

The National Industrial Recovery Act--Its Permanent Feature

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supplement the program to raise commodity prices, has launched a campaign to purchase newly mined gold at prices well above the customary one of \$20.67 an ounce,²⁹ but the effect of thus devaluating the dollar has had, at this writing, no marked effect upon farm prices. Disappointing as the early results may be, the determination and enterprise of the President and his cabinet continues to sustain the morale of the vast majority of the farmers. The Agricultural Adjustment Act, though originally a hasty improvisation for a desperate emergency, represents a wide departure from previous legislation enacted for farm "relief" both in theory and administration, and may well be considered an introduction to a new era in the history of American agriculture.

LEON BRAUN.

THE NATIONAL INDUSTRIAL RECOVERY ACT—ITS PERMANENT FEATURE.—Since the last issue of this periodical (May, 1933), the most outstanding piece of legislation has been the National Industrial Recovery Act.¹ Most of the provisions of this enactment will undoubtedly prove to be temporary, and with those we are not primarily concerned. We shall endeavor to indicate what permanent guidepost of new government policy this portentous title, symbolized by the familiar blue eagle, stands for in the effort of the present administration to find its way out of the "slough of despond."

The applicability of the National Recovery Act extends to persons, natural or artificial, whose business is in or affecting interstate or foreign commerce,² and the Recovery Act of the State of New York, in its provisions concerning intrastate commerce,³ pledged its co-operation to the National Recovery Administration. The gravamen of this whole legislative structure orients itself from the system of codes, whether voluntary or involuntary, provided for therein, as will be shown hereinafter.

The operation of the National Act is excluded, legally, from dealing with industries purely in intrastate (and in no way in or

will yield \$150,000,000; the tax now in effect on tobacco is scheduled to raise \$20,000,000; a similar tax on hogs will go into effect in November and is expected to produce \$348,000,000; a processing tax on corn of 30 cents a pound, soon to go into effect, will yield from \$60,000,000 to \$70,000,000. Part of the hog tax and an additional \$40,000,000 will be paid to corn farmers who reduce planting 20%, on the theory that hog prices will thus be improved, since 42% of the nation's corn crop is used as hog feed.

²⁹ Radio address by President Roosevelt, Oct. 22, 1933.

¹ 48 STAT. —, approved June 16, 1933.

² *Id.* tit. 1, §6 (d).

³ UNCONSOLIDATED LAWS, 1933, c. 781.

affecting interstate or foreign) commerce, which refuse to sign the codes. This refusal on the part of such industries is rendered largely ineffectual, however, by the provision of the New York State Recovery Act which declares that any such code "shall be the standard of fair competition for such trade * * * as to transactions intrastate in character";⁴ by the dread of a consumers' boycott by those who pledged themselves to purchase only at the sign of the blue eagle; by the fear of labor trouble such as strikes or walkouts of employes who have more chance of getting better conditions by dint of collective bargaining; and, finally, by the hardships of financing their operations, as contrasted with codified industries which find it easier to get credit.⁵

Congress authorized the President to establish administrative, planning and research agencies for two years, and to delegate any of his functions to them.⁶ It is thought that this amounts to an improper delegation of legislative power by Congress to the President and his appointees. It is submitted that Congress may avoid any such question if it amends this Act by a blanket adoption of the standards of fair competition as set forth in the various codes already approved, thereby leaving it to the President, and the administrative agencies acting under him, to work out the details and to carry on the execution of the Act.⁷ The Act makes every infraction of a code a misdemeanor punishable by a \$500 fine for every offense, each day of violation constituting a separate offense, and prescribes injunctive relief to be sought by the United States District Attorneys. The amendment suggested above would seem to avoid the consequences of the decision in *United States v. Cohen Grocery Co.*, where Congress's failure to prescribe fixed and ascertainable standards of guilt resulted in the affirmation by the Supreme Court of the United States of the quashing of the indictment.⁸

Besides the voluntary codes which Congress has authorized the President to approve, the President is empowered, after notice and hearing, to prescribe codes for industries which do not or cannot work out their own and whose acts are against the prescribed policy and inimical to public interest.⁹ The President has the further power, where abuses in wage and price cutting are found, in order to make a code effective, after notice and hearing, to announce that no person may engage in or carry on any business in or affecting interstate or foreign commerce specified in such an announcement without a license. Such licenses are to be granted for not longer than one year

⁴ *Id.* §§1, 2.

⁵ To be financed by local mortgage companies which are in turn to be financed by the Reconstruction Finance Corporation. *Vide* current press.

⁶ *Supra* note 1, tit. 1, §2.

⁷ *J. W. Hampton, Jr. & Co. v. United States*, 276 U. S. 394, 48 Sup. Ct. 348 (1927).

⁸ 255 U. S. 81, 41 Sup. Ct. 298 (1920).

⁹ *Supra* note 1, tit. 1, §3 (d).

and may be suspended or revoked, after public notice and hearing, the order of the President being final, if in accordance with law.¹⁰

Title 1, Section 5 of the Act provides that while this title is in effect and for 60 days thereafter any code or agreement approved or prescribed by the President and "any action complying with the provisions thereof taken during such period shall be exempt from the provisions of the anti-trust laws of the United States." The same provision we find in the State Recovery Act.¹¹ This would seem to provide for a trial period to test the effect of a qualified reversal of the anti-trust policy of the United States and of New York State. This is regarded as of permanent value and of most momentous significance.

