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Emergency Legislation

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"EMERGENCY" LEGISLATION

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A MATTER of common discussion among laymen and of particular interest to lawyers is the question of how far the state and national legislatures may go in enacting laws predicated on the emergency created by the current depression.

Can a law, which in normal times could be clearly seen to trench upon constitutional guarantees and to violate prohibitions, be nevertheless supported because of an emergency declared to exist?

If "emergency" legislation is to be upheld as such, what are the limits, if any, on the power of the legislature?

There are a number of recent cases decided by state courts which expound the doctrine.

A recent decision of the Supreme Court of Minnesota upholds a Mortgage Moratorium Act, although it is admitted that the operation of the Act impaired the obligation of a contract.

There the court definitely held that, under the police power in a public emergency, statutes may be enacted which "temporarily" impair the obligations of contracts, provided they be such as the emergency reasonably demands.

It is a judicial question whether the exercise of the extraordinary power is "reasonable."

Thus, the general police power becomes supreme in a state where such emergency is found to exist, and specific guarantees concerning the obligations of contract must yield.[1]

On the other hand, the Supreme Court of North Dakota has recently ruled that a statute is not sustainable as an emergency exercise of the police power where its effect is to contravene constitutional provisions.

It was here held that a law fixing a period of redemption from foreclosure sale, which existed at the time of the execution of a mortgage, constituted as much a part of the contract as if it had been expressly incorporated therein, and the 1933 statute, in extending the period of redemption and thereby preventing the issuance of a deed upon foreclosure at the expiration of the redemption period provided by law in existence at the time of the execution of the mortgage, was also void

[1]Blaisdell v. Home B. & L. Assn., U. S. Law Jour., Vol. 1, p. 421.

in that it deprives the person entitled to such deed of the possession of his property and its rents and profits without due process of law, in violation of the State Constitution and the 14th Amendment of the Federal Constitution.[2]

The South Carolina Court has upheld the Emergency Banking Act of 1933 giving the governor of the state plenary powers to supervise and control banks, and prohibiting legal proceedings against banks without the governor's written approval.

It was held that the depositors were not thereby deprived of their property without due process of law, and the statute was not to be stricken down on the ground that they were prevented from collection of the stockholders' liability guaranteed by the Constitution. They were not illegally denied the right of a speedy remedy in the courts for the redress of a wrong.

The Act was considered to be a valid exercise of the police power for the protection of the general welfare in view of the existing emergency.

The measure did not "unreasonably" invalidate private rights or "arbitrarily" violate the guarantees.

It was said the depositors and others affected must not be allowed to so use their own property as to bring an irreparable calamity upon the general public.[3]

On the other hand, the Arkansas Act preventing a deficiency judgment in a foreclosure suit was held void. This law provided that the value of the real estate involved in a mortgage foreclosure suit shall be the amount of the mortgage loan irrespective of the amount which may be realized from the sale of the property, and that plaintiff shall not be entitled to decree of foreclosure unless he shall file a stipulation that he will bid the amount of the debt, interest, and costs, and, before the court may confirm a sale, it must determine that the purchaser bid the fair market value of the property notwithstanding the absence of fraud or inequitable conduct.[4]

In Federal Land Bank of St. Louis v. Floyd, it was held that this Act could not be given a retroactive effect.[5]

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[2]Cleveringa, State ex rel. v. Klein, 1 U. S. L. J. 353.
[3]Zimmerman, State ex rel. v. Gibbes, 1 U. S. L. J. 263.
[4]Adams v. Spillyards, 1 U. S. L. J. 386.
[5]1 U. S. L. J. 386.

The Supreme Court of Washington decided on June 5th that it was within the power of the legislature to authorize an issuance of $10,000,000 of state bonds for unemployment relief although the constitutional debt limit was $400,000, but this limitation did not apply to debts incurred *"to repel invasion and suppress insurrection."*

It was thought that, in view of existing conditions, it could be said that the purpose of the Act was to "suppress insurrection," although no acts of violence had yet occurred. It was proper to suppress the insurrection before it arose.[6]

These cases are striking illustrations of the development of the doctrine, which a recent writer has termed "amorphous."

