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Constitutional Law - Interstate and Intrastate Commerce Under the Agricultural Marketing Agreement Act

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leans *only*, whereas Section 69 of the same article embraces the office of sheriff in all other parishes. Thus it can be urged with force that Section 69 of Article VII has no bearing on this case because it and Section 93 do not relate to the same offices. The former applies to the office of sheriff but does not include the special office of criminal sheriff, which is peculiar to Orleans Parish. Moreover, Section 69 cannot afford a satisfactory solution to the problem caused by a vacancy in the office of sheriff in a parish other than Orleans, because although comprehensive in terms, it actually leaves a hiatus with respect to filling a vacancy in an unexpired term of less than a year for the combined reasons that it does not permit of recess appointments and the legislature is in regular session for only sixty days out of every two years. Therefore if such a vacancy occurs, for example, in adjoining St. Bernard Parish while the legislature is not in session, and the unexpired term is less than a year, there would be no possible legal means of filling the vacancy under the law as it now appears.

The instant case seems correctly decided under the constitutional provisions applicable. However, one cannot but observe that Mr. Palfrey's appointment was invalid only by reason of a chance occurrence—the fact that the Senate was in recess. If the Senate had been in session, then the Governor's appointment of Palfrey would have been "as provided by law" and Williams would have been sheriff for the temporary period of several hours instead of for the rest of the unexpired term.[14]

O.P.S.

CONSTITUTIONAL LAW—INTERSTATE AND INTRASTATE COMMERCE UNDER THE AGRICULTURAL MARKETING AGREEMENT ACT—The United States sought to compel the defendant to comply with the order of the Secretary of Agriculture[1] issued under the asserted authority of the Agricultural Marketing Agreement Act.[2] The declared

14. According to Article III, § 8, of the Constitution, the legislature meets in regular session on the second Monday in May every second year. This being so, the legislature met only a few days after the expiration of the term of the office involved in this case. Of this the supreme court said in the instant case: "But this is merely an incident in this case, and does not compel a departure from the provisions in the Constitution for the filling of vacancies in public office." State ex rel. Palfrey v. Judges of Criminal District Court of the Parish of Orleans, 199 La. 232, 5 So. (2d) 756, 758, (1942).

1. Order No. 41, Aug. 28, 1939.

2. 50 Stat. 246, 7 U.S.C.A. § 608c (1937). For a complete and thorough explanation of the functioning of this act, see United States v. Rock Royal Co-operative, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446 (1939).

policy of the act is to raise the purchasing power of agricultural commodities, and at the same time, to protect the interest of the consumer.[3] The defendant was engaged in the retail milk business in Illinois. All of the milk purchased by the defendant was from producers within the state, and all of the sales made by it were to consumers within the state. The defense was that its business was entirely intrastate and that consequently the statute did not, and under the commerce clause, could not constitutionally apply to it. *Held,* the defendant's business, by way of competition, has an injurious effect upon the regulation by Congress of the milk moving interstate, and may, therefore, be regulated as a valid exercise of the power to make the primary regulation effective. *United States v. Wrightwood Dairy Company,* 62 S.Ct. 523 (1942).

The power of Congress to regulate commerce, by virtue of the commerce clause of the Constitution,[4] has been greatly expanded in the past few years by the interpretation given the commerce clause by the Supreme Court.[5] It was very early recognized that that power was plenary and complete in itself, and acknowledged no limitations other than those prescribed by the Constitution.[6] It was not, however, until recent years that the court vastly extended the field of Congressional control by declaring certain activities, theretofore considered as intrastate, to be a part of, engaged in, or closely or intimately affecting interstate commerce, and hence, subject to federal regulation.[7] It appears that the principal case, at the minimum, has opened up an important field of application of federal power over commerce.

As it is elementary that Congress cannot regulate those activities which are entirely intrastate,[8] and as the defendant's busi-

3. ". . . establish prices to farmers at a level that will give agricultural commodities a purchasing power . . . (1) equivalent to the purchasing power of agricultural commodities in the base period . . . (2) to protect the interest of the consumer. . . ." Agricultural Marketing Agreement Act, supra note 1.

