such is the necessary conclusion. When Congress alters the standard of the currency, then to permit the government to pay in currency of the new standard is simply to place it on a par with all other debtors. It can pay in currency of the reduced standard simply because all other debtors have the same privilege. This is obviously a very different thing from permitting the government to scale down the face amount of its obligations. If it were permitted to take the latter course, it could do so for its own benefit exclusively and without the nation-wide readjustments flowing from an alteration in the currency system. It could, in other words, derive a special discriminatory advantage for itself at the expense of its own creditors, without reference to any uniform general system of currency and credit revision. To prohibit such discriminatory action as repudiation may well be sound; but it does not in any sense require, as the Court suggests in the passage quoted, that the government, as one debtor among many, should be prohibited from maintaining itself on a par with other debtors and should instead be compelled to assume a position

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15. *Id.* at 435.

of special and peculiar disadvantage, as the Court's argument requires it to do.

If in fact the government, because it is the government, is thus incapacitated, as the Court holds, from taking advantage of a revaluation of currency in the same way as other debtors, the results are serious from both a logical and a practical point of view. From a logical point of view, it means substantially that the money in which government obligations are to be paid is a different kind of money from the new currency in which private obligations may legally be discharged, and which, the court admitted, was intended to provide a single and uniform monetary system. There is thus established precisely such a dual system of two currencies existing side by side as the Court in the *Baltimore and Ohio Case* held that Congress might constitutionally reject in favor of a single uniform system, and upon the rejection of which the Court based its distinction of that case from *Bronson v. Rodes*.

But the practical consequences of the Court's position are even more serious. In the *Baltimore and Ohio Case* the Court pointed out, as already indicated, that the receipts of private debtors come into their hands in the form of the new currency and that it would therefore be onerous in the extreme to compel payment in the old currency of higher standard. Precisely the same argument applies to the government. Logically applied, it would amount in plain figures to increasing by about three-fourths the principal amount of the national debt and the annual debt service in the same proportion. Possibly such a result might be welcomed as a potential deterrent to currency devaluation; but in view of the Court's frank recognition in the *Baltimore and Ohio Case* of the plenary power of Congress to regulate the value of money in its discretion, it would hardly seem that such a consideration should influence the judicial result.

It would not have been impossible for the Court to have found ways for the government as a debtor to preserve its parity of position with other debtors without, at the same time, opening the door to a special repudiation of its own obligations. One way, among others, which might be suggested would have been to recognize frankly the distinction between the essentially private-law position of government as a business entity when borrowing and lending money like private business entities, and on the other hand its public sovereign capacity which it exercises when it undertakes to legislate for the general good by regulating the currency. Such a distinction would permit the sovereign power to deal with governmental debts on the same footing as other debts, while still prevented from preferring itself specially if that was thought undesirable. This distinction exists in all civil law countries and, while it has never been fully recognized in the common law, so that its acceptance might possibly open the door to a revision of some of

our conceptions, we already have the basis of it well established in our recognized distinction between the governmental and nongovernmental functions of public bodies, and the conception, if applied merely by way of analogy, need not necessarily be extended to the point of inconvenience.

In not choosing to take this or some similar course, and in holding the government without power to alter the monetary standard in which its own obligations are payable, the Court was, however, unwilling apparently to bring about the tremendous increase in the fiscal burdens of the nation which the logic of its position might be thought to entail. It therefore sought and found another and different way of escape from the difficulty. This was by holding that in spite of the legal obligation of the government to pay its bonds in currency of the old standard, nevertheless the plaintiff in the case at bar had not shown that the failure to perform the obligation had resulted in any actual damages entitling him to recover. The case in other words was one of *injuria absque damno*. This result was reached on the ground that in view of the legislation withdrawing gold coin from circulation and the consequent absence of a free domestic market for gold, the plaintiff's damage did not consist in the monetary value of the excess gold of which he was deprived by the government's refusal to honor its obligation, but only in such loss as he might have sustained through the lower purchasing power in the domestic market of the new dollar as compared with the old. The court held that he had neither pleaded nor proved such loss of purchasing power, saying:

"Plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever. On the contrary, in view of the adjustment of the internal economy to the single measure of value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements, the payment to the plaintiff of the amount which he demands would appear to constitute, not a recoupment of loss in any proper sense, but an unjustified enrichment."<sup>16</sup>

This language would appear to place the denial of recovery on no broader or more general ground than defect of proof by Mr. Perry. The door is thus left open to future suits in which plaintiffs may attempt to show that the rise in prices which has been proceeding since the gold legislation and may be expected to proceed still farther has resulted in that loss of buying power which the court appears to recognize as constituting actual damage. Whatever the fate of such suits may be, it is not to be expected that the ingenuity of the profession will ignore so promising an opening for litigation.