It is to be noted that these state cases are in a different classification from those dealing with national legislation.

The various states possess unlimited police power in respect of their domestic affairs, and the national government does not possess the police power under any specific grant, and can exercise such power only in relation to a power otherwise possessed.

The supreme courts of the several states may in general determine for themselves the construction to be placed upon their state constitutions (subject to the 14th Amendment).

One court may determine to uphold an Act under the doctrine of transcendent police power and the next court on the same or similar facts hold that the constitutional guarantees concerning due process and contract rights are applicable at all times and under all circumstances, and that the "police power" can be exercised only within limits and without transcending the guarantees.

Under the latter view, certain fundamental liberties exist, which it is the object of the "bill of rights" to declare, and the purpose having been declared without exception, no exception can be implied.

Under the conditions of the present, it is difficult, if not impossible, for a lawyer to forecast with any degree of certainty the result which will be arrived at by the state court in adopting the one view or the other. The "judicial process" is affected by the individual viewpoint of the judge—his entire personal background—the liveliness of his apprehension

[6]Hamilton, Wash., ex rel. v. Martin, 1 U. S. L. J. 369.

or appreciation of the declared emergency, so a prognostication here is not attempted, nor anything further than a mere indication of the philosophy of the "pro-emergency" people as opposed to that of those who insist on a strict constitutionalism.

As to the application of the doctrine to state legislation, we leave the subject here with the quotation from a decision by the Supreme Court of Minnesota, which might have had some bearing in the recent decision of that court upholding the Mortgage Moratorium Act, to which reference has been made:

> "Constitutions are not made for existing conditions only, nor in the view that the state of society will not advance or improve, but for future emergencies and conditions, and their terms and provisions are constantly expanded and enlarged by construction to meet the advancing and improving affairs of men."
>
> *Elwell v. Comstock,* 99 Minn. 261, 109 N. W. 113.

The problem with respect to Federal government is different. Can the doctrine be applied to national legislation and laws otherwise transcending the specific grants of power be upheld because of the existence of an emergency nationwide in scope?

The Federal government is one of limited authority—the state in respect of the exercise of the "police power" is unlimited.

The National Industrial Recovery Act includes as a feature the power of the President to impose on an industry a "Code of Fair Competition, fixing such maximum hours of labor, minimum rates of pay, and other conditions of employment in the trade or industry or subdivision thereof investigated, which he finds to be necessary to effectuate the policy of this title. * * *"

This Act is avowedly based on the commerce clause.

The "Recovery Act" goes farther than the recent proposal for an act limiting working time to 30 hours a week. The latter contained no features concerning wage fixation.

Both measures proceed upon the postulate that Congress under its right of control of "interstate commerce" may lawfully impose such requirements as a condition of the right to engage in the business.

The theory is that Congress possesses this power to regulate or prohibit interstate commerce merely on account of the general public good—Congress possesses unlimited power in the premises and that its motives are not to be inquired into.

The theory seems to collide with the doctrine of the "Child Labor" case (Hammer v. Dagenhart, 247 U. S. 251). In that case the court held an Act of Congress to be unconstitutional which prohibited transportation in interstate commerce of goods made in a factory in which within 30 days prior to their removal therefrom children under the age of 14 years had been employed or permitted to work.

It was held that this was not a regulation but rather an attempt to control the hours of labor of children in the states. It was said:

"Over interstate transportation or its incidents the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation. * * *

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture. * * *

"The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. * * *

"To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the Federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states. * * *"

There was a vigorous dissent by Mr. Justice Holmes, which was concurred in by McKenna, Brandeis and Clark. Day wrote the majority opinion, White, Van Devanter and McReynolds concurred. Of the justices participating only Van Devanter and McReynolds, of the majority, are still on the bench, and only Brandeis of the minority.

