ADVANCE SHEET – November 26, 2021

President's Letter

In this issue we reproduce three Supreme Court opinions on the basic structure of American government rendered on the same day, May 27, 1935.

While the following 85 years have somewhat eroded the force of the opinions, none have been overruled, and all have pertinence to recent political controversies.

The first of these is the famous *Schechter* 'sick chicken' case 295 U.S. 495 (1935) invalidating the National Recovery Administration Act. The NRA was about to expire and almost certainly would not have been renewed in its original form.

Chief Justice Hughes' opinion on the Commerce Clause was later eroded, most notably in the case of *Wickard v. Filburn*, allowing regulation of substantially all agricultural production, on an 'indirect effects' theory. But limits on Commerce Clause powers survive, as was shown in the *Sibelius* case holding failure to buy insurance as being beyond the Commerce power, and in the *Lopez* and *Morrison* cases, limiting the reach of the clause on social issues (gun control and sex discrimination).

The delegation holding of the *Schechter* case was severely eroded in the *Yakus* case rendering wartime price regulations virtually nonreviewable through the use of techniques resembling those employed by the State of Texas in a recent abortion case. But Justice Cardozo's concurring condemnation of 'delegation run riot' still lives, and may be invoked against some or all of the provisions of the pending budget reconciliation bill.

The second May 27 decision was *Louisville Joint Stock Bank v. Radford*, 295 U.S.555 (1935) invalidating limitations on mortgage foreclosures imposed by the Frazier-Lemke Act. While the statute invalidated was an extreme statute, Justice Brandeis' definition of the rights of secured creditors still lives. The opinion's express insistence that some impairments of mortgagees' and landlords' rights require the use of eminent domain did not play a large part in recent controversies over COVID foreclosure and evictions moratoria, though it should have done so.

The third decision was the unanimous decision by Justice Sutherland joined by Justice Brandeis and others in *Humphrey's Executor v. U.S.*, 295 U.S.602 (1935) invalidating the summary removal of a Federal Trade Commissioner and expressly limiting Chief Justice Taft's opinion of ten years earlier in *Myers v. United States*. At least as to 'the fourth branch of government,' federal administrative agencies, the opinion vindicated without citing Justice Brandeis' memorable dissent in the *Myers* case with its statement that the separation of powers was adopted "not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but by means of the inevitable friction incident to the distribution of the governmental powers among three branches, to save the people from autocracy." The *Humphreys* opinion was not a favorite of President Roosevelt; still less of the advocates of an 'unitary executive' during the Bush, Jr. and Trump administrations, whose variations on this theme have become strangely muted since the election of President Biden.

The faith of librarians and archivists, and at one time of lawyers, is that the controversies of the past can illuminate the present.

George W. Liebmann

Of Thanksgiving & Penumbras

Yesterday was, as I am sure most of you remember, Thanksgiving. I hope it was a wonderful day for one and all and that it is the beginning of what will be a happy and joyous holiday season.

Writing for the Supreme Court in *Griswold v. Connecticut*, Justice William O. Douglas famously said that a general right to privacy was found in the "penumbras," or zones, created by the specific guarantees of several amendments in the Bill of Rights, including the First, Third, Fourth, and Ninth Amendments.

The simple definition of a penumbra is "the partially shaded outer region of the shadow cast by an opaque object." It is, in my estimation, a wonderful concept that allows the full meaning of a concept to be achieved.

A penumbra that I am particularly grateful for is that which emanates from family. I suppose that those of us of a certain age knew exactly what a family was. It was painted by Norman Rockwell and it was on the cover of the *Saturday Evening Post*. Times change, however, sometimes for the worse, this time for the better. Families are defined by many things, but mostly by what they feel toward one another. Whether it be as the result of the inclusive nature of a penumbra, or some other means, I am grateful for the wonderful magic that has transformed many friends I have met over the years, including a good number that I have met here at the Library, into my family. For this I am grateful, I am most thankful.

Take care everyone and I hope to see you soon.

Joe Bennett

A.L.A. SCHECHTER POULTRY CORPORATION et al.
v.
UNITED STATES.
UNITED STATES
v.
A.L.A. SCHECHTER POULTRY CORPORATION et al.
Nos. 854, 864.
Argued May 2, 3, 1935.
Decided May 27, 1935.
Synopsis
On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
The A.L.A. Schechter Poultry Corporation, the Schechter Live Poultry Market, Joseph Schechter, Martin Schechter, Alex Schecter, and Aaron Schechter were indicted for an alleged conspiracy and for violations of the Code of Fair Competition for the Live Poultry Industry of the metropolitan area in and about the city of New York. A demurrer to indictment was sustained in part and overruled in part (United States v. Schechter, 8 F.Supp. 136). A conviction on one count of conspiracy and on certain substantive counts was affirmed in part and reversed in part by the Circuit Court of Appeals (76 F.(2d) 617), and defendants and the United States bring certiorari.
Judgment of conviction reversed.
Phrase ‘unfair methods of competition’ within Federal Trade Commission Act has broader meaning than common-law term ‘unfair competition,’ but its scope cannot be precisely defined, and what constitutes ‘unfair methods of competition’ must be determined in particular instances, upon evidence, in light of particular competitive

conditions and of what is found to be a specific and substantial public interest (Federal Trade Commission Act s 5 (15 USCA s 45)).
Attorneys and Law Firms
Messrs. Joseph Heller, Frederick H. Wood, and Jacob E. Heller, all of New York City, for petitioner A.L.A. Schechter Corporation and others.
The Attorney General and Messrs. Stanley F. Reed, Sol. Gen., and Donald R. Richberg, both of Washington, D.C., for the United States.
Opinion

