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Constitutional Law—Constitutionality of the National Industrial Recovery Act (Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935))

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membership looks to and must be governed by the law of the State granting the incorporation."¹⁵

It is well settled that a receiver, in the absence of a statutory provision vesting him with rights as quasi-assignee or representative of creditors, has no power as of right to sue in the courts of a jurisdiction foreign to his appointment,¹⁶ because he is considered merely as an arm or officer of the court which appoints him. The Superintendent of Banks is not an officer of any court, but is an administrative officer of the state¹⁷ and in liquidation proceedings of any bank the corporate property and claims vest in him.¹⁸ Where, however, the rights of a receiver do not rest merely upon his appointment by the court of another state, but there has been an assignment to him, in his official capacity, of the property in question, or, by virtue of the statute of such state, the title to the property is vested in him, he may sue and recover the same, not strictly by virtue of his appointment, but by reason of his title as an assignee.¹⁹

M. B. G.

CONSTITUTIONAL LAW—CONSTITUTIONALITY OF THE NATIONAL INDUSTRIAL RECOVERY ACT.—The defendants are slaughterhouse operators in Brooklyn. They buy most of their poultry at the freight depots in New York City, although on a few occasions they have made purchases directly from commission men in Philadelphia. The chickens are slaughtered immediately and sold to retailers for local consumption. The Attorney-General secured the indictment of these defendants for violations of the "Live Poultry Code,"¹ and they

¹⁵ *Modern Woodmen of America v. Mixer*, 267 U. S. 544, 69 L. ed. 783, 45 Sup. Ct. 389 (1925); 2 BEALE, *CONFLICT OF LAWS* (1935) 865-882; *RESTATEMENT, CONFLICT OF LAWS* (1934) §187.

¹⁶ *Booth v. Clark*, 58 U. S. 322 (1854); *Sterrett v. Second National Bank*, 248 U. S. 73, 76, 39 Sup. Ct. 27 (1915).

¹⁷ *N. Y. BANKING LAW* (1909) §80; *Broderick v. McGuire*, 119 Conn. 83, 101, 174 Atl. 314, 94 A. L. R. 890 (1935); *Van Tuyl v. Lewis*, 165 App. Div. 412, 150 N. Y. Supp. 786 (1st Dept. 1914); *Van Tuyl v. Schwab*, 165 App. Div. 412, 150 N. Y. Supp. 786 (1st Dept. 1914). In enforcing the stockholder's individual liability, the Superintendent of Banks acts on behalf of the creditors and not in any sense on behalf of the bank itself.

¹⁸ *Isaac v. Marcus, et al.*, 258 N. Y. 257, 263, 179 N. E. 487 (1932).

¹⁹ *Converse v. Hamilton*, 224 U. S. 243, 257, 32 Sup. Ct. 415 (1912); *Selig v. Hamilton*, 234 U. S. 652, 34 Sup. Ct. 926 (1914); *Bullock v. Oliver*, 155 Ga. 151, 116 S. E. 293 (1922); *Broderick v. Stephano*, 314 Pa. 408, 171 Atl. 582 (1934); *Broderick v. McGuire*, *supra* note 17, the court said, "that the Superintendent of Banks is just as much a quasi or statutory assignee of the right to enforce the obligations of stockholders as is a receiver seeking to enforce a similar obligation."

¹ "Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and About the City of New York," approved by executive

were convicted on nineteen counts. The Circuit Court of Appeals sustained the conviction on seventeen counts,² and the case went to the Supreme Court on writs of certiorari to review. The defendants contended (1) that the Code had been adopted pursuant to an unconstitutional delegation by Congress of legislative powers; (2) that it attempts to regulate intrastate transactions which lie outside the authority of Congress; (3) that in certain provisions it was repugnant to the due process clause of the Fifth Amendment. *Held*, defendants' contentions (1) and (2) upheld. National Industrial Recovery Act, Sections 1 and 3, held invalid for those reasons. Defendants' contention (3) not passed upon. *Schechter Poultry Corp. v. United States*, *United States v. Schechter Poultry Corp.*, 295 U. S. 495, 55 Sup. Ct. 837 (1935).

The legislative power in the federal government is vested in Congress.³ It, exclusively, has the right to create law for the government of the nation,⁴ and this power may not be delegated to any

order of the President, and became effective on April 13, 1934. This Code was made pursuant to §3 of the N.I.R.A.—Act of June 16, 1933, c. 90, 48 STAT. 195, 196, 15 U. S. C. A. §703 (1933).