Six new justices who did not participate in that decision are Hughes, Sutherland, Butler, Stone, Roberts, and Cardozo.

The dissent, of course, proceeds upon the doctrine that, under the Constitution, sole control over interstate commerce is vested in Congress, which possesses the broad right to de-

clare the conditions under which commerce may be carried on. The power is unlimited, and a movement of goods may be regulated or prohibited without any regard whatever to their character as being innocuous or harmful.

If this paramount power is found to come in collision with the avowed policy of a state under its "general police power," the latter must yield.

It is thought by some that, in view of the present personnel of the court, the result would be different and the minority view would now be upheld if a case were presented considered to be identical in principle with that of the Child Labor case.

But quite apart from that speculation, it is the view of many that legislation of the type of the "Recovery" Act can be upheld on the "emergency" doctrine in line with the preamble or "declaration of policy" found in the Act.

An interesting discussion of this phase occurred in the Senate on April 3rd, when the bill (S. 158)—30-hour week —was under consideration.

Senator Black, the author of that bill, strongly upheld the "emergency" doctrine.

Senator Borah asked this question:

"Mr. President, do I understand the Senator to admit that if this were permanent legislation it would be unconstitutional?"

To which Black replied:

"I am simply calling attention now to this one phase of it, that, even if anyone should reach the conclusion that permanent legislation would not be authorized by the Constitution, that conclusion could not be urged with reference to legislation for two years only without ignoring the opinions of the Supreme Court in the case of Block v. Hirsh; Brown v. Feldman; Wilson v. New, and Fort Smith Railroad v. Mills."

(The Hirsh case is 256 U. S. 136, 41 Sup. Ct. 458, 16 A. L. R. 165; the Brown case, 41 Sup. Ct. 465; Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, L. R. A. 1917E, 938; Fort Smith R. R. v. Mills, 253 U. S. 206, 40 Sup. Ct. 256.)

Mr. Borah remarked:

"The most objectionable feature of this bill is that which rests upon the contention that the Congress or the

court, or the Congress and the court, may adjudge a bill or a law constitutional upon the theory that an emergency exists, whereas, if no emergency exists it would not be regarded as constitutional."

He then said:

"This measure presents one of the most important questions, not only from a constitutional standpoint but from a humanitarian standpoint, that has been presented of late in this body. It presents the question of how far the court will go in the future in permitting the Congress to exclude from interstate commerce any commodity which the Congress in its wisdom may see fit to exclude. Secondly, it involves the humanitarian and social question of limiting the days of work per week. The former question presents a constitutional problem which has been before the court from time to time since the Government was organized and has never yet been clearly and definitely and finally settled as to the question presented by this measure. * * *

"Mr. President, let me say that if the emergency feature is stricken from this bill, I myself shall not be averse to seeing this proposed law go to the Supreme Court of the United States, because I think it is an open question in the Supreme Court of the United States as to the power which Congress has to exclude from interstate commerce ordinary commodities."

Senator Black is here presented as arguing in support of his bill solely because of the emergency, whereas, Senator Borah repudiates that doctrine but states that he would be in favor of the bill with the emergency feature stricken, because he considers it to be an "open question" as to the power to exclude "ordinary" commodities from interstate commerce.

That is, if it is considered that the "30-hour week" bill is in the same category as the "Child Labor" Act involved in Hammer v. Dagenhart, he, nevertheless, would be in favor of presenting the matter anew to the Supreme Court of the United States. However, the "emergency doctrine" is entirely abhorrent to him.

On the assumption that "N. I. R. A." is an Act in like case with the Child Labor Act, it would appear that Mr. Borah was right in the position he took.

The Federal Government is one of limited power, and a

power not otherwise existing cannot be called into being merely because of an assertion contained in a preamble.

The Block case referred to by Senator Black involved a law of the State of New York and the police power possessed by that state. The entire police power was possessed by the state in respect of the subject-matter. In the then existing emergency situation — housing shortage in connection with the prosecution of the war—it was considered that ordinary private rights had to yield to the transcendent police power possessed by the state.

