line should follow the main channel of navigation, which the court found to have a well-defined existence both in the river and in the bay. The court admitted that there was force in Delaware's argument based on inconvenience, but it pointed out that the inconvenience would be greater if the *thalweg* were not followed consistently through the river and the bay alike, because it would result in a crooked line, conforming to the indentations and windings of the coast, but without relation to the needs of shipping. On the contrary, if the line were located in the *thalweg*, it would "follow the course furrowed by the vessels of the world."

In a learned opinion Mr. Justice Cardozo reviewed the doctrine and the jurisprudence concerning the location of boundary lines in navigable rivers, and concluded that "international law today divides the river boundaries between states by the middle of the main channel, when there is one, and not by the geographical centre, half way between the banks." He added: "The underlying rationale of the doctrine of the *thalweg* is one of equality and justice. 'A river,' in the words of Holmes, J. (*New Jersey* v. *New York*, 283 U. S. 342) 'is more than an amenity, it is a treasure.' If the dividing line were to be placed in the centre of the stream rather than in the centre of the channel, the whole track of navigation might be thrown within the territory of one state to the exclusion of the other." Adverting to the development of the *thalweg* rule from an age when it lacked precision and fixity, he declared that there "has emerged out of the flux of an era of transition a working principle of division adapted to the needs of the international community. Through varying modes of speech the law has been groping for a formula that will achieve equality in substance, and not equality in name only. Unless prescription or convention has intrenched another rule, we are to utilize the formula that will make equality prevail." It was, he thought, the application of this formula which equality, justice and convenience required in the present case. It is not easy to see how the soundness of his reasoning could be successfully challenged.

James W. Garner

THE "GOLD CLAUSE" DECISION IN RELATION TO FOREIGN BONDHOLDERS

The decision of the Supreme Court of the United States in Perry *v.* United States, handed down on February 18, 1935, raises several interesting problems in international law. The issue before the court was the constitutionality of a joint resolution of Congress, adopted June 5, 1933, in accordance with which every provision contained in a contractual obligation which purported to give to the holder of the obligation a right to require payment in gold or in a particular kind of coin or currency was declared to be "against public policy," and such provisions were forbidden in future contracts. Further, every obligation, past or future, whether containing such a provision or not, should be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment was legal tender for public and

https://doi.org/10.2307/2190499 Published online by Cambridge University Press

private debts. The term "obligation" was defined to include both obligations *of* and *to* the United States, excepting currency.

The Supreme Court, after having decided at the instance of another plaintiff that the law was constitutional with respect to private contracts between citizen and citizen, took the position in Perry's case that it was beyond the power of Congress by legislative fiat to set aside the obligations of the United States to the holders of government bonds calling for payment in gold. In making payment in legal tender instead of gold, the court held, the United States was guilty of breach of contract with Perry and was due to pay damages for the breach. Inasmuch, however, as the plaintiff, in view of the purchasing power of the legal tender that had been paid to him in place of gold, could not show damage to the extent claimed, or any actual damage, his suit before the Court of Claims must necessarily fail, since that court had no jurisdiction to entertain an action for nominal damages.

What is the inference to be drawn with respect to foreign bondholders who might bring their claims before the Court of Claims in reliance upon their ability to show damages in their case? Confessedly there has been breach of contract. We may put aside for the moment the question whether a foreign government which took up the claim of its citizen might not present a case in equity for specific performance, since the same considerations which would support an equitable claim would appear to indicate a claim for damages in a suit at law. Proceeding then upon the ground that damages are due, how are such damages to be determined? In the case of the plaintiff Perry the court held that his damages could not be assessed "without regard to the internal economy of the country at the time the alleged breach occurred." The demand of Perry for the "equivalent" in currency of the gold coin called for by the contract could not mean more than "the amount of money which the promised gold coin would be worth to the bondholder for the purposes for which it could legally be used," having in view the control of export and foreign exchange and the restricted domestic use. In the case of the foreign bondholder none of these legal restrictions upon the use of gold apply. The provisions of his own local law do not enter into the question. Hence his damages should be measured upon a different basis from that applied to the domestic bondholder.

