BACKGROUND OF NEW DEAL DECISIONS

IV
THE GREENBACK ISSUE AND LEGAL TENDER OF DE-VALUED PAPER.

By JAMES H. GILBERT.

The question which the Supreme Court was called upon to decide in the famous gold clause cases was not new. In essence it was the same issue that confronted the court in several cases during the fiat money regime and depreciated paper.

In fact, the precise parallel of the devaluation is found in the Federal Act of 1834 by which the weight of the gold dollar was reduced by six per cent. So far as effects on debtor and creditor are concerned, a forty per cent reduction in the metallic content of the dollar is more important than a six per cent cut but there is no difference in principle or legal validity.

Finding difficulty in meeting its pressing obligations through tax revenues or the sale of bonds, the Federal Government in February, 1862, authorized the issue of $150,000,000 of United States notes popularly known as "greenbacks." Although these notes were irredeemable and worth less than face value from the time of their issue they made legal tender in the payment of all debts with the exception of import duties and interest on the public debt.

Apparently the government expected that the tariff receipts in gold would be enough to pay the interest on the bonded debt and the credit of the government would be improved by the device of gold payment in part.

As the volume of greenbacks increased by successive issues, prices rose and the value of paper money fell in terms of gold. Indeed at one time it took $2.85 in paper to buy one dollar in gold.

In obedience to Gresham's law cheap money drove dear money out of circulation and in all parts of the United States except the Pacific Coast gold and silver even in the smallest denominations slipped quietly out of circulation.

In Oregon and California where gold and silver came in abundance from the mines and where custom favored the issue of hard money, specie remained the standard and the chief medium of exchange thruout the Civil War. Greenbacks were used to some extent but at their market value in coin.

When greenbacks were worth 50 cents in gold a man with a ten dollar debt to pay had the option of paying a ten dollar gold piece or twenty dollars in United States notes. If he insisted on the acceptance of greenbacks at full face value he would be boycotted by the business community.

Long-standing laws in Oregon had required the payment of taxes in gold and silver coin but tax collectors were continually under pressure to accept the depreciated notes in payment of tax bills.

The sheriff of Lane county, finding plenty of greenbacks among his tax receipts, tried to pay the county's share of state taxes in the same medium. Refusal of state authorities to accept anything but hard money carried the case to the United States Supreme Court in the famous case of Lane County v. Oregon.

The higher court held that the State had a right to determine the medium in which taxes sould be paid. The Federal law making greenbacks lawful tender for debts, public and private, did not apply to state taxes. A tax is not a debt. The latter is an obligation voluntarily entered into while a tax is a **coerced** payment for public services.

Naturally the question of the legality of greenbacks as a tender for debts contracted prior to the date of issue was bound to arise.

At a time when gold and silver were the only lawful tender, both parties to a contract expected settlement in specie. Creditors were reluctant to accept United States notes, at one time worth only thirty-four cents, in terms of gold, in the payment of debts originating before fiat money displaced the specie standard.

This issue came squarely before the courts in the famous case of Hepburn v. Griswold which arose in the State of Kentucky. Mrs. Hepburn had given a note to Griswold two years before the first issue of greenbacks, when "there was no lawful money which could be lawfully tendered in payment of private debts but gold and silver." Following the issue of greenbacks, Mrs. Hepburn offered in March, 1864, the requisite amount of United States notes. The State court held the debt was satisfied in full.

The case came up to the Supreme Court which held that the legal tender quality of the notes applied only to debts contracted subsequent to the issue and did not apply to pre-existing debts.

The clear intent of parties in the case of pre-existing debts was that payment should be made in gold or silver which had "intrinsic value" and not in United States notes that "had no intrinsic value" but "purchasing power determined by the quanitiy in circulation," the court held.

The forced acceptance of the United States notes at face value would infringe the obligation of contract which is contrary to the spirit if not the letter of the Constitution and would be contrary to justice and equity, it added.

Chief Justice Chase, who wrote the opinion, drew a sharp distinction between the pawer to issue legal tender notes and the power to coin money.

" (the power to issue notes) is certainly not the same power as the power to coin money," he said.

The practical import of this decision, if allowed to stand, would be to increase the long-standing debts of corporations by about twenty per cent.

At the time the decision was handed down (1870) gold commanded a premium of twenty per cent. It was certain that influence would be brought to bear to secure a reversal.

What followed reflects in some degree on the honor of the Court.