There is a further field of possible litigation opened by the doctrine of actual damages which the court has laid down. This is in connection

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16. *Id.* at 438.

with the use of dollars for the purchase of foreign exchange. The reduction in the gold content of the dollar, however indirect its effect on internal purchasing power in the domestic markets, had a very direct and immediate effect in increasing the number of dollars needed to purchase a given amount of any foreign currency. The Court in considering the *Perry Case* declined to recognize an element of damage in the fact that more new dollars were needed to buy gold for export because, as it pointed out, exports of gold had been placed under license, and therefore presumably Mr. Perry might have been unable to export the gold even if he had bought it. But this would not be true, of course, of the purchase of foreign exchange to make settlements or purchases abroad. Here the bond-owner, by being compelled to take payment of his principal or interest in the new dollars which he expected to exchange for foreign currency, is limited to receiving a smaller amount of such currency than would be the case if he received the larger number of new dollars to which the gold content of the old dollars due him would have entitled him. There is to this extent actual damage and therefore at least ground for arguing that on the Court's theory he would be entitled to a recovery.

The issue of such attempts to apply in actual litigation the views suggested by the court is uncertain, and will no doubt have to be worked out from case to case, unless Congress should take refuge, as a flood of litigation might very well impel it to do, in the more or less unpalatable course of falling back on the immunity of the sovereign and closing the Court of Claims to cases of this sort. There is however one class of claims as to which even this course would not be effective, and which are directly invited by the unequivocal holding of the Supreme Court that the United States is under a legal duty to pay its obligations in dollars of the standard provided in their tenor. I refer to the claims of foreign nationals who are holders of such bonds.

The Court, after stating that "The right to make binding obligations is a competence attaching to sovereignty,"<sup>17</sup> continues as follows:

"This is recognized in the field of international engagements. Although there may be no judicial procedure by which such contracts may be enforced in the absence of the consent of the sovereignty to be sued, the engagement validly made by a sovereign state is not without legal force, as readily appears if the jurisdiction to entertain a controversy with respect to the performance of the engagement is conferred upon an international tribunal."<sup>18</sup>

While admittedly there is no international tribunal which could take jurisdiction over such a controversy without our consent, nevertheless the admission of the validity of the claim by our highest court lays the strongest

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17. *Id.* at 436.

18. *Id.* at 412, n. 3.

possible basis for its presentation against the United States through diplomatic channels by foreign countries on behalf of their nationals who hold our bonds. While we are not subject to the jurisdiction of any international tribunal, we are still in diplomatic relations with other countries, and so long as such relations exist these countries are entitled to claim their lawful rights through diplomatic channels even though no legal procedure exists for enforcing them. Whether or not the gold clause in our government bonds constitutes under international law an obligation superior to the authority of Congress to regulate the currency is still an open question, as it was an open question under our municipal law before the decision of the *Perry Case*. The decisions of the Permanent Court of International Justice,<sup>19</sup> in the case of the Serbian and Brazilian bonds, which are cited in Mr. Justice McReynolds' dissenting opinion, are by no means conclusive, because of important differences in essential facts. Although the question under international law would thus seem to be open, there is certainly a difficulty thrown in the way of our appealing to it by the broad and seemingly unequivocal language with reference to our national law in the *Perry* decision. The foreign holders can claim as entitled under our own law, and there is no such obstacle in the matter of proof of damages as may serve to bar our own citizens, because the decline of the exchange value of the dollar affords a readily computable measure.

It is the considerations that I have just been advancing which lend special point and importance to the separate opinion of Mr. Justice Stone in the *Perry Case*, with a few excerpts from which I shall conclude:

" . . . it is unnecessary, and I think undesirable, for the Court to undertake to say that the obligation of the gold clause in government bonds is greater than in the bonds of private individuals, or that in some situation not described, and in some manner and in some measure undefined, it has imposed restrictions upon the future exercise of the power to regulate the currency. . . . I therefore do not join in so much of the opinion as may be taken to suggest that the exercise of the sovereign power to borrow money on credit, which does not override the sovereign immunity from suit, may nevertheless preclude or impede the exercise of another sovereign power, to regulate the value of money; or to suggest that, although there is and can be no present cause of action upon the repudiated gold clause, its obligation is nevertheless, in some manner and to some extent not stated, superior to the power to regulate the currency which we now hold to be superior to the obligation of the bonds."<sup>20</sup>

19. Publications of the Permanent Court of International Justice, Series A, Nos. 20/21 (1929). In both these cases the debtor country issued, specifically for sale abroad, obligations payable *not in its own currency* but in the currency of a particular foreign country, *i. e.*, the French franc. The terms of the obligation specified the *gold franc*. The issue was whether, when France altered the value of the franc, the amount of the obligations fluctuated correspondingly. Obviously this seems a different situation from the issuance domestically of obligations of a country in its own currency over which it has sovereign control.

20. *Perry v. United States*, 55 Sup. Ct. 432, 438, 439 (1935).