The past fifty years have seen the growth and waning of a great deterrent movement directed against integrated industrial organization. The early common law doctrine against "pre-empting, engrossing, regrating, and forestalling" restricted conduct in restraint of trade in the medieval fairs and markets. Standards of fair competition grew up after the overturn of mercantilism and the advent of the *laissez faire* doctrine of the physiocrats. After the industrial revolution, the pressure of cut-throat competition led eventually to the growth of gentlemen's agreements and pools, which were held illegal.¹² Next came the trusts, which used absolute ownership and control and whose methods were in accordance with the common law. This form of organization looked like a great new discovery, but its too rapid development brought on a social hysteria and politicians used it for its unpopularity.¹³ This resulted in the Sherman Anti-Trust Act.¹⁴ The *Standard Oil*¹⁵ and the *North River Sugar Refining*¹⁶ cases declared trusts illegal and *ultra vires* and in the latter the surrender of stock to the trust by the individual shareholders was held corporate action subjecting it to dissolution. So the trust movement collapsed and a new device developed, namely, holding companies, wherein the directors had even less fiduciary responsibilities than former trustees.

The Sherman Anti-Trust Act condemned as illegal "every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the states and with foreign countries," and made it a crime to participate therein.¹⁷ One of the first cases under it was *In re Greene*,¹⁸ where it was held that the mere size achieved by a business through lawful means giving it an

¹⁰ *Ibid.* §4 (b).

¹¹ *Supra* note 3.

¹² *Alger v. Thatcher*, 19 Pick. 51, 54 (Mass. 1836).

¹³ TAFT, ANTI-TRUST LAWS AND THE SUPREME COURT (1914) 2, 5.

¹⁴ 26 STAT. 209 (1890) 15 U. S. C. A. §1 (1928).

¹⁵ 221 U. S. 1 (1912).

¹⁶ 121 N. Y. 582, 24 N. E. 834 (1890).

¹⁷ *Supra* note 14.

¹⁸ 52 Fed. 104 (C. C. S. D. Ohio, 1892).

incidental monopoly was not within the statute. The *American Sugar Refining* case¹⁹ held that the particular contract there involved was intrastate and hence the federal courts had no jurisdiction. In the *Northern Securities* case,²⁰ the concurring opinion of Justice Brewer referred to the common law rule of reason.²¹ This "rule of reason" was proclaimed by the majority of the Court in the *Standard Oil* case²² and the *American Tobacco* case.²³ The *U. S. Steel Corp.* case²⁴ declared that a monopoly must be successful or a series of acts must be prejudicial to society before a combination would be declared illegal. Thus the plain meaning of the Act was hedged about and construed away until it merely affected the form of combination, but was powerless to hinder monopolies which produced at minimum social cost. The recognition of this fact led to the Federal Trade Commission Act²⁵ and, under the sponsorship of the Commission, over a hundred trade practice conferences have been held in the past fifteen years. In spite of the rulings of the Federal Trade Commission which have been upheld by the Court,²⁶ the mushroom growth of the holding companies, culminating in the unstable pyramid of the 1929 boom and resulting in the recent collapse, brought home to the administration that monopoly is necessary and may be beneficial in the form of trade associations and labor unions under the rigid control of the government. Thus we see that the suspension of the anti-trust laws by the National Recovery Act is not a bolt from the blue in so far as it indicates a change in policy, but is the final recognition by the present administration of the underlying economic trend of the last half century.

RHEA JOSEPHSON.

EMERGENCY MORTGAGE LEGISLATION.—Out of the land has come the enormous wealth of this country and in the land has been invested the greater part of the wealth which the land has produced.

¹⁹ *United States v. E. C. Knight Co.*, 156 U. S. 1 (1895).

²⁰ 193 U. S. 197 (1903).

²¹ *Mogul Steamship Co. v. McGregor*, 61 L. J. Q. B. 295 (1892) A. C. 25.

²² *Supra* note 15.

²³ *Id.* at 106.

²⁴ *United States v. United States Steel Co.*, 251 U. S. 417, 40 Sup. Ct. 293 (1919).

²⁵ 38 STAT. 717 (1914) 15 U. S. C. A. 41, 45, 46 (1928), declaring that "unfair methods of competition in commerce are declared unlawful," that the Federal Trade Commission is established, *inter alia*, for investigation of compliance with anti-trust decrees; for investigation of violation of anti-trust statutes; and for readjustment of business corporations violating anti-trust statutes.

²⁶ *Federal Trade Commission v. Gratz*, 253 U. S. 421, 40 Sup. Ct. 572 (1920); *Federal Trade Commission v. Beechnut Packing Co.*, 257 U. S. 441, 42 Sup. Ct. 150 (1922); *Federal Trade Commission v. Sinclair Refrigerator Co.*, 261 U. S. 463, 43 Sup. Ct. 450 (1923).