Two standards appear to be applicable as a measure of the damages due to the foreign bondholder. The first would be based upon the conception of the gold clause as a device for insuring that money borrowed shall be paid back in money as good as that loaned. Taking money as a medium of exchange, having value by reason of its purchasing power of a given quantity of goods, to pay back money "as good as that borrowed" would call for the determination of the purchasing power of dollars at the time the foreign bondholder bought his bond. Supposing the bonds to have been paid off in 1933, what was the relation between the purchasing power in Great Britain or France of dollars paid for a bond acquired, for example, in 1923 and

https://doi.org/10.2307/2190499 Published online by Cambridge University Press

the purchasing power of the same number of dollars in 1933? The difference, if any, would be the amount due by the United States in damages. By this standard the United States would, of course, be entitled to pay in legal tender fewer as well as more than the number of dollars called for by the bond in case the purchasing power of the dollar had increased rather than fallen in terms of the domestic market of the foreign bondholder. In principle, there would seem to be no reason why the foreign bondholder should profit by the advance in the value of gold due to the demoralization of his own national currency. For if that were the case it might be argued that the United States had an equal right to depreciate its own currency; and the foreign bondholder, having bought his bond in the open market, must take his chances of devaluation along with citizens, provided only that the legal tender given him in place of gold had not lost its old purchasing power.

Stated thus even in its simplest terms, this first standard of determining damages is seen to be so difficult of application as to be ruled out from the start. The problem of determining the relative purchasing power of dollars in terms of the market open to the foreign bondholder would be practically impossible of solution. The restrictions put upon the use of gold in the United States, which, in the eyes of the court, were a consideration in determining the damages due to a citizen bondholder, not being applicable to the foreigner, could not be taken to account; while the possible restrictions in the particular foreign country would seem not to be a proper subject of inquiry by the United States. The assumption would have to be that the foreign bondholder could use the gold called for by his bond for any and every purpose for which it had been customary to use it.

The second standard of measuring the damages due to the foreign bondholder would be the difference between the value of the present legal tender dollar in terms of the national currency of the foreign bondholder and the value of dollars of the former gold content, in other words, the paper money equivalent of the gold clause obligation. Payment of the increased number of depreciated dollars as damages for the breach of contract would, of course, be practically the same as recognizing the obligation of specific performance of the contract; for the gold itself is not the object sought by the foreign bondholder but merely its equivalent in legal tender. In Feist *v.* Société Intercommunale Belge d'Électricité (1934), A. C. 161,[1] the British House of Lords, overruling the Chancery Division and the Court of Appeal, held that the gold clause in the contract between the Belgian company and the bondholder was not to be construed as constituting the mode of payment, now forbidden by law, but as describing and measuring the company's obligation which could and should be met in such a sum in sterling as represented the gold value of the nominal amount due on the bond. In reaching this conclusion the court relied upon the decision of the Permanent Court of International Justice in the Serbian Loans case, where it was held that "the treat-

[1] Reprinted in this JOURNAL, Vol. 28 (1934), p. 374.

https://doi.org/10.2307/2190499 Published online by Cambridge University Press

ment of the gold clause [in the contention of the Serbian government] as indicating a mere modality of payment, without reference to a gold standard of value, would not be to construe but to destroy it."

Can the obligation of the United States upon its gold bonds be offset in particular cases by considerations arising from the unpaid obligations of certain foreign governments to the United States, or from the fact that the resolution of June 5, 1933, makes to foreign governments the extremely valuable concession of being able to pay their debts to the United States in depreciated gold dollars, or from the fact that large numbers of American holders of foreign bonds have suffered by reason of the circumstance that payment on their bonds was not specified to be in gold and was made in depreciated currency? All three considerations bear upon the extent to which obligations due by a state to an alien individual may be validly set aside by identifying the alien with his government and meeting his claim by entering a counterclaim based upon the debts or torts of his government. Such an identification, it is submitted, would be so contrary to the established principles of international law that it must be rejected upon its mere suggestion. Even the most extreme nationalist must hesitate before asserting a doctrine that would have such far-reaching implications. As a practical proposition, the attempt to identify the individual with his government would put an end forthwith to all foreign purchases of government bonds and indeed to all contracts between citizens of one state and the government of another. It would be bad law and worse economics, whatever claims might be made for it in the realm of abstract equity.

In its last analysis the gold clause in government bonds of the United States held by foreigners is an obligation of good faith. However equitable and just it may be that the United States should ask of its citizen bondholders that they subordinate technical rights to the good of their country as a whole as determined by the judgment of the elected legislative body, the same reasoning does not apply to the foreign bondholder. He bought his bond in reliance upon the good faith of the United States, and the maintenance of that good faith is imperative. It is not merely a question of preserving the credit of the United States as a borrower; it is a matter of national morals higher than mere practical considerations. The sole plea in abatement that might be made to the obligation would be the hard fact that the United States did not have the gold (and therefore did not have its equivalent in legal tender) with which to make the payment called for by the bond. This plea, however, is, under the actual circumstances, simply inadmissible. The gold is here and could be transferred without in any way disrupting the national economy. In fact most economists are agreed that the transfer of the gold would not only not disrupt domestic finances but would actually stimulate foreign trade. Apparently in this case the copybook maxim of honesty being the best policy is more than a pious instruction for children.

C. G. Fenwick

https://doi.org/10.2307/2190499 Published online by Cambridge University Press