Mr. Chief Justice HUGHES delivered the opinion of the Court.
Petitioners in No. 854 were convicted in the District Court of the United States for the Eastern District of New York on eighteen counts of an indictment charging violations of what is known as the 'Live Poultry Code,'1 and on an additional count for conspiracy to commit such violations.2 By demurrer to the indictment and appropriate motions on the trial, the defendants contended (1) that the code had been adopted pursuant to an unconstitutional delegation by Congress of legislative power; (2) that it attempted to regulate intrastate transactions which lay outside the authority of Congress; and (3) that in certain provisions it was repugnant to the due process clause of the Fifth Amendment.
'The Circuit Court of Appeals sustained the conviction on the conspiracy count and on sixteen counts for violation of the code, but reversed the conviction on two counts which charged violation of requirements as to minimum wages and maximum hours of labor, as these were not deemed to be within the congressional power of regulation. 76 F.(2d) 617. On the respective applications of the defendants (No. 854) and of the government (No. 864), this Court granted writs of certiorari April 15, 1935. 295 U.S. 723, 55 S.Ct. 651, 79 L.Ed. —-.
New York City is the largest live poultry market in the United States. Ninety-six per cent. of the live poultry there marketed comes from other states. Three-fourths of this amount arrives by rail and is consigned to commission men or receivers. Most of these freight shipments (about 75 per cent.) come in at the Manhattan Terminal of the New York Central Railroad, and the remainder at one of the four terminals in New Jersey serving New York City. The commission men transact by far the greater part of the business on a commission basis, representing the shippers as agents, and remitting to them the proceeds of sale, less commissions, freight, and handling charges. Otherwise, they buy for their own account. They sell to slaughterhouse operators who are also called marketmen.
The defendants are slaughterhouse operators of the latter class. A.L.A. Schechter Poultry Corporation and Schechter Live Poultry Market are corporations conducting wholesale poultry slaughterhouse markets in Brooklyn, New York City. Joseph Schechter operated the latter corporation and also guaranteed the credits of the former corporation, which was operated by Martin, Alex, and Aaron Schechter. Defendants ordinarily purchase their live poultry from commission men at the West Washington Market in New York City or at the railroad terminals serving the city, but occasionally they purchase from commission men in Philadelphia. They buy the poultry for slaughter and resale. After the poultry is trucked to their slaughterhouse markets in Brooklyn, it is there sold, usually within twenty-four hours, to retail poultry dealers and butchers who sell directly to consumers. The poultry purchased from defendants is immediately slaughtered, prior to delivery, by shochtim in defendants' employ. Defendants do not sell poultry in interstate commerce.
The 'Live Poultry Code' was promulgated under section 3 of the National Industrial Recovery Act.3 That section, the pertinent provisions of which are set forth in the margin,4 authorizes the President to approve 'codes of fair competition.' SUCH A CODE may be approved for a trade or industry, upon application by one or more trade or industrial associations or groups, if the President finds (1) that such associations or

groups 'impose no inequitable restrictions on admission to membership therein and are truly representative,' and (2) that such codes are not designed 'to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy' of title 1 of the act (15 USCA s 701 et seq.). Such codes 'shall not permit monopolies or monopolistic practices.' As a condition of his approval, the President may 'impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared.' Where such a code has not been approved, the President may prescribe one, either on his own motion or on complaint. Violation of any provision of a code (so approved or prescribed) 'in any transaction in or affecting interstate or foreign commerce' is made a misdemeanor punishable by a fine of not more than $500 for each offense, and each day the violation continues is to be deemed a separate offense.

The 'Live Poultry Code' was approved by the President on April 13, 1934. Its divisions indicate its nature and scope. The code has eight articles entitled (1) 'purposes,' (2) 'definitions,' (3) 'hours,' (4) 'wages,' (5) 'general labor provisions,' (6) 'administration,' (7) 'trade practice provisions,' and (8) 'general.'

The declared purpose is 'To effect the policies of title I of the National Industrial Recovery Act.' The code is established as 'a code for fair competition for the live poultry industry of the metropolitan area in and about the City of New York.' That area is described as embracing the five boroughs of New York City, the counties of Rockland, Westchester, Nassau, and Suffolk in the state of New York, the counties of Hudson and Bergen in the state of New Jersey, and the county of Fairfield in the state of Connecticut.

The 'industry' is defined as including 'every person engaged in the business of selling, purchasing of resale, transporting, or handling and/or slaughtering live poultry, from the time such poultry comes into the New York metropolitan area to the time it is first sold in slaughtered form,' and such 'related branches' as may from time to time be included by amendment. Employers are styled 'members of the industry,' and the term 'employee' is defined to embrace 'any and all persons engaged in the industry, however compensated,' except 'members.'

The code fixes the number of hours for workdays. It provides that no employee, with certain exceptions, shall be permitted to work in excess of forty hours in any one week, and that no employees, save as stated, 'shall be paid in any pay period less than at the rate of fifty (50) cents per hour.' The article containing 'general labor provisions' prohibits the employment of any person under 16 years of age, and declares that employees shall have the right of 'collective bargaining' and freedom of choice with respect to labor organizations, in the terms of section 7(a) of the act (15 USCA s 707(a). The minimum number of employees, who shall be employed by slaughterhouse operators, is fixed; the number being graduated according to the average volume of weekly sales.

Provision is made for administration through an 'industry advisory committee,' to be selected by trade associations and members of the industry, and a 'code supervisor,' to be appointed, with the approval of the committee, by agreement between the Secretary of Agriculture and the Administrator for Industrial Recovery. The expenses of administration are to be borne by the members of the industry proportionately upon the basis of volume of business, or such other factors as the advisory committee may deem equitable, 'subject to the disapproval of the Secretary and/or Administrator.'

The seventh article, containing 'trade practice provisions,' prohibits various practices which are said to constitute 'unfair methods of competition.' The final article provides for verified reports, such as the Secretary or Administrator may require, '(1) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and (2) for the determination by the Secretary or Administrator of the extent to which the declared policy of the act is being effectuated by this code.' The members of the industry are also required to keep books and records which 'will clearly reflect all financial transactions of their respective businesses and the financial condition thereof,' and to submit weekly reports showing the range of daily prices and volume of sales' for each kind of produce.