²The original indictment contained sixty counts, twenty-seven of which were dismissed by the trial court, and the defendants were acquitted of fourteen others (8 F. Supp. 136, E. D. N. Y., 1935). On appeal the Circuit Court reversed the lower court on two counts and sustained the conviction of the defendants on seventeen others (76 F. [2d] 617, C. C. A. 2d, 1935). The case came to the Supreme Court on the following counts: one for conspiracy to violate the provisions of the N.I.R.A. and the "Live Poultry Code"; two for violation of the minimum wage and maximum hour provisions; ten for violation of the requirements concerning "straight killing" (see Code, art. VII, §14); one charged sale of an unfit chicken; two charged sales without having poultry inspected and approved as required by ordinances of the City of New York; and one charged sales to dealers who were not licensed, also in violation of New York City ordinances.

³U. S. CONST. Art. I, §1:

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

And Art. I, §8, par. 18:

Congress shall have power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

⁴*Burton v. United States*, 202 U. S. 344, 26 Sup. Ct. 688 (1905); *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273 (1887); *Confiscation Cases*, 87 U. S. 92 (1873); *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436 (1903); *McCulloch v. Maryland*, 17 U. S. 412 (1819); *United States v. Harris*, 106 U. S. 629, 1 Sup. Ct. 601 (1882); *Muskrat v. United States*, 219 U. S. 346, 31 Sup. Ct. 250 (1910).

other branch,⁵ to any state,⁶ or to any executive or administrative individual or group.⁷ The N.I.R.A.⁸ makes a broad declaration of legislative policy, outlining in general terms many sweeping reforms.⁹ Section 3 of that Act gives to the President the power to create "Codes of Fair Competition," to be formulated by representatives of each industry and approved by him, or, if the industry does not write their own, the President may do so for them.¹⁰ Within certain indefinite boundaries, the President may approve these Codes and thereafter they have the force of law and a violation thereof is a crime.¹¹ It is true that Congress may create a standard of policy for the government of intricate economic institutions, particularizing limits, powers and duties for such government, and may then delegate to a minor administrative group the power to make rules and regulations in the furtherance of that policy.¹² But in such instances the

⁵ *Field v. Clarke*, 143 U. S. 649, 12 Sup. Ct. 495 (1891); *Morrill v. Jones*, 106 U. S. 466, 1 Sup. Ct. 423 (1882); *Peoples Passenger R. Co. v. Memphis City R. Co.*, 77 U. S. 38 (1869); *Wayman v. Southard*, 23 U. S. 1 (1825); *United States v. Mathews*, 146 Fed. 306 (E. D. Wash. 1916); *United States v. Blasingame*, 116 Fed. 654 (S. D. Cal. 1900); *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241 (1934). In the last case above the court says, "The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential functions with which it is thus vested" (by U. S. CONST. ART. I, §1—author); *Ex Parte Lasswell*, 36 P. (2d) 678 (D. C. of App., 2d. Dist. Cal., 1935).

⁶ *Moore v. Allen*, 7 J. J. Marsh 651 (Ky. 1832).

⁷ *Field v. Clarke*, 143 U. S. 649, 12 Sup. Ct. 495 (1891); *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241 (1934); *I. C. C. v. Cincinnati R. Co.*, 76 Fed. 183 (C. C. S. D. Ohio 1896), *aff'd*, 167 U. S. 479, 17 Sup. Ct. 896 (1896); *First Nat. Bank v. Union Trust Co.*, 244 U. S. 416, 37 Sup. Ct. 734 (1916).

⁸ 48 STAT. 195, 15 U. S. C. A. §701 *et seq.* (1933).

⁹ See the opinion of Chief Justice Hughes in *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241 (1934) at 417 *et seq.* This case is of extreme importance on the entire subject of delegation of legislative power by Congress, inasmuch as it is the first case to declare an act of Congress unconstitutional for that reason. Note (1935) 44 YALE L. J. 849, at 856; Note (1935) 48 HARV. L. REV. 798, at 799, and authorities listed thereunder.

¹⁰ N.I.R.A., *supra* note 8, §703, subs. (a), (b), (c) and (d). Subd. (d) reads as follows:

"Upon his own motion, or if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent in any trade or industry or subdivision thereof, and if no code of fair competition therefor has theretofore been approved by the President, the President, after such public notice and hearing as he shall specify, may prescribe and approve a code of fair competition for such trade or industry or subdivision thereof, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of this section * * *"

¹¹ N.I.R.A., *supra* note 8, §703, subd. (f) provides that any violation of any code created in accordance with the N.I.R.A. shall be a misdemeanor and punishable by a fine of not more than \$500 for each offense, and "each day such violation continues shall be deemed a separate offense."

