taken in the great majority of jurisdictions where it is held that the conclusion of the governor must stand unless clearly erroneous.[20] This holding seems to be eminently fair and sensible, allowing the court to rectify obvious mistakes and review cases involving bad faith, but at the same time attaching due weight to the executives' determinations.

In the instant case there was evidence that the date of the alleged crime was at a different time than that charged in the indictment. Since this evidence was satisfactory to the governor and his action not contrary to law, the court very properly refused to reverse his decision.

J. L. A.

EMINENT DOMAIN — TITLE AND RIGHT OF POSSESSION BEFORE ACTUAL COMPENSATION—[Federal].—In the recent case of *Hessel v. A. Smith & Co.*[1] a landowner sought an injunction to restrain a contractor from proceeding to erect a government building, on the ground that the statute under which the land had been acquired from the plaintiff was unconstitutional. The statute,[2] which provided that in proceedings by the United States to condemn land, the title and right of possession should vest in the United States on the filing of a "Declaration of Taking" and the deposit in court of the amount of estimated compensation, was held constitutional against the claim that it violated the 5th Amendment.

It is well settled that the government may constitutionally take possession of privately-owned land prior to conclusion of condemnation proceedings, even in the absence of express statutory authority, provided adequate provision is made for ultimate payment of just compensation to the landowner.[3] The procedure approved by the court in the earlier cases, however, has been criticized as not adequately protecting the rights of the property owner.

The mere right to have the compensation judicially determined subsequently to the taking with the ultimate award insured by the pledge of

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to fulfill the functions of an appeal or writ of error.[19] A middle ground is

19. People v. Hazard, 361 Ill. 60, 196 N. E. 827 (1935); In re Halderman, 119 A. 735 (Pa. 1923); In re Frederich, 149 U. S. 70, 13 S. Ct. 793 (1893). Habeas Corpus is not the proper proceeding to try the question as to the guilt or innocence of the accused. Munsey v. Clough, supra, note 8; State ex rel Cooney v. Hoffmeister, 80 S. W. (2d) 195 (Mo. 1935).

20. Munsey v. Clough, supra, note 8; Hogan v. O'Neill, supra, note 9; Keeton v. Gaiser, supra, note 8. Governor's determination as to the sufficiency of the sworn evidence that the party charged is a fugitive from justice is subject to judicial review. Drumm v. Penderson et al., 259 N. W. 208 (Iowa 1935).

1. 3 U. S. Law Week 1201 (D. C. E. D. Ill., June 30, 1936).

2. 46 Stat. 1421, 40 U. S. C. A. sec. 258 (1931).

3. Cherokee Nation v. The Southern Kansas Ry. Co., 135 U. S. 641, 10 S. Ct. 965, 34 L. ed. 295 (1890); Bragg v. Weaver, 251 U. S. 57, 40 S. Ct. 63, 64 L. ed. 135 (1919); in re Condemnation for Improvement of Rouge River, 266 Fed. 105 (D. C. Mich., 1920); Backus v. Fort Street Union Depot Co., 169 U. S. 557, 18 S. Ct. 445, 42 L. ed. 853 (1897).

public faith, has been held adequate, without regard to uncompensated deprivation during the potentially long period of litigation against the government.[4] Furthermore, under the procedure permitted by the earlier cases, the property owner always ran the risk of having his land returned without any allowance being made for oftentimes important consequential damages, if the governmental agency which appropriated the land acted without authority[5] or if the government decided to abandon the condemnation proceedings.[6] As a result, one court warned that the "doctrine goes to the verge of what can be sanctioned without destroying the essential right of the citizen" to just compensation for his property.[7]

The statute in the principal case, however, not only required that a deposit be made in court before the taking, but made the money available to the property owner.[8] It also provided that the head of the department instituting the proceedings file an opinion with the deposit to the effect that in his opinion the ultimate award would not be greater than the amount deposited.[9] The property owner may contend for a larger sum even though he applies to the court for the use of the sum deposited. If the landowner does not withdraw the money deposited before final judgment, the statute provides for the payment of interest at the rate of 6 per cent from the date of taking of the land.[10] The statute also provides that the taking of title irrevocably commits the United States to the payment of the ultimate award.[11]

The theoretical point that the government cannot acquire title, as distinguished from possession, prior to the payment of full compensation, would seem to have little validity. Practical considerations make the former alternative preferable to the latter. It precludes the possibility of an abandonment by the government, and definitely removes the liability from the land owner to pay the state taxes, for which he might be held as long as he retains the title.[12]

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4. U. S. v. O'Neill, 198 Fed. 677, 683 (D. C. D. Colo., 1912); Adirondack Ry. Co. v. People, 175 U. S. 335, 349, 20 S. Ct. 460, 44 L. ed. 492, 500 (1899); Crozier v. Krupp, 224 U. S. 290, 306, 32 S. Ct. 448, 56 L. Ed. 771 (1912); the responsibility of a city which may be enforced in the courts, held equivalent to prior compensation. In re Mayor, 99 N. Y. 569, 2 N. E. 642 (1885); landowner's right left to depend on the outcome of litigation with a third party which had reasonable grounds for disputing its liability, Williams v. Parker, 188 U. S. 491, 23 S. Ct. 440, 47 L. ed. 562 (1902).

5. Hooe v. United States, 218 U. S. 322, 31 S. Ct. 85, 54 L. ed. 1055, 1060 (1910).

6. Lewis, *Eminent Domain* (1st ed. 1888) sec. 655; Ford v. Park Com'rs, 148 Ia. 1, 126 N. W. 1030; Ann. Cas. 1912 B. 940 (1910).

7. Great Falls Mfg. Co. v. Garland, 25 Fed. 521, 529 (C. C. D. Md., 1885).

8. (1931) 46 Stat. 1421, c. 307, sec. 1; 40 U. S. C. A. sec. 258a.

9. (1931) 46 Stat. 1422, c. 307, sec. 5; 40 U. S. C. A. sec. 258e.

10. (1931) 46 Stat. 1421, c. 307, sec. 1; 40 U. S. C. A. sec. 258a.

11. (1931) 46 Stat. 1422, c. 307, sec. 3; 40 U. S. C. A. sec. 258c.

12. Jasper Land & Improvement Co. v. Kansas City, 293 Mo. 674, 293 S. W. 864 (1922); Buckhout v. City of New York 82 App. Div. 218, 81 N. Y. S. 723 (1903).

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).