4. U.S. Const. Art. I, § 8, cl. 3.

5. See Humes, Trend of Decisions Respecting the Power of Congress to Regulate Interstate Commerce (1940) 26 A.B.A.J. 846.

6. Gibbons v. Ogden, 22 U.S. 1, 6 L.Ed. 23 (1824).

7. See the valuable summation and collection of cases in United States v. Darby Lumber Co., 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609, 132 A.L.R. 1430 (1941).

8. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X. See United States v. Darby Lumber Co., 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609, 132 A.L.R. 1430 (1941), which declares that this amendment simply states a truism, and adds nothing as a limitation on federal power. The federal government was simply one of delegated powers from the outset. The Constitution grants Congress control only over commerce between the states and foreign commerce. U.S. Const. Art. I, § 8, cl. 3.

ness was admittedly intrastate,[9] it was essential that the court find some substantial connection between that business and interstate commerce in order to bring it within federal jurisdiction. That was done by finding that the competition afforded by the defendant's products had an injurious effect upon federal regulations governing milk moving interstate into Illinois. The court has never before squarely held that the effects of free competition on interstate commodities might render the intrastate commodities subject to federal regulation.[10] The railroad rate cases[11] come very close to that conclusion, but it must be remembered that in those cases the court was dealing with transportation, and the absolute necessity that the channels through which commerce flows be kept open. Any impairment of that system would disrupt all commerce. "It is axiomatic that the court is more solicitous about extending Congressional power over transportation than over other activities."[12] Were it not for that fact the present case might very well be an extention of that doctrine.[13]

The labor board[14] and tobacco marketing cases[15] are hardly in point. They involved the regulation of activities essential to the successful entrance of goods into commerce, the control of "embryonic commerce," where at least a portion of the goods are destined for interstate commerce.[16] There, federal regulatory

9. United States v. Wrightwood Dairy Co., 62 S. Ct. 523, 525 (1942).

10. Cf. Board of Trade of the City of Chicago v. Olsen, 262 U.S. 1, 43 S.Ct. 470, 67 L.Ed. 839 (1922); Stevens Co. v. Foster & Kleiser Co., 311 U.S. 255, 61 S.Ct. 210, 85 L.Ed. 173 (1940). The language of the court in these two cases raises a strong implication that it might be done.

11. Minnesota Rate Cases, Simpson v. Shepard, 230 U.S. 352, 33 S.Ct. 729, 57 L.Ed. 1501 (1913); Houston, East & West Texas Railway Co. v. United States, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914); Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Co., 257 U.S. 563, 42 S.Ct. 232, 66 L.Ed. 371, 22 A.L.R. 1086 (1922).

12. Note (1940) 28 Ill. Bar J. 209, 210.

13. In the rate cases, however, it was not so much the element of competition which caused the restraint, but rather the voluntary acts of the railroads in making up for low rates charged to intrastate shippers by raising the rates charged to interstate shippers. See cases cited in note 11, supra.

14. National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937); Associated Press v. National Labor Relations Board, 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937); Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S.Ct. 206, 83 L.Ed. 126 (1939).

15. Mulford v. Smith, 307 U.S. 38, 59 S.Ct. 648, 83 L.Ed. 1092 (1939), noted in (1939) 52 Harv. L. Rev. 1364; Currin v. Wallace, 306 U.S. 1, 59 S.Ct. 379, 83 L. Ed. 441 (1939).

16. Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U.S. 453, 68 S.Ct. 656, 82 L.Ed. 954 (1938); National Labor Relations Board v. Idaho-Maryland Mines Corp., 98 F. (2d) 129 (C. C. A. 9th, 1938), wherein the court found that an unfair labor practice did not affect commerce so as to give the Board jurisdiction where none of the goods were destined for inter-

power was based on the prospective movement of the goods in interstate commerce, although the court has not been dogmatic about the percentage of the goods that need enter those channels.[17]

It will be noted that the present case involves the very antithesis of the practice condemned in the Sherman Act.[18] One is concerned with the fostering of interstate commerce by the destruction of monopolistic practices which tend to destroy free and fair competition;[19] the other involves the fostering of interstate commerce by the destruction of otherwise free and fair competition which tends to offset federal regulations. If Congress has power to adopt either policy, and that much has previously been made clear, that power can be said to embrace regulation of local commerce to the extent reasonably necessary to effectuate the policy. The fact that there had been a radical change in policy would not be controlling.