The President approved the code by an executive order (No. 6675—A) in which he found that the application for his approval had been duly made in accordance with the provisions of title 1 of the National Industrial Recover Act; that there had been due notice and hearings; that the code constituted 'a code of fair competition' as contemplated by the act and complied with its pertinent provisions, including clauses (1) and (2) of subsection (a) of section 3 of title 1 (15 USCA s 703(a)(1, 2); and that the code would tend 'to effectuate the policy of Congress as declared in section 1 of Title I.'5 The executive order also recited that the Secretary of Agriculture and the Administrator of the National Industrial Recovery Act had rendered separate reports as to the provisions within their respective jurisdictions. The Secretary of Agriculture reported that the provisions of the code 'establishing standards of fair competition (a) are regulations of transactions in or affecting the current of interstate and/or foreign commerce and (b) are reasonable,' and also that the code would tend to effectuate the policy declared in title 1 of the act, as set forth in section 1 (15 USCA s 701). The report of the Administrator for Industrial Recovery dealt with wages, hours of labor, and other labor provisions.6

Of the eighteen counts of the indictment upon which the defendants were convicted, aside from the count for conspiracy, two counts charged violation of the minimum wage and maximum hour provisions of the code, and ten counts were for violation of the requirement (found in the 'trade practice provisions') of 'straight killing.' This requirement was really one of 'straight' selling. The term 'straight killing' was defined in the code as 'the practice of requiring persons purchasing poultry for resale to accept the run of any half coop, coop, or coops, as purchased by slaughterhouse operators, except for culls.'7 The charges in the ten counts, respectively, were that the defendants in selling to retail dealers and butchers had permitted 'selections of individual chickens taken from particular coops and half coops.'

Of the other six counts, one charged the sale to a butcher of an unfit chicken; two counts charged the making of sales without having the poultry inspected or approved in accordance with regulations or ordinances of the city of New York; two counts charged the making of false reports or the failure to make reports relating to the range of daily prices and volume of sales for certain periods; and the remaining count was for sales to slaughterers or dealers who were without licenses required by the ordinances and regulations of the city of New York.

First. Two preliminary points are stressed by the government with respect to the appropriate approach to the important questions presented. We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power.8 The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extraconstitutional authority were anticipated **843 and precluded by the explicit terms of the Tenth Amendment—'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.'

The further point is urged that the national crisis demanded a broad and intensive co-operative effort by those engaged in trade and industry, and that this necessary co-operation was sought to be fostered by permitting them to initiate the adoption of codes. But the statutory plan is not simply one for voluntary effort. It does not seek merely to endow voluntary trade or industrial associations or groups with privileges or immunities. It involves the coercive exercise of the lawmaking power. The codes of fair competition which the statute attempts to authorize are codes of laws. If valid, they place all persons within their reach under the obligation of positive law, binding equally those who assent and those who do not assent. Violations of the provisions of the codes are punishable as crimes.

Second. The Question of the Delegation of Legislative Power.—We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. Panama Refining Company v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed . 446. The Constitution provides that '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.' Article 1, s 1. And the Congress is authorized 'To make all Laws which shall be necessary and proper for carrying into Execution' its general powers. Article 1, s 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly. We pointed out in the Panama Refining Company Case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained. Id., 293 U.S. 388, page 421, 55 S.Ct. 241, 79 L.Ed. 446.

Accordingly, we look to the statute to see whether Congress has overstepped these limitations—whether Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others.

The aspect in which the question is now presented is distinct from that which was before us in the case of the Panama Refining Company. There the subject of the statutory prohibition was defined. National Industrial Recovery Act, s 9(c), 15 USCA s 709(c). That subject was the transportation in interstate and foreign commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. The question was with respect to the range of discretion given to the President in prohibiting that transportation. Id., 293 U.S. 388, pages 414, 415, 430, 55 S.Ct. 241, 79 L.Ed. 446. As to the 'codes of fair competition,' under section 3 of the act, the question is more fundamental. It is whether there is any adequate definition of the subject to which the codes are to be addressed.

What is meant by 'fair competition' as the term is used in the act? Does it refer to a category established in the law, and is the authority to make codes limited accordingly? Or is it used as a convenient designation for whatever set of laws the formulators of a code for a particular trade or industry may propose and the President may approve (subject to certain restrictions), or the President may himself prescribe, as being wise and beneficient provisions for the government of the trade or industry in order to accomplish the broad purposes of rehabilitation, correction, and expansion which are stated in the first section of title 1?9

The act does not define 'fair competition.' 'Unfair competition,' as known to the common law, is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. Good-year's Rubber Manufacturing Co. v. Good-year Rubber Co., 128 U.S. 598, 604, 9 S.Ct. 166, 32 L.Ed. 535; Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U.S. 118, 140, 25 S.Ct. 609, 49 L.Ed. 972; Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 413, 36 S.Ct. 357, 60 L.Ed. 713. In recent years, its scope has been extended. It has been held to apply to misappropriation as well as misrepresenation, to the selling of another's goods as one's own—to misappropriation of what equitably belongs to a competitor. International News Service v. Associated Press, 248 U.S. 215, 241, 242, 39 S.Ct. 68, 63 L.Ed. 211, 2 A.L.R. 293. Unfairness in competition has been predicated of acts which lie outside the ordinary course of business and are tainted by fraud or coercion or conduct otherwise prohibited by law.10 Id., 248 U.S. 315, page 258, 39 S.Ct. 68, 63 L.Ed. 211, 2 A.L.R. 293. But it is evident that in its widest range, 'unfair competition,' as it has been understood in the law, does not reach the objectives of the codes which are authorized by the National Industrial Recovery Act. The codes may, indeed, cover conduct which existing law condemns, but they are not limited to conduct of that sort. The government does not contend that the act contemplates such a limitation. It would be opposed both to the declared purposes of the act and to its administrative construction.

The Federal Trade Commission Act [section 5 (15 USCA s 4511 introduced the expression 'unfair methods of competition,' which were declared to be unlawful. That was an expression new in the law. Debate apparently convinced the sponsors of the legislation that the words 'unfair competition,' in the light of their meaning at common law, were too narrow. We have said that the substituted phrase has a broader meaning, that it does not admit of precise definition; its scope being left to judicial determination as controversies arise. Federal Trade Commission v. Raladam Co., 283 U.S. 643, 648, 649, 51 S.Ct. 587, 75 L.Ed. 1324, 79 A.L.R. 1191; Federal Trade Commission v. R. F. Keppel, 291 U.S. 304, 310—312, 54 S.Ct. 423, 78 L.Ed. 814. What are 'UNFAIR METHODS OF COMPETITION' ARE THUS to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest. Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441, 453, 42 S.Ct. 150, 66 L.Ed. 307, 19 A.L.R. 882; Federal Trade Commission v. Klesner, 280 U.S. 19, 27, 28, 50 S.Ct. 1, 74 L.Ed. 138, 68 A.L.R. 838; Federal Trade Commission v. Raladam Co., supra; Federal Trade Commission v. R. F. Keppel, supra; Federal Trade Commission v. Algoma Lumber Co., 291 U.S. 67, 73, 54 S.Ct. 315, 78 L.Ed. 655. To make this possible, Congress set up a special procedure. A commission, a quasi judicial body, was created. Provision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the commission is taken within its statutory authority. Federal Trade Commission v. Raladam Co., supra; Federal Trade Commission v. Klesner, supra.12

In providing for codes, the National Industrial Recovery Act dispenses with this administrative procedure and with any administrative procedure of an analogous character. But the difference between the code plan of the Recovery Act and the scheme of the Federal Trade Commission Act lies not only in procedure but in subject-matter. We cannot regard the 'fair competition' of the codes as antithetical to the 'unfair methods of competition' of the Federal Trade Commission Act. The 'fair competition' of the codes has a much broader range and a new significance. The Recovery Act provides that it shall not be construed to impair the powers of the Federal Trade Commission, but, when a code is approved, its provisions are to be the 'standards of fair competition' for the trade or industry concerned, and any violation of such standards in any transaction in or affecting interstate or foreign commerce is to be deemed 'an unfair method of competition' within the meaning of the Federal Trade Commission Act. Section 3(b) of the act, 15 USCA s 703(b).

For a statement of the authorized objectives and content of the 'codes of fair competition,' we are referred repeatedly to the 'Declaration of Policy' in section 1 of title 1 of the Recovery Act (15 USCA s 701). Thus the approval of a code by the President is conditioned on his finding that it 'will tend to effectuate the policy of this title.' Section 3(a) of the act, 15 USCA s 703(a). The President is authorized to impose such conditions 'for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared.' Id. The 'policy herein declared' is manifestly that set forth in section 1. That declaration embraces a broad range of objectives. Among them we find the elimination of 'unfair competitive practices.' But, even if this clause were to be taken to relate to practices which fall under the ban of existing law, either common law or statute, it is still only one of the authorized aims described in section 1. It is there declared to be 'the policy of Congress'— 'to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.'13

Under section 3, whatever 'may tend to effectuate' these general purposes may be included in the 'codes of fair competition.' We think the conclusion is inescapable that the authority sought to be conferred by section 3 was not merely to deal with 'unfair competitive practices' which offend against existing law, and could be the subject of judicial condemnation without further legislation, or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose is clearly disclosed to authorize new and controlling prohibitions through codes of laws which would embrace what the formulators would propose, and what the President would approve or prescribe, as wise and beneficient measures for the government of trades and industries in order to bring about their rehabilitation, correction, and development, according to the general declaration of policy in section 1. Codes of laws of this sort are styled 'codes of fair competition.'

We find no real controversy upon this point and we must determine the validity of the code in question in this aspect. As the government candidly says in its brief: 'The words 'policy of this title' clearly refer to the 'policy' which Congress declared in the section entitled 'Declaration of Policy'—Section 1. All of the policies there set forth point toward a single goal—the rehabilitation of industry and the industrial recovery which unquestionably was the major policy of Congress in adopting the National Industrial Recovery Act.' And that this is the controlling purpose of the code now before us appears both from its repeated declarations to that effect and from the scope of its requirements. It will be observed that its provisions as to the hours and wages of employees and its 'general labor provisions' were placed in separate articles, and these were not included in the article on 'trade practice provisions' declaring what should be deemed to constitute 'unfair methods of competition.' The Secretary of Agriculture thus stated the objectives of the Live Poultry Code in his report to the President, which was recited in the executive order of approval:

'That said code will tend to effectuate the declared policy of title I of the National Industrial Recovery Act as set forth in section 1 of said act in that the terms and provisions of such code tend to: (a) Remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof: (b) to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups; (c) to eliminate unfair competitive practices; (d) to promote the fullest possible utilization of the present productive capacity of industries; (e) to avoid undue restriction of production (except as may be temporarily required); (f) to increase the consumption of industrial and agricultural products by increasing purchasing power; and (g) otherwise to rehabilitate industry and to conserve natural resources.'

The government urges that the codes will 'consist of rules of competition deemed fair for each industry by representative members of that industry—by the persons most vitally concerned and most familiar with its problems.' Instances are cited in which Congress has availed itself of such assistance; as, e.g., in the exercise of its authority over the public domain, with respect to the recognition of local customs or rules of miners as to mining claims,14 or, in matters of a more or less technical nature, as in designating the standard height of drawbars.15 But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title 1? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

The question, then, turns upon the authority which section 3 of the Recovery Act vests in the President to approve or prescribe. If the codes have standing as penal statutes, this must be due to the effect of the executive action. But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry. See Panama Refining Company v. Ryan, supra, and cases there reviewed.

Accordingly we turn to the Recovery Act to ascertain what limits have been set to the exercise of the President's discretion: First, the President, as a condition of approval, is required to find that the trade or industrial associations or groups which propose a code 'impose no inequitable restrictions on admission to membership' and are 'truly representative.' That condition, however, relates only to the status of the initiators of the new laws and not to the permissible scope of such laws. Second, the President is required to find that the code is not 'designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them.' And to this is added a proviso that the code 'shall not permit monopolies or monopolistic practices.' But these restrictions leave virtually untouched the field of policy envisaged by section 1, and, in that wide field of legislative possibilities, the proponents of a code, refraining from monopolistic designs, may roam at will, and the President may approve or disapprove their proposals as he may see fit. That is the precise effect of the further finding that the President is to make—that the code 'will tend to effectuate the policy of this title.' While this is called a finding, it is really but a statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws. These are the only findings which Congress has made essential in order to put into operation a legislative code having the aims described in the 'Declaration of Policy.'

Nor is the breadth of the President's discretion left to the necessary implications of this limited requirement as to his findings. As already noted, the President in approving a code may impose his own conditions, adding to or taking from what is proposed, as 'in his discretion' he thinks necessary 'to effectuate the policy' declared by the act. Of course, he has no less liberty when he prescribes a code on his own motion or on complaint, and he is free to prescribe one if a code has not been approved. The act provides for the creation by the President of administrative agencies to assist him, but the action or reports of such agencies, or of his other assistants—their recommendations and findings in relation to the making of codes—have no sanction beyond the will of the President, who may accept, modify, or reject them as he pleases. Such recommendations or findings in no way limit the authority which section 3 undertakes to vest in the President with no other conditions than those there specified. And this authority relates to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country.

Such a sweeping delegation of legislative power finds no support in the decisions upon which the government especially relies. By the Interstate Commerce Act (49 USCA s 1 et seq.), Congress has itself provided a code of laws regulating the activities of the common carriers subject to the act, in order to assure the performance of their services upon just and reasonable terms, with adequate facilities and without unjust discrimination. Congress from time to time has elaborated its requirements, as needs have been disclosed. To facilitate the application of the standards prescribed by the act, Congress has provided an expert body. That administrative agency, in dealing with particular cases, is required to act upon notice and hearing, and its orders must be supported by findings of fact which in turn are sustained by evidence. Interstate Commerce Commission v. Louisville & Nashville Railroad Company, 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431; State of Florida v. United States, 282 U.S. 194, 51 S.Ct. 119, 75 L.Ed. 291; United States v. Baltimore & Ohio Railroad Company, 293 U.S. 454, 55 S.Ct. 268, 79 L.Ed. 587. When the Commission is authorized to issue, for the construction, extension, or abandonment of lines, a certificate of 'public convenience and necessity,' or to permit the acquisition by one carrier of the control of another, if that is found to be 'in the public interest,' we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers, and can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation. New York Central Securities Corporation v. United States, 287 U.S. 12, 24, 25, 53 S.Ct. 45, 77 L.Ed. 138; Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co., 270 U.S. 266, 273, 46 S.Ct. 263, 70 L.Ed. 578; Chesapeake & Ohio Railway Co. v. United States, 283 U.S. 35, 42, 51 S.Ct. 337, 75 L.Ed. 824.

Similarly, we have held that the Radio Act of 1927 16 established standards to govern radio communications, and, in view of the limited number of available broadcasting frequencies, Congress authorized allocation and licenses. The Federal Radio Commission was created as the licensing authority, in order to secure a reasonable equality of opportunity in radio transmission and reception. The authority of the Commission to grant licenses 'as public convenience, interest or necessity requires' was limited by the nature of radio communications, and by the scope, character, and quality of the services to be rendered and the relative advantages to be derived through distribution of facilities. These standards established by Congress were to be enforced upon hearing and evidence by an administrative body acting under statutory restrictions adapted to the particular activity. Federal Radio Commission v. Nelson Brothers Bond & Mtg. Co., 289 U.S. 266, 53 S.Ct. 627, 77 L.Ed. 1166.

In Hampton, Jr. & Company v. United States, 276 U.S. 394, 48 S.Ct. 348, 350, 72 L.Ed. 624 the question related to the 'flexible tariff provision' of the Tariff Act of 1922.17 We held that Congress had described its plan 'to secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States.' As the differences in cost might vary from time to time, provision was made for the investigation and determination of these differences by the executive branch so as to make 'the adjustments necessary to conform the duties to the standard underlying that policy and plan.' Id. 276 U.S. 394, pages 404, 405, 48 S.Ct. 348, 350, 72 L.Ed. 624. The Court found the same principle to be applicable in fixing customs duties as that which permitted Congress to exercise its rate-making power in interstate commerce, 'by declaring the rule which shall prevail in the legislative fixing of rates,' and then remitting 'the fixing of such rates' in accordance with its provisions 'to a rate-making body.' Id. 276 U.S. 394, page 409, 48 S.Ct. 348, 352, 72 L.Ed. 624. The Court fully recognized the limitations upon the delegation of legislative power. Id. 276 U.S. 394, pages 408—411, 48 S.Ct. 348, 72 L.Ed. 624.

To summarize and conclude upon this point: Section 3 of the Recovery Act (15 USCA s 703 is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion described in section 1. In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.

Third. The Question of the Application of the Provisions of the Live Poultry Code to Intrastate Transactions.—Although the validity of the codes (apart from the question of delegation) rests upon the commerce clause of the Constitution, section 3(a) of the act (15 USCA s 703(a) is not in terms limited to interstate and foreign commerce. From the generality of its terms, and from the argument of the government at the bar, it would appear that section 3(a) was designed to authorize codes without that limitation. But under section 3(f) of the act (15 USCA s 73(f) penalties are confined to violations of a code provision 'in any transaction in or affecting interstate or foreign commerce.' This aspect of the case presents the question whether the particular provisions of the Live Poultry Code, which the defendants were convicted for violating and for having conspired to violate, were within the regulating power of Congress.

These provisions relate to the hours and wages of those employed by defendants in their slaughterhouses in Brooklyn and to the sales there made to retail dealers and butchers.

Were these transactions 'in' interstate commerce? Much is made of the fact that almost all the poultry coming to New York is sent there from other states. But the code provisions, as here applied, do not concern the transportation of the poultry from other states to New York, or the transactions of the commission men or others to whom it is consigned, or the sales made by such consignees to defendants. When defendants had made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the city, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce. Brown v. Houston, 114 U.S. 622, 632, 633, 5 S.Ct. 1091, 29 L.Ed. 257; Public Utilities Commission v. Landon, 249 U.S. 236, 245, 39 S.Ct. 268, 63

L.Ed. 577; Industrial Association v. United States, 268 U.S. 64, 78, 79, 45 S.Ct. 403, 69 L.Ed. 849; Atlantic Coast Line R. Co. v. Standard Oil Co., 275 U.S. 257, 267, 48 S.Ct. 107, 72 L.Ed. 270.

The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a 'current' or 'flow' of interstate commerce, and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a state does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the state. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states. Hence decisions which deal with a stream of interstate commerce—where goods come to rest within a state temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here. See Swift & Company v. United States, 196 U.S. 375, 387, 388, 25 S.Ct. 276, 49 L.Ed. 518; Lemke v. Farmers' Grain Company, 258 U.S. 50, 55, 42 S.Ct. 244, 66 L.Ed. 458; Stafford v. Wallace, 258 U.S. 495, 519, 42 S.Ct. 397, 66 L.Ed. 735, 23 A.L.R. 229; Board of Trade of City of Chicago v. Olsen, 262 U.S. 1, 35, 43 S.Ct. 470, 67 L.Ed. 839; Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 439, 50 S.Ct. 220, 74 L.Ed. 524.

Did the defendants' transactions directly 'affect' interstate commerce so as to be subject to federal regulation? The power of Congress extends, not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations. Thus, Congress may protect the safety of those employed in interstate transportation, 'no matter what may be the source of the dangers which threaten it.' Southern Railway Company v. United States, 222 U.S. 20, 27, 32 S.Ct. 2, 4, 56 L.Ed. 72. We said in Mondou v. New York, N.H. & H.R. Co. (Second Employers' Liability Cases), 223 U.S. 1, 51, 32 S.Ct. 169, 56 L.Ed. 327, 38 L.R.A.(N.S.) 44, that it is the 'effect upon interstate commerce,' not 'the source of the injury,' which is 'the criterion of congressional power.' We have held that, in dealing with common carriers engaged in both interstate and intrastate commerce, the dominant authority of Congress necessarily embraces the right to control their intrastate operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. Houston, E. & W.T.R. Co. v. U.S. (The Shreveport Case), 234 U.S. 342, 351, 352, 34 S.Ct. 833, 58 L.Ed. 1341; Railroad Commission of State of Wisconsin v. Chicago, Burlington & Quincy R. Co., 257 U.S. 563, 588, 42 S.Ct. 232, 66 L.Ed. 371, 22 A.L.R. 1086. And combinations and conspiracies to restrain interstate commerce, or to monopolize any part of it, are none the less within the reach of the Anti-Trust Act (15 USCA s 1 et seq.) because the conspirators seek to attain their end by means of intrastate activities. Coronado Coal Company v. United Mine Workers, 268 U.S. 295, 310, 45 S.Ct. 551, 69 L.Ed. 963; Bedford Cut Stone Company v. Journeyman Stone Cutters' Association, 274 U.S. 37, 46, 47 S.Ct. 522, 71 L.Ed. 916, 54 A.L.R. 791.

We recently had occasion, in Local 167 V. United States, 291 U.S. 293, 54 S.Ct. 396, 78 L.Ed. 804, to apply this principle in connection with the live poultry industry. That was a suit to enjoin a conspiracy to restrain and monopolize interstate commerce in violation of the Anti-Trust Act. It was shown that marketmen, teamsters, and slaughterers (shochtim) had conspired to burden the free movement of live poultry into the metropolitan area in and about New York City. Marketmen had organized an association, had allocated retailers among themselves, and had agreed to increase prices. To accomplish their objects, large amounts of money were raised by levies upon poultry sold, men were hired to obstruct the business of dealers who resisted, wholesalers and retailers were spied upon, and by violence and other forms of intimidation were prevented from freely purchasing live poultry. Teamsters refused to handle poultry for recalcitrant marketmen, and members of the shochtim union refused to slaughter. In view of the proof of that conspiracy, we said that it was unnecessary to decide when interstate commerce ended and when intrastate commerce began. We found that the proved interference by the conspirators 'with the unloading, the transportation, the sales by marketmen to retailers, the prices charged, and the amount of profits exacted' operated 'substantially and directly to restrain and burden the untrammelled shipment and movement of the poultry,' while unquestionably it was in interstate commerce. The intrastate acts of the conspirators were included in the injunction because that was found to be necessary for the protection of interstate commerce against the attempted and illegal restraint. Id. 291 U.S. 293, pp. 297, 299, 300, 54 S.Ct. 396, 398, 78 L.Ed. 804.

The instant case is not of that sort. This is not a prosecution for a conspiracy to restrain or monopolize interstate commerce in violation of the Anti-Trust Act. Defendants have been convicted, not upon direct charges of injury to interstate commerce or of interference with persons engaged in that commerce, but of violations of certain provisions of the Live Poultry Code and of conspiracy to commit these violations. Interstate commerce is brought in only upon the charge that violations of these provisions—as to hours and wages of employees and local sales—'affected' interstate commerce.

In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as, e.g., the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control. As we said in Simpson v. Shepard (Minnesota Rate Case), 230 U.S. 352, 410, 33 S.Ct. 729, 745, 57 L.Ed. 1511, 48 L.R.A. (N.S.) 1151, Ann. Cas. 1916A, 18: 'In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favored, and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the state, enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the state.' See, also, Kidd v. Pearson, 128 U.S. 1, 21, 9 S.Ct. 6, 32 L.Ed. 346; Heisler v. Thomas Colliery Co., 260 U.S. 245, 259, 260, 43 S.Ct. 83, 67 L.Ed. 237.

The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. Coronado Coal Company v. United Mine Workers, 268 U.S. 295, 310, 45 S.Ct. 551, 69 L.Ed. 963. But, where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions. This principle has frequently been applied in litigation growing out of labor disputes. United Mine Workers v. Coronado Coal Company, 259 U.S. 344, 410, 411, 42 S.Ct. 570, 66 L.Ed. 975, 27 A.L.R. 762; United Leather Workers' International Union v. Herkert, 265 U.S. 457, 464—467, 44 S.Ct. 623, 68 L.Ed. 1104, 33 A.L.R. 566; Industrial Association v. United States, 268 U.S. 64, 82, 45 S.Ct. 403, 69 L.Ed. 849; Levering & Garrigues v. Morrin, 289 U.S. 103, 107, 108, 53 S.Ct. 549, 551, 77 L.Ed. 1062. In the case last cited we quoted with approval the rule that had been stated and applied in Industrial Association v. United States, supra, after review of the decisions, as follows: 'The alleged conspiracy, and the acts here complained of, spent their intended and direct force upon a local situation—for building is as essentially local as mining, manufacturing or growing crops—and if, by resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act (15 USCA ss 1—7, 15 note).'

While these decisions related to the application of the Federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government. We must consider the provisions here in question in the light of this distinction.

The question of chief importance relates to the provisions of the code as to the hours and wages of those employed in defendants' slaughterhouse markets. It is plain that these requirements are imposed in order to govern the details of defendants' management of their local business. The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wages have no direct relation to interstate commerce. The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a state and there dealt in as a part of its internal commerce. This appears from an examination of the considerations urged by the government with respect to conditions in the poultry trade. Thus, the government argues that hours and wages affect prices; that slaughterhouse men sell at a small margin above operating costs; that labor represents 50 to 60 per cent. of these costs; that a slaughterhouse operator paying lower wages or reducing his cost by exacting long hours of work translates his saving into lower prices; that this results in demands for a cheaper grade of goods: and that the cutting of prices brings about a demoralization of the price structure. Similar conditions may be adduced in relation to other businesses. The argument of the government proves too much. If the federal government may determine the wages and hours of employees in the internal commerce of a state, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power.

The government also makes the point that efforts to enact state legislation establishing high labor standards have been impeded by the belief that, unless similar action is taken generally, commerce will be diverted from the states adopting such standards, and that this fear of diversion has led to demands for federal legislation on the subject of wages and hours. The apparent implication is that the federal authority under the commerce clause should be deemed to extend to the establishment of rules to govern wages and hours in intrastate trade and industry generally throughout the country, thus overriding the authority of the states to deal with domestic problems arising from labor conditions in their internal commerce.

It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power of the federal government in its control over the expanded activities of interstate commerce and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a state. The same answer must be made to the contention that is based upon the serious economic situation which led to the passage of the Recovery Act—the fall in prices, the decline in wages and employment, and the curtailment of the market for commodities. Stress is laid upon the great importance of maintaining wage distributions which would provide the necessary stimulus in starting 'the cumulative forces making for expanding commercial activity.' Without in any way disparaging this motive, it is enough to say that the recuperative efforts of the federal government must be made in a manner consistent with the authority granted by the Constitution.

We are of the opinion that the attempt through the provisions of the code to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power.

The other violations for which defendants were convicted related to the making of local sales. Ten counts, for violation of the provision as to 'straight killing,' were for permitting customers to make 'selections of individual chickens taken from particular coops and half coops.' Whether or not this practice is good or bad for the local trade, its effect, if any, upon interstate commerce was only indirect. The same may be said of violations of the code by intrastate transactions consisting of the sale 'of an unfit chicken' and of sales which were not in accord with the ordinances of the city of New York. The requirement of reports as to prices and volumes of defendants' sales was incident to the effort to control their intrastate business.

In view of these conclusions, we find it unnecessary to discuss other questions which have been raised as to the validity of certain provisions of the code under the due process clause of the Fifth Amendment.

On both the grounds we have discussed, the attempted delegation of legislative power and the attempted regulation of intrastate transactions which affect interstate commerce only indirectly, we hold the code provisions here in question to be invalid and that the judgment of conviction must be reversed.

No. 854—reversed.

No. 864—affirmed.

Footnotes

1 The full title of the Code is 'Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York.'

2 The indictment contained 60 counts, of which 27 counts were dismissed by the trial court, and on 14 counts the defendants were acquitted.

3 Act of June 16, 1933, c. 90, 48 Stat. 195, 196; 15 U.S.C. s 703 (15 USCA s 703).

4 'Codes of fair competition.

'Sec. 3. (a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: Provided, That such code or codes shall not permit monopolies or monopolistic practices: Provided further, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code. as the President in his discretion deems necessary to effectuate the policy herein declared.

'(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended (chapter 2 of this title); but nothing in this title (chapter) shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended (chapter 2).

'(c) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition approved under this title (chapter); and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

'(d) 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. * * *

'(f) When a code of fair competition has been approved or prescribed by the President under this title (chapter), any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense.'

5 The executive order is as follows:

'Executive Order.

'Approval of Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York.

'Whereas, the Secretary of Agriculture and the Administrator of the National Industrial Recovery Act having rendered their separate reports and recommendations and findings on the provisions of said code, coming within their respective jurisdictions, as set forth in the Executive Order No. 6182 of June 26, 1933, as supplemented by Executive Order No. 6207 of July 21, 1933, and Executive Order N. 6345 of October 20, 1933, as amended by Executive Order No. 6551 of January 8, 1934;

'Now, therefore, I, Franklin D. Roosevelt, President of the United States, pursuant to the authority vested in me by title I of the National Industrial Recovery Act, approved June 16, 1933, and otherwise, do hereby find that:

‘1. An application has been duly made, pursuant to and in full compliance with the provisions of title I of the National Industrial Recovery Act, approved June 16, 1933, for my approval of a code of fair competition for the live poultry industry in the metropolitan area in and about the City of New York; and

‘2. Due notice and opportunity for hearings to interested parties have been given pursuant to the provisions of the act and regulations thereunder; and,

‘3. Hearings have been held upon said code, pursuant to such notice and pursuant to the pertinent provisions of the act and regulations thereunder; and

‘4. Said code of fair competition constitutes a code of fair competition, as contemplated by the act and complies in all respects with the pertinent provisions of the act, including clauses (1) and (2) of subsection (a) of section 3 of title I of the act; and

‘5. It appears, after due consideration, that said code of fair competition will tend to effectuate the policy of Congress as declared in section 1 of title I of the act.

‘Now, therefore, I, Franklin D. Roosevelt, President of the United States, pursuant to the authority vested in me by title I of the National Industrial Recovery Act, approved June 16, 1933, and otherwise, do hereby approve said Code of Fair Competition for the Live Poultry Industry in the Metropolitan Area in and about the City of New York.

‘Franklin D. Roosevelt,

‘President of the United States.

'The White House,

‘April 13, 1934.’

6 The Administrator for Industrial Recovery stated in his report that the Code had been sponsored by trade associations representing about 350 wholesale firms, 150 retail shops, and 21 commission agencies; that these associations represented about 90 per cent. of the live poultry industry by numbers and volume of business; and that the industry as defined in the code supplies the consuming public with practically all the live poultry coming into the metropolitan area from forty-one states and transacted an aggreagate annual business of approximately $90,000,000. He further said that about 1,610 employees were engaged in the industry; that it had suffered severely on account of the prevailing economic conditions and because of unfair methods of competition and the abuses that had developed as a result of the ‘uncontrolled methods of doing business'; and that these conditions had reduced the number of employees by approximately 40 per cent. He added that the report of the Research and Planning Division indicated that the code would bring about an increase in wages of about 20 per cent. in this industry and an increase in employment of 19.2 per cent.

7 The prohibition in the code (article VII, s 14) was as follows: ‘Straight Killing.—The use, in the wholesale slaughtering of poultry, of any method of slaughtering other than ‘straight killing’ or killing on the basis of official grade. Purchasers may, however, make selection of a half coop, coop, or coops, but shall not have the right to make any selection of particular birds.'

8 See Ex parte Milligan, 4 Wall. 2, 120, 121, 18 L.Ed. 281; Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 426, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481.

9 That section (15 USCA s 701), under the heading ‘Declaration of Policy,’ is as follows: ‘Section 1. A national emergency productive of widespread unemployment and disoreganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of co-operative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries,

to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.'

10 See cases collected in Nims on Unfair Competition and Trade-Marks, c. I, s 4, p. 19, and chapter XIX.

11 Act of September 26, 1914, c. 311, 38 Stat. 717, 719, 720 (section 5 (15 USCA s 45)).

12 The Tariff Act of 1930 (section 337, 46 Stat. 703 (19 USCA s 1337)), like the Tariff Act of 1922 (section 316, 42 Stat. 943 (19 USCA s 174 et seq.)), employs the expressions 'unfair methods of competition' and 'unfair acts' in the importation of articles into the United States, and in their sale, 'the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States.' Provision is made for investigation and findings by the Tariff Commission, for appeals upon questions of law to the United States Court of Customs and Patent Appeals, and for ultimate action by the President when the existence of any 'such unfair method or act' is established to his satisfaction.

13 See note 9.

14 Act of July 26, 1866, c. 262, 14 Stat. 251; Jackson v. Roby, 109 U.S. 440, 441, 3 S.Ct. 301, 27 L.Ed. 990; Erhardt v. Boaro, 113 U.S. 527, 535, 5 S.Ct. 560, 28 L.Ed. 1113; Butte City Water Co. v. Baker, 196 U.S. 119, 126, 25 S.Ct. 211, 49 L.Ed. 409.

15 Act of March 2, 1893, c. 196, 27 Stat. 531 (45 USCA s 1 et seq.); St. Louis, Iron Mountain & S. Railway Co. v. Taylor, 210 U.S. 281, 286, 28 S.Ct. 616, 52 L.Ed. 1061.

16 Act of February 23, 1927, c. 169, 44 Stat. 1162, as amended by the Act of March 28, 1928, c. 263, 45 Stat. 373.

17 Act of September 21, 1922, c. 356, title 3, s 315, 42 Stat. 858, 941 (19 USCA s 154 et seq.).

LOUISVILLE JOINT STOCK LAND BANK
v.
RADFORD.*.

No. 717.
Argued May 6, 1935.

Decided May 27, 1935.

Synopsis

On Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

In the matter of William W. Radford, Sr., bankrupt, wherein the Louisville Joint Stock Land Bank intervened attacking the constitutionality of the Frazier-Lemke Act. A decree upholding the bankruptcy proceeding and granting a five-year stay of proceedings against the bankrupt was affirmed by the Circuit Court of Appeals (74 F.(2d) 576), and intervener brings certiorari.

Reversed.

Opinion

Mr. Justice BRANDEIS delivered the opinion of the Court.

This case presents for decision the question whether subsection (s) added to section 75 of the Bankruptcy Act1 by the Frazier-Lemke Act, June 28, 1934, c. 869, 48 Stat. 1289, 11 USCA s 203(s), is consistent with the Federal Constitution. The federal court for Western Kentucky (In re Radford (D.C.) 8 F.Supp. 489) and the Circuit Court of

Appeals for the Sixth Circuit (74 F.(2d) 576) held it valid in this case; and it has been sustained elsewhere.2 In view of the novelty and importance of the question, we granted certiorari (294 U.S. 702, 55 S.Ct. 547, 79 L.Ed. 1238).

In 1922 (and in 1924) Radford mortgaged to the Louisville Joint Stock Land Bank a farm in Christian county, Kentucky, comprising 170 acres, then presumably of the appraised value of at least $18,000.3 The mortgages were given to secure loans aggregating $9,000, to be repaid in instalments over the period of 34 years with interest at the rate of 6 per cent. Radford's wife joined in the mortgages and the notes. In 1931 and subsequent years, the Radfords made default in their covenant to pay the taxes. In 1932 and 1933, they made default in their promise to pay the instalments of interest and principal. In 1933, *574 they made default, also, in their covenant to keep the buildings insured. The Bank urged the Radfords to endeavor to refinance the indebtedness pursuant to the provisions of the Emergency Farm Mortgage Act, May 12, 1933, c. 25, 48 Stat. 41.4 After they declined to do so, the Bank having declared the entire indebtedness immediately payable, commenced, in June, 1933, a suit in the circuit court for Christian county against the Radfords and their tenant to foreclose the mortgages; and, invoking a covenant in the mortgage expressly providing therefor, sought the appointment of a receiver to take possession and control of the premises and to collect the rents and profits.

The application for the appointment of a receiver was denied, and all proceedings in the suit were stayed, upon request of the Conciliation Commissioner for Christian County appointed under section 75 of the Bankruptcy Act (see 11 USCA s 203), as he stated that Radford desired to avail himself of the provisions of that section. Proceeding under it, Radford filed, in the federal court for Western Kentucky, a petition praying that he be afforded an opportunity to effect a composition of his debts. The petition was promptly approved and a meeting of the creditors was held. But Radford failed to obtain the acceptance of the requisite majority in number and amount to the composition proposed. Then, the Bank offered to accept a deed of the mortgaged property in full satisfaction of the indebtedness to it and to assume the unpaid taxes. Radford refused to execute the deed; and on June 30, 1934, the state court entered judgment ordering a foreclosure sale.

Meanwhile, the Frazier-Lemke Act had been passed on June 28, 1934 (11 USCA s 203(s); and on August 6, 1934, and again on November 10, 1934, Radford filed amended petitions for relief thereunder. The second amended petition prayed that Radford be adjudged a bankrupt; that his property, whether free or encumbered, be appraised; and that he have the relief provided for in paragraphs 3 and 7 of subsection(s) of the Frazier-Lemke Amendment, 11 USCA s 203(s)(3, 7). That act provides, among other things, that a farmer who has failed to obtain the consents requisite to a composition under section 75 of the Bankruptcy Act, may, upon being adjudged a bankrupt, acquire alternative options in respect to mortgaged property:

1. By paragraph 3, the bankrupt may, if the mortgagee assents, purchase the property at its then appