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Lease—Gold Clause—Payment

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Although the obiter dictum in an early Supreme Court case[13] would seem to create precedent for holding unconstitutional any statute which permits title to pass before the payment of full compensation, the opinions in two other cases[14] would provide adequate and reliable precedent for the decision of the principal case.

From the practical as well as the strictly legal standpoint, therefore, it is submitted that the court's decision in *Hessel v. A. Smith & Co.* might safely be relied upon in future cases involving the same point.

F. L. K.

LEASE—GOLD CLAUSE—PAYMENT—[Federal].—In the case of *Emery Bird Thayer Dry Goods Co. v. Williams*[1] the plaintiff was lessee under a 99-year lease[2] providing for payment of rent, after the seventh year of the lease, in quarterly installments of 139,320 grains of "pure unalloyed gold," the lessor having the right to demand, in lieu of such gold payment, the sum of $6,000. Gold payments were subsequently rendered illegal by Resolution of Congress[3] and impossible by Executive Order requiring the surrender of gold to the Government.[4] The lessor insisted that the lessee make payments of $10,158.75[5] in currency, which he claimed to be the true currency equivalent of the gold specified. The lessee made such payments under protest and sued for the return of the excess of each payment[6] above $6,000. The lessor asked in a cross-bill for forfeiture of the lease. The court found against the lessee, holding that the lease required payment of $10,158.75 as the value of the gold at the time of payment. It further said that the lessor was not entitled to forfeiture of the lease and that the Joint Resolution of Congress did not apply to the lease in question.

Congress, in its Joint Resolution,[7] while it stated that "Every provision contained in or made with respect to any obligation which purports to give

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13. Garrison v. City of New York, 21 Wall. 196, 204, 22 L. ed. 612 (1874).
14. Crowner v. Watertown & R. R. Co., 9 How. Pr. 457 (N. Y., 1854); Sweet v. Rechel, 159 U. S. 380, 16 S. Ct. 43, 40 L. ed. 188, 199 (1895).

1. 15 F. Supp. 938 (D. C. W. D. Mo., 1936).
2. The lease in question was executed April 11, 1890.
3. 48 Stat. 113, 31 U. S. C. A. sec. 463 (June 5, 1933).
4. Executive Order, No. 6260, 12 U. S. C. A. sec. 95 note (Aug. 28, 1933); see also 48 Stat. 1, 12 U. S. C. A. secs. 95, 95a.
5. This figure may be arrived at as follows: (1) By dividing 139,320, the number of grains specified in the lease, by 13.71428, the number of grains of pure gold in the now-devalued dollar; (2) By dividing 139,320 by 480 to obtain the number of ounces in the number of grains specified and multiplying by $35.00, the price of newly-mined gold. See World Almanac (1936) 285; Bakewell, *Past and Present Facts about Money in the United States* (1936) 117-120; Warren and Pearson, *Gold and Prices* (1935) 153-175; Proclamation of Jan. 31, 1934, reducing the weight of the gold dollar, 48 Stat. 1730, 31 U. S. C. A. sec. 821 note; 48 Stat. 51, 31 U. S. C. A. sec. 821 and note; Gold Reserve Act, 48 Stat. 337, 342, 31 U. S. C. A. sec. 821 (1934).
6. Payments in question are those of Jan. 1, April 1, July 1, and Oct. 1, 1934, and Jan. 1, 1935.
7. 48 Stat. 113, 31 U. S. C. A. sec. 463 (June 5, 1933).

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the obligee the right to require payment in gold . . . is declared to be against public policy," provided for the discharge in currency of only those obligations which are "payable in money of the United States."[8] There is no method provided for the discharge of an obligation, like that in the instant case, payable in grains of pure gold.[9] Since this stipulation cannot be complied with literally,[10] some other solution of the rights of the parties must be found.

One of the lessee's contentions was that he should be allowed to take advantage of the lessor's alternative right[11] to demand $6,000. There are no American cases to support such a view.[12] Nor can the lessor's request for forfeiture of the lease be supported. Where a contract calls for payment in a specific kind of property, upon the failure of the party bound to deliver that kind of property he is liable to pay its value in money.[13] Furthermore, as the court said in the instant case, "Equity will relieve against forfeiture of a lease for failure to pay the stipulated rent when due when compensation for that failure can be and has been made. . . ."[14]

The only satisfactory solution is to require the lessee to pay the value of the bullion at the time and place of payment.[15] The court also reached this

8. The word "obligation" was defined in Congress' Joint Resolution as "an obligation . . . payable in money of the United States." 48 Stat. 113, 31 U. S. C. A. sec. 463 (1933).

9. See Dawson, The Gold Clause Decisions (1935), 33 Mich. L. Rev. 647, 669. In the Gold Clause cases the obligations were payable in gold coin and therefore were obligations payable in money of the United States under the Joint Resolution. Norman v. Baltimore & O. R. R. Co., 294 U. S. 240, 55 S. Ct. 407, 79 L. ed. 885, 95 A. L. R. 1352 (1935); Nortz v. U. S., 294 U. S. 317, 55 S. Ct. 428, 79 L. ed. 907 (1935); Perry v. U. S., 294 U. S. 330, 55 S. Ct. 432, 79 L. ed. 912 (1935).

10. Supra, notes 3 and 4. There are certain exceptions to the required delivery of gold to the Treasury, but the gold in the instant case does not fall within them. See Order of the Secretary of the Treasury of Dec. 28, 1933, requiring delivery of gold to the Treasurer of the U. S., as amended by Orders of Jan. 11, 1934 and Jan. 15, 1934.

11. It is difficult to follow the court when it says in the opinion that the lessor did not have alternative rights, but that the right to require payment of $6,000 was an "additional, supplemental right," especially since the lessor for years before 1934 had been satisfied by payments in money and had not chosen to rely on his other right, to demand gold.

12. Factual situation must be distinguished from where obligor, not obligee, has the option and, upon his failure to perform in one way, he is bound by the other alternative as in Welsh v. Welsh's Estate, 148 Minn. 235, 181 N. W. 356 (1921); Rapid Safety Fire Extinguisher Co. v. The Hay-Button Mfg. Co., 75 N. Y. S. 1008 (1902). See Restatement, *Contracts* (1932) sec. 469.

13. New York News Publishing Co. v. National Steamship Co., 148 N. Y. 39, 42 N. E. 514 (1895); Delafield v. S. F. & S. M. Ry. Co., 5 Cal. Unrep. 71, 40 Pac. 958 (1895); Goodwin v. Heckler, 252 Pa. 337, 97 Atl. 475 (1916). To require literal compliance would be hard and unconscionable. American Chicle Co. v. Somerville Paper Box Co. 50 Ont. 517, 64 D. L. R. 547 (1921), cited in Nebolsine, The Gold Clause in Private Contracts (1933) 42 Yale L. J. 1051, 1079.

14. See Gould v. Hyatt, 154 N. E. 173 (Ohio App., 1926); Cedrom Coal Co. v. Moss, 230 Ala. 32, 159 So. 225 (1935).

15. Holyoke Water Power Co. v. American Writing Paper Co., 9 F. Supp. 451 (D. C. Mass., 1935). On appeal it was held that the indenture in this

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conclusion, saying that any statute which required surrender of gold for anything less than just compensation[16] would be "clearly void and without effect." Just compensation, it said, is the true value of the grains of gold, which is $10,158.75, due to governmental reduction in the number of grains of gold to the dollar, and not a "fictitious, artificial value" set by the Treasury. But, if the lessor were paid in gold, he would be required to turn it over to the Treasury[17] for the value set by the Treasury[18] for gold circulating in non-compliance with its orders. The price that the lessor would obtain for 139,320 grains of gold, under present rates, would be not $10,158.75, but $6,000.[19] This would seem to be the "true" value of the gold and it furthermore corresponds to the alternative sum which the parties mentioned in the lease. If the lessor were allowed more, there would appear to be "unjust enrichment"[20] by reason of the governmental regulations.

S. H. W.

LOTTERIES—MOVIE "BANK NIGHTS"—OPINION OF ATTORNEY GENERAL—[Missouri].—Business men have long recognized that any sales promotion scheme which embodies chance as an element is almost certain of success. Chance as the main theme of promotion schemes has had an endless number of variations. The latest variation to be challenged is known as "Bank Night." Under this plan a theater operator advertises a prize to be awarded each week. A registration book is set up at or near the theater in which anyone, without charge, may write his name and address opposite a number. On the advertised night, at a specified hour, one number is drawn from a

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case came within the Joint Resolution and was hence dischargable "dollar for dollar." 83 F. (2d) 398 (C. C. A. 1, 1936). The Supreme Court has granted certiorari in this case. 4 U. S. Law Week 144 (1936).

16. This involves interpretation of Article V of the United States Constitution. The validity of the Treasury's price for gold circulating despite legislation demanding its surrender was not challenged in the instant case and has not as yet been ruled on. Just compensation for gold surrendered to the Treasury would appear to be currency having a purchasing power equivalent to that of the gold before its possession was ruled illegal. This would involve a consideration of the effect of devaluation upon the price structure. The difficulty of determining the exact amount of price increase caused by devaluation and then of determining just what loss would be borne by one who had turned in his gold because of Treasury orders is readily seen. See Perry v. U. S., 294 U. S. 330, 354-358. The argument also suggests itself that gold lawfully in use has a market value different from the official price of newly-mined gold and from the Treasury price of gold circulating in non-compliance with regulations.

17. See statutes and Executive Order cited in note 4, supra. Also, Orders of the Secretary of the Treasury of Dec. 28, 1933, Jan. 15, 1934, Jan. 17, 1934, relating to the delivery of gold.

18. Instructions sent by the Secretary of the Treasury on Jan. 17, 1934, concerning gold wrongfully withheld.

19. This figure is arrived at as follows: Divide 139,320 by 480, the number of grains in a troy ounce of gold, and multiply by $20.67, the price set by the Treasury for gold circulating in non-compliance with its orders under Order of Jan. 17, 1934.

20. See Perry v. U. S. 294 U. S. 330, 354-358.

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