However, it is noteworthy that Congress, in deleting the words "in competition with" from the 1933 act[20] and substituting in their stead the words "directly affecting" in the 1937 act,[21] was

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state commerce. This same reasoning could be applied to a constitutional question..

17. National Labor Relations Board v. Fainblatt, 306 U.S. 601, 59 S.Ct. 668, 83 L.Ed. 1014 (1939). In respect to this case, the court in the *Darby* case says: "Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. . . ." United States v. Darby Lumber Co., 312 U.S. 100, 123, 61 S.Ct. 451, 461, 85 L.Ed. 609, 622 (1941). See H.R. 2182, 75th Cong., 1st Sess. (1937).

18. Sherman Anti-Trust Act, 26 Stat. 209, 15 U.S.C.A., §§ 1-7, note 15 (1890).

19. Nothern Securities Co. v. United States, 193 U.S. 197, 24 S.Ct. 436, 48 L. Ed. 679 (1904); Swift and Co. v. United States, 196 U. S. 375, 25 S.Ct. 276, 49 L.Ed. 518 (1905); United States v. Patten, 226 U.S. 525, 33 S.Ct. 141, 57 L.Ed. 333 (1913); Coronado Coal Co. v. United Mine Workers of America, 268 U.S. 295, 45 S.Ct. 551, 69 L.Ed. 963 (1925); Local 167 of International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America v. United States, 291 U.S. 293, 54 S.Ct. 396, 78 L.Ed. 804 (1934); Stevens Co. v. Foster & Kleiser Co., 311 U.S. 255, 61 S.Ct. 210, 85 L.Ed. 173 (1940).

Under the Anti-Trust Act an intrastate activity which restrains interstate commerce can be brought under the act only in the event that there is an *intent* to restrain interstate commerce, plus an actual restraint. United Leather Workers International Union v. Herkert and Meisel Trunk Co., 265 U.S. 457, 44 S.Ct. 623, 68 L.Ed. 1104 (1924); Industrial Association of San Francisco v. United States, 268 U.S. 64, 45 S.Ct. 403, 69 L.Ed. 849 (1925); Coronado Coal Co. v. United Mine Workers of America, supra; Levering and Garrigues Co. v. Morrin, 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062 (1933); Apex Hosiery Co. v. William Leader, 310 U.S. 469, 60 S.Ct. 982, 84 L. Ed. 1311 (1940).

20. Agricultural Adjustment Act, 48 Stat. 31 (1933), as amended by 48 Stat. 528 (1934), 7 U.S.C.A. §§ 601-620 (1935).

21. Agricultural Marketing Agreement Act, 50 Stat. 246 (1937), 7 U.S.C.A. § 608c (1937).

apparently cognizant of the fact that there were constitutional limitations on their power to regulate activities affecting interstate commerce. This is made particularly evident in view of the fact that Congress was attempting to make the act conform to the opinion of the court in the *Schechter* case.[22] Whatever doubt there may have been as to the constitutional effects of this change of policy has now been dissolved by the decision in the principal case.

It would appear, therefore, that the liberal attitude of the court has once more given Congress the green light. Under the doctrine of the present case commodities produced and sold exclusively within one state may be subject to federal control if the same commodities are coming into the state via interstate commerce, and the element of competition is present. The fact that the enterprises dealing with the commodities which have come into the state must first be subject to federal regulation themselves before the intrastate commodities can be regulated, is not a serious limitation since the *Rock Royal* case,[23] which found that such enterprises directly affect commerce, is itself practically boundless in application.[24] The decisions could possibly be confined to the commodity with which they deal, that is, milk, because of its inherent nature and the social necessity and desirability that there be an adequate supply and distribution of pure and wholesome milk. It is well to remember that constitutional adjudication is statecraft, a function quite different from ordinary judicial business, and the court is by no means committed by its

22. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947 (1935), declaring Title I of the National Industrial Recovery Act unconstitutional.