The Court was in process of being reduced to seven members under the operation of a law of 1866 providing that no vacancy should be filled until the body was reduced to seven. This act was repealed and the number of judges increased to nine. Justices Strong and Bradley, whose stand on the greenback issue could have been inferred from previous decisions and opinions, were appointed to fill the vacancies.

In the legal tender cases that came before the court the decision in the Griswold case was violently reversed. The greenbacks were held lawful tender for pre-existing debts as well as those entered into after the issue was authorized.

A contract to pay money is a contract to pay not that which was lawful tender at the time the contract was drawn, but only that which is designated as money at the time of maturity and payment, the court held. The forced acceptance of paper, depreciated as it may be, does not infringe the obligation of contract, it said.

Even if it did the Federal Government is not bound by the Constitution from infringing the obligation of contract. This prohibition is clearly against the state and not the national government.

Another case decided in 1868 seemed more or less inconsistent with the stand taken in the legal tender cases. This was Bronson v. Rodes and involved the legality of a tender of greenbacks for a debt contracted in 1851 and specifically payable in gold and silver coin.

Rodes ,the debtor in the transaction, tendered the requisite amount in depreciated paper. At the time of the tender a dollar in gold was worth $2.25 in terms of greenbacks. State courts had upheld the legality of the tender and ordered the cancellation of the mortgage involved.

On appeal to the Supreme Court the higher tribunal held that it was the "purpose of courts to enforce contracts according to the lawful interest and understanding of the parties" and that the clear intent of both creditor and debtor in 1851 was that the debt be discharged in gold and silver.

This contract was in reality "an agreement to deliver a certain weight of standard gold." It was in fact "not distinguishable from a contract to deliver a certain weight of bullion."

There were two standards in use at the time recognized by state and federal laws. Parties to the contract and chosen the specie standard in preference to the other.

As the Supreme Court faced the momentous gold clause decision the precedents were not very clear.

If the tribunal followed the decisions in Hepburn v. Griswold or Benson v. Rodes it appeared that Congress could not be sustained in abrogating the gold clause in billions of pre-existing contracts.

If, however, the court accepted the principle of the legal tender cases that a contract to pay money is a contract to pay whatever is money at maturity, whether it be depreciated paper or a devalued dollar, the way was open to sustain Congressional action.

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IV.
THE DOCTRINE OF JUDICIAL REVIEW AND THE ADVISORY OPINION.

By WAYNE L. MORSE.

In a very real sense, the doctrine of judicial supremacy makes it possible for us in this country to experience a social revolution through the orderly processes of law to the extent that our courts adjust constitutional concepts to social demands.

Such adjustments are going on at the present time in a dramatic fashion, and we are all familiar with the part that the supreme court is playing in that revolution.

However, the recent decisions of the court on constitutional law issues, especially the decision in the Schecter poultry case declaring unconstitutional much of the N. I. R. A., have brought forth again certain proposals aimed at limiting the doctrine of judicial review.

Even prior to the gold clause decision, articles began to appear in leading American periodicals questioning the desirability of continuing to vest in the supreme court the sweeping power of judicial review.

There was open suggestion that attempts might be made to enlarge the court in order to bring about a reversal of such decisions, and historical precedent was cited for it.

Although it is true that both President Lincoln and President Grant have been charged by some historians with having packed the court in order to secure decisions desired by them, it is gratifying to note that President Roosevelt has indicated rather clearly that New Deal legislation must be adjusted in accordance with the constitutional interpretations rendered by the supreme court. However, there are significant groups in our citizenry who are making specific proposals to check the powers of the supreme court.

The view of the ultra conservative that such action would result in chaos or that it would even destroy constitutional government is a fear argument rather than a fact argument because it is possible to have a written constitution and still check the powers of the supreme court to declare acts of congress unconstitutional.

Thus, Justice Holmes has written, "The United States constitution would not come to an end if the court lost its power to declare acts of congress void."

However, any such change entails significant modifications in our theory of separation of governmental powers and on the basis of the long time record of the United States supreme court, I think that we as a people should be most hesitant in checking the powers of that court.

Nevertheless, there is a great deal of merit in the criticism of those who claim that the present power of judicial review results in a great deal of waste.

Obviously, no business could succeed if it purchased expensive machinery, installed it and started to run it before it determined whether or not that machinery would manufacture the goods for which it was purchased.

In a sense that is what is now done in this country in regard to legislative machinery. It costs millions of dollars to put important federal legislation into operation.

Yet our system permits the supreme court to declare such legislation unconstitutional and thus in effect wipe it off the books at a great financial loss, not only to the government but to business men who have endeavored to adjust to it.

It has been suggested that one way to prevent such a waste would be to create a separate department of the supreme court whose sole task it would be to pass upon constitutional questions involved in major legislation prior to its final enactment.

A proposal somewhat similar was submitted to the constitutional convention in 1787 by Randolph of Virginia and rejected by the framers of the constitution. The Randolph plan proposed to associate a certain number of the judges with the executive in the exercise of a revisionary power over laws passed by Congress.

However, that is not exactly the same plan as the proposal for a department to pass judgment upon the constitutionality of acts of Congress in advance.

Some of the arguments advanced against the proposal for advisory opinions are that such a plan would be an encroachment upon the doctrine of judicial review and the independence of the court.

This argument is of questionable validity because under the proposal the court would have the same power that it now has to determine the constitutionality of acts of Congress, but when requested by the executive or by Congress it would determine the matter of constitutionality before the law is put into effect.

It is contended that such a proposal would in effect turn that department of the court into a legislative drafting bureau, but obviously this would not be the case because the decisions would not vary in form from those now given.

At the present time the court does not tell Congress how to make a certain act constitutional, but rather tells Congress why a certain act is unconstitutional.

It is also claimed that the advisory opinion plan would be undesirable because decisions would be rendered upon the basis of hypothetical cases, thus varying from the present well-established practice of determining constitutionality upon the basis of actual litigation.

This objection is of doubtful validity because many cases now are purely test cases of little consequence as far as the interests of the party litigants are concerned when viewed in light of the major constitutional questions involved.

The advisory plan, on the other hand, would give the court greater latitude in rendering its constitutional decisions, in that all features of a given act could be decided as to their constitutionality while at the present time the facts of a given case often involve only a part of an act and so its constitutionality is decided piecemeal.

Perhaps a more valid objection would be that the proposal would involve a task impossible of performance by a separate department of the court, if all, or even most, of the acts of congress were to be submitted to the court in advance, let alone the acts of state legislatures, which might possibly be in conflict with the federal constitution.

If such a plan is to be feasible, it would have to be limited in some way so that only major legislation would be submitted to the court in advance.

If the power of judicial review is finally curtailed, the chief reason for such action will be the dissatisfaction of large numbers of our people with the delay, uncertainty, and waste entailed in the present procedure.

A perfected advisory opinion plan might prove to be an effective way of retaining the court's right to exercise the doctrine of judicial review and at the same time make possible the speedy adjustment of major legislation to the constitution.

If the principle of such a plan is sound and desirable, the mechanics for its operation should not prove difficult of solution.

Huckleberry Time Here; Recipes Are Available

With the evergreen huckleberries now ripening along the Oregon coast and other varieties in the mountains, many homemakers are planning to obtain quantities of this delicious fruit for canning, for making jams and jellies, and for serving fresh in pies, puddings, frozen or gelatin desserts, and in many other ways. The crop this season promises to be the best in several year, reports George Waldo, federal specialist in small fruits, stationed at Oregon State college.

The evergreen huckleberry, also known as the "shot" and the "coast" huckleberry, is really a blueberry, according to Dr. George Darrow, senior horticulturist of the U. S. department of agriculture. That is, he says, it is one of the group having many very small, soft seeds, rather than 10 large bony seeds as the true huckleberries have.

Several years ago Miss Claribel Nye, state leader of home economics extension, concluded that more people would be enjoying the huckleberries if more information on varied ways of using them were available. Accordingly she issued a public request for huckleberry recipes. The response brought "favorite" recipes from 13 counties in Oregon, Washington and California. Each recipe was tested, and from all those received 18 of the choicest were selected and published in bulletin form for free distribution. This bulletin, HE 382, is still available on request from county extension offices or from the college at Corvallis.

One of the simple but very delicious recipes included in the bulletin is huckleberry pudding, which is made as follows:

Huckleberry Pudding

3 cups huckleberries
1½ cups sugar.
1½ tbsp. flour.
3 tbsp. lemon juice.

Put all ingredients (except lemon juice) in a deep baking pan and cook until slightly thick; add lemon juice; pour a thin baking powder dough over berries; bake in a moderate oven 20 to 30 minutes. The baking powder dough may be made a little thicker and cut into biscuit shapes and placed in the berries and baked. Serve with cream.