¹² *In re Chapman*, 166 U. S. 661, 17 Sup. Ct. 677 (1896); *St. Louis Merchants' Bridge Terminal R. Co. v. United States*, 188 Fed. 191 (C. C. A. 8th, 1911).

legislature itself has made the law and the rules thereafter set are made in the execution of that law.¹³ But Congress, in the N.I.R.A., did not set any adequate standard,¹⁴ nor did it reasonably limit the

¹³ *Rail and River Coal Co. v. Yaple*, 214 Fed. 273 (E. D. Ohio 1914); *Mutual Film Co. v. Industrial Comm. of Ohio*, 215 Fed. 138 (N. D. Ohio 1914); *United States v. Louisville & N. R. Co.*, 176 Fed. 942 (N. D. Ala. 1910); *Bushaber v. Union Pac. R. R. Co.*, 240 U. S. 1, 36 Sup. Ct. 236 (1916); *Red "C" Oil Co. v. Board of Agriculture of North Carolina*, 222 U. S. 38, 32 Sup. Ct. 9 (1912). In *Mutual Film Co. v. Industrial Comm.*, *supra*, the question was whether a statute creating and empowering a moving picture censorship commission was unconstitutional as a delegation of legislative power. The standard set by the statute was, "Only such films as are in the judgment and discretion of the Board of Censors of a moral, educational or amusing and harmless character shall be passed and approved by such board." The Court said:

"It may be conceded that this language might have been extended by descriptive and illustrative words, and yet it is not at all certain that the act would have been any more intelligible than it is now. * * * Is it correct, then, to say that the enacted standard is insufficient? * * * We think that the standard fixed by the statute now under consideration will bear favorable comparison * * * (with other statutes establishing a 'standard'—author). We are thus constrained to believe that, under the present rule of decision of Ohio alone, the primary standard here prescribed is sufficient to avoid the charge that legislative power is delegated."

The case of *I. C. C. v. Goodrich Transit Co.*, 224 U. S. 194, 32 Sup. Ct. 436 (1912) is right in point. There the Court, in construing the powers granted to the Interstate Commerce Commission, said:

"In sect. 20 Congress has authorized the Commission to require annual reports. The act itself prescribes in detail what those reports shall contain. The Commission is permitted, in its discretion, to require a uniform system of accounting, and to prohibit other methods of accounting than those which the Commission may prescribe. In other words, Congress has laid down general rules for the guidance of the Commission, leaving to it merely the carrying out of details in the exercise of the power so conferred. This, we think, is not a delegation of legislative authority."

¹⁴ *Hart Coal Corp. v. Sparks*, 7 F. Supp. 16 (W. D. Ky. 1934), *reaff'd*, 9 F. Supp. 825 (1935). The Court stated that the N.I.R.A. was unconstitutional as it set up no standards to guide him (the President—author) in carrying out the legislative policy and will expressed in the act. *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241 (1934); *United States v. Weirton Steel Co.*, 10 F. Supp. 55 (D. C. Del. 1935); *The Acme, Inc. v. Harlan Besson*, 10 F. Supp. 1 (D. C. N. J. Eq. 1935); *United States and Ickes v. Superior Products, Inc.*, 9 F. Supp. 943 (S. D. Idaho 1935), where the Court said:

"The act fails to authorize the President, or any other, to fix either wholesale or retail gasoline or any prices, or set up any standard or rule of any unfair practices or charges to operate as a guide to or limitation upon the power of the President and it authorizes him to prescribe Codes and rules for conducting the business. * * * This is clearly an attempt by Congress to transfer to the President a necessary function with which it is vested and which it cannot do under section 1 of Article 1 and paragraph 18, section 8, Article 1 of the Constitution."

powers of the President.¹⁵ Instead it gave him the power virtually to *make* the law by proclamation.¹⁶ Such delegation of legislative power is unconstitutional and without precedent.¹⁷

"The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, * * *." ¹⁸ The Tenth Amendment to the Constitution reserves the power to regulate intrastate commerce to the respective states.¹⁹ The "Live Poultry Code," ²⁰ as promulgated under the N.I.R.A., attempts to regulate the business of these defendants by setting minimum wage scales, maximum hours of labor, and other like prohibitions. But the defendants' business is clearly intrastate,²¹ and if it *affects* interstate commerce at all, it does

¹⁵ Cases note 14. Particular reference is here made to *The Acme, Inc. v. Harlan Besson*, 10 F. Supp. 1 (D. C. N. J. Eq. 1935). The Court, among other things, discusses §2 of the N.I.R.A. (15 U. S. C. A. 702). In referring to §2 generally, the Court states:

"This places no limitation whatever upon the Executive."