The Brown case, although dealing with a District of Columbia matter, proceeded upon the theory that the District, in respect of questions of policing, had a power equivalent to that possessed by a state.

Wilson v. New determined that Congress could, in the exercise of its power over commerce, fix a standard working day for employees engaged in the operation of trains on interstate carriers, and make a temporary wage regulation in connection therewith. The right of control there upheld was determined in view of a situation in which complete interruption of interstate commerce was threatened.

It was held that the public right and the public power to preserve it was not "under the control of the private right to establish a standard by agreement" and it was further said: "nor is it an answer to this view to suggest that the situation was one of emergency and that emergency cannot be made the the source of power." *Ex Parte Milligan,* 401 Wall 2. "The proposition begs the question, *since although an emergency may not call into life a power which has never lived, nevertheless, emergency may afford a reason for the exertion of a living power already enjoyed.*"

The things undertaken by the Act therein questioned were admittedly within the scope of "regulation"—an extreme application, however.

Thus, *Wilson v. New* cannot reasonably be relied upon as supporting the "emergency" doctrine as at present expounded.

Furthermore, it appears fallacious to assume that such an act as "N. I. R. A." is in the category of the Child Labor case.

It will be noted that in the decision in the latter case

there are a number of references to the fact that the matter treated of is one purely of "local concern"—that is, it was considered to be clear that the purpose of Congress was not to regulate commerce but to control the State of North Carolina in respect of its domestic policy.

If it may be discerned in connection with legislation fixing hours of labor or limitation on the export of oil from a state which has been produced in violation of the law of that state, etc., that a real national policy is involved, then, on the basis of the determination of such national policy, Congress possesses full power of control over the transportation of such articles and by forbidding the same is not trenching upon the authority possessed by the state.

The legislative declaration of "national policy" does not bind the courts, and it is a judicial question whether the "policy" exists in such sense as to warrant the contemplated exertion of power.

Thus, if Congress should undertake to apply the "quota" principle to the production of oil within the several states, and to forbid the export of that oil from any state exceeding the "quota" upon the asserted policy of conserving oil for the use of the Navy, or for any other particular national purpose, the question would be open for the courts to determine whether or not a matter which hitherto has been regarded as purely a local problem of production has actually become one of national concern.

In this view and in the light of present conditions, it would seem to be a comparatively easy matter to show that there is a sufficient basis in national policy for the exertion of the broad control attempted by "N. I. R. A." in so far as it deals with the prohibition or regulation of goods moving in interstate commerce.

However, a reading of the Act will convince that its purpose is to go farther than a regulation of products moving in interstate commerce.

Seemingly, a virtually unlimited control of production is attempted by the Act.

The preamble in its reference to the "policy of Congress to remove obstructions to the free flow of interstate and for-

eign commerce which tend to diminish the amount thereof" is stated to afford the basis for the broad policy of control over management and production within the state.

The concept is that anything affecting intrastate commerce affects interstate commerce.

If, for example, a company engaged only in a local business should be considered not subject to the operation of the "Recovery Act," whereas, its competitor engaged in business in the several states should be subject to the Act, the result would be that the latter would be subjected to a competition it could not meet at the hands of the local company. The latter would not be under regulation as to wages, hours of employment, etc., and could underprice the products of its competitor.

So, Congress endeavored to include all operations, and it is evident that the Administrator considers that local operations are covered.

It is true that a number of the sections refer solely to transactions in or affecting interstate or foreign commerce. (Sec.3-B, 3-F, 4-A.)

However, the provision that the President may, upon certain findings, proceed to license business enterprises, in order to make effective a code of fair competition, does not contain a reference to the "interstate" feature. (Sec. 7, 7-C, 10-A.)

Some of these enforcement provisions are connected with the interstate commerce feature—others are not. One might surmise that in the one case the author of the bill saw that he was on pretty firm ground and desired specifically to mention the interstate feature—this, however, does not evidence an intent to make the Act applicable only in such case. The framework of the Act may have been so set up as to save it as severable if it should be held that the control over production could be applied only to an interstate operation.

Is it possible, under the emergency or the "national policy" theory, to extend the application of the Act to business purely local in character and not in competition with interstate business, under the concept that all business is now affected with a public interest—a claim recently advanced by Senator Wagner? His speech in the Senate seemed to limit

this theory to control of the state business found to be in competition with interstate commerce.

Is it true that emergency may produce a situation where state and Federal subjects are so far "blended" that it can legitimately be said the national policy of recovery would fail unless all operations within a state be nationally controlled? In such a situation it is argued that the state authority yields to the Federal authority of necessity. This is deduced on the authority of the Minnesota rate cases.

Certainly such a conclusion would require a very great extension of doctrines hitherto taught. Perhaps that "advance" is not greater than that already taken by some state courts in upholding such legislation as acts declaring moratoria.

In the Kansas Natural Gas case, 221 U. S. 227, the court said:

"* * * we have said that 'in matters of foreign and interstate commerce there are no state lines.' In such commerce, instead of the states, a new power appears and a new welfare, a welfare which transcends that of any state. But rather let us say it is constituted of the welfare of all the states and that of each state is made the greater by a division of its resources, natural and created, with every other state. That was the purpose * * * of the interstate commerce clause of the Constitution of the United States."

There is no fixed line of demarcation between matters of local or state concern on the one side and those of national concern on the other. With the changes and developments of society a matter commonly regarded as local in aspect may become one of national importance.

Nevertheless, it would appear to be impossible for the national power to arrogate to itself control of all subjects.

Mr. Justice Holmes remarked in the Superior Oil case, 280 U. S. 390:

"The importance of the Commerce Clause to the Union, of course, is very great. But it also is important to prevent that clause being used to deprive the states of their life blood. * * *"

So, the question is whether the "new welfare" or "new deal," may be carried to the extent that, because of a critical economic condition, control over all industry may be assumed under the claim of a total integration and that state lines disappear and all business is now impressed with a national interest so as to make every operation one in interstate commerce for the purpose of the Act.

Professor Handler, in his fine article on N. I. R. A. in the August "Bar Journal," says that: "The emergency created a mist in which the familiar contours of the landmarks of constitutional decision seemed blurred or even lost."

I trust this contribution may not intensify the gloom. It is intended merely to indicate the rationale by which acts of the new dispensation may be upheld.

EMINENT RIVAL AUTHORS

By J. W. KELLEY *of the Denver Bar*

JOHN MARSHALL, Chief Justice of the Supreme Court of the United States, in his fiftieth year wrote a Life of George Washington, the first president. It is a dull work of five volumes, Marshall not having a knack for biography, yet evidently fancying himself gifted in that respect to the point of vanity. The most entertaining portion of the Life is in the Appendix where the author sets out with scrupulous care the original draft of the Declaration of Independence, as penned by Thomas Jefferson, and the changes and improvements afterward made at the suggestion of others.

Marshall was careful to state that John Adams, Benjamin Franklin and R. R. Livingston were on the drafting committee with Jefferson. He proved beyond question that the most brilliant paragraph in the Declaration was lifted bodily from a resolution written by Richard Henry Lee and that other paragraphs (especially the one on slavery), afterward stricken out, were clumsily written. Marshall had no great opinion of the third president of the United States, politically or otherwise, and he evidently sought by this means to prove to posterity that the faultless phrases of the immortal Declaration were not entirely emanations from the brain of Jefferson, and his original draft an inferior grade of literary skill. As evidence that the object of the great Chief Justice was to diminish Jefferson's reputation as a writer it is noted that when Marshall later prepared a one volume Life of Washington he abridged everything in his original work except the part of the Appendix reflecting upon Jefferson's literary ability which he set forth in all the meticulous amplitude of his first effort.