23. United States v. Rock Royal Co-operative, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446 (1939).

24. See the dissent in that case: "Congress possesses the powers delegated by the Constitution—not others. The opinion of this court in Schechter Poultry Corp. v. United States, 295 U.S. 495, 75 L.Ed. 1570, 55 S.Ct. 837, 97 A.L.R. 947 (1935), noteworthy because of modernity and reaffirmative of ancient doctrine—sufficiently demonstrates the absence of Congressional authority to manage private affairs under the transparent guise of regulating interstate commerce. True, production and distribution of milk are most important enterprises, not easy of wise execution; but so is breeding the cows, authors of the commodity; also, sowing and reaping the fodder which inspires them." United States v. Rock Royal Co-operative, 307 U.S. 533, 582, 59 S.Ct. 993, 1017, 83 L.Ed. 1446, 1475 (1939).

It is difficult to reconcile the finding by the court of a *direct* effect upon interstate commerce in the *Rock Royal* case with the contrary finding by the court in the *Schechter* case upon almost identical facts—the only difference being the commodity involved in each case. However, the more recent decisions have shown a marked tendency on the part of the court to abandon the concept of direct and indirect effects as a distinguishing feature.

adjustment of a particular constitutional problem to embrace all the logical implications of its decision.[25]

E.L.L.

CRIMINAL PROCEDURE—PRESENCE OF THE ACCUSED DURING TRIAL —During a trial for manslaughter the jury was removed from the courtroom to the jail to receive a demonstration of evidence. The record stated generally that the accused was present during the trial, but failed to show whether he was present or absent at the time the evidence complained of was taken. Defense counsel did not object and reserve a bill of exception to the alleged absence of accused during the demonstration of evidence. *Held,* that since the error was not patent on the face of the record, and since no objection was made and exception reserved, the error complained of was waived and could not be urged as a ground for a new trial. *State v. Augusta,* 7 So. (2d) 177 (La. 1942).

The jurisprudence of the state of Louisiana is in accord with the general common law rule[1] to the effect that one who is on trial for a felony must be present in court during every important stage of the trial from the moment of his arraignment to his sentence.[2] Not only must he be present, but the records of the court must affirmatively show his presence or state facts from which his presence may be inferred.[3] The failure of the record to show the presence of the accused during important proceedings does not ipso facto constitute reversible error, and the case may be tempo-

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25. The fact that the Federal government has in the past few months enacted statutes authorizing price regulation for all commodities is another matter. Such statutes are enacted for emergency purposes and can be grounded on the war power.

1. Bishop, New Criminal Procedure (2 ed. 1913) 240, § 273; Clark, Handbook of Criminal Procedure (2 ed. 1918) 492, § 148. Lee v. State, 56 Ark. 4, 19 S.W. 16 (1892); Lowman v. State, 80 Fla. 18, 85 So. 166 (1920); McLendon v. State, 96 Miss. 25, 50 So. 864 (1910); State v. Bramlett, 114 S.C. 389, 103 S.E. 755 (1920). Canadian cases: Rex v. McDougall, 8 O.L.R. 30, 24 C.L.T. 324 (1904); Rex v. Paris, 69 D.L.R. 373, 38 Can. Crim. Cas. 126 (1922).

2. State v. Christian, 30 La. Ann. 367 (1878); State v. Ford, 30 La. Ann. 311 (1878); State v. Smith, 31 La. Ann. 406 (1879); State v. Davenport, 33 La. Ann. 231 (1881); State v. Thomas, 128 La. 813, 55 So. 415 (1911); State v. Futrell, 159 La. 1093, 106 So. 651 (1925); State v. Layton, 180 La. 1029, 158 So. 375 (1934).

3. When evidence is admitted during the trial, the Constitution requires that the accused be present. La. Const. of 1921, Art. I, § 9; Art. 365, La. Code of Crim. Proc. of 1928. State v. Christian, 30 La. Ann. 367 (1878); State v. Revells, 31 La. Ann. 387 (1879); State v. Smith, 31 La. Ann. 406 (1879); State v. Thomas, 128 La. 813, 55 So. 415 (1911); State v. White, 156 La. 770, 101 So. 136 (1924); State v. Futrell, 159 La. 1093, 106 So. 651 (1925); State v. Layton, 180 La. 1029, 158 So. 375 (1934).