In speaking of §2, subd. (b) it says:

"Here it should be noted there is no compulsion about the matter. Hence, it affords no limitation, sets up no fact finding body, and leaves the Executive free."

And again, with reference to subd. (c) :

"Here there is no requirement that the Trade Commission must be resorted to, and again the Executive is left free to act."

The Court concludes :

"Certainly, no reasonable limitations and no sufficient definitions of power are found in the foregoing language. It is all very broad and general. * * * We can arrive at no other conclusion than that the Recovery Act is unconstitutional because it attempts an unlawful delegation of legislative authority."

¹⁶ *Supra* note 15.

¹⁷ *Cline v. Consumers Cooperative Gas and Oil Co.*, 152 Misc. 653, 274 N. Y. Supp. 362 (Sup. Ct. 1934) ; *Hart Coal Corp. v. Sparks*, 7 F. Supp. 16 (W. D. Ky. 1934) ; *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 Sup. Ct. 241 (1934).

¹⁸ U. S. CONST. Art. I, §8, par. 3.

¹⁹ U. S. CONST. Amend. 10.

²⁰ *Supra* note 1.

²¹ See authorities upon which the instant case bases its conclusion. *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091 (1884) ; *Public Utilities Commission v. Landon*, 249 U. S. 236, 245, 39 Sup. Ct. 268 (1918) ; *Industrial Ass'n v. United States*, 268 U. S. 64, 78, 79, 45 Sup. Ct. 403 (1925) ; *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 267, 48 Sup. Ct. 107 (1926).

In *Public Utilities Comm. v. Landon*, *supra*, the question was whether gas, conveyed from one state to another by pipe lines remained in interstate commerce to the "burner-tips" and hence whether the local seller of the gas was engaged in interstate commerce. The Court said :

"But in no proper sense can it be said, under the facts here disclosed, that sale and delivery of gas to their customers at burner-tips by the

so only indirectly.²² The "Code," therefore, and the statute which purports to authorize the "Code," are unconstitutional as contravening the Tenth Amendment.

J. C. O'C.

CONSTITUTIONAL LAW—CONSTITUTIONALITY OF CHAPTER 781 OF LAWS OF 1933 (STATE RECOVERY ACT, SCHACKNO ACT).—The plaintiff was a retail coal dealer and conducted a small intrastate business in Binghamton, N. Y. The defendants were the Divisional Code Authority of the Retail Solid Fuel Industry, having jurisdiction of New York State except New York City and Long Island. In accordance with the provisions of the National Industrial Recovery Act¹ and in furtherance of the Code of Fair Competition for the Retail Solid Fuel Industry,² the defendants declared an emergency to exist in their jurisdiction and issued an executive order³ establishing minimum prices for the retail sale of coal therein. By virtue of the authority given them by the New York State Recovery Act⁴ the defendants sought to compel the plaintiff to conform to their executive order. Because of a threatened prosecution by the defendants for his failure to maintain the minimum prices set by them, the plaintiff sued here for a permanent injunction to restrain the defendants from interfering with his intrastate coal business. This appeal is by the defendants from two orders, (1) granting the plaintiff's motion for an injunction *pendente lite*, and (2) denying the defendants' motion to dismiss the complaint for failure to state a cause of action. Question certified—"Does the complaint set forth a cause of action?" *Held*, orders affirmed. The question certified answered in the affirmative. Chapter 781, Laws of 1933 (The State Recovery Act also called the Schackno Act) held as an unconstitutional delegation of legislative power, and unconstitutional because

local companies operating under special franchises, constituted any part of interstate commerce. * * * Interstate movement ended when the gas passed into local mains."

²² *Simpson v. Shepard*, 230 U. S. 352, 410, 33 Sup. Ct. 729 (1912); *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6 (1887); *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 259, 260, 43 Sup. Ct. 83 (1922); *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 410, 411, 42 Sup. Ct. 570 (1921); *Levering & Garrigues v. Morris*, 289 U. S. 103, 107, 108, 53 Sup. Ct. 549, 551 (1933).

¹ 48 STAT. 195, 15 U. S. C. A. §§701 *et seq.* (1933).

² Code No. 280 established with the approval of the President on Feb. 14, 1934, pursuant to the N.I.R.A., *supra* note 1.

³ Executive Order No. 3E of the Divisional Code Authority for the Retail Solid Fuel Industry, Div. No. 3, dated June 29, 1934.

⁴ N. Y. Laws of 1933, c. 781, also called the Schackno Act and The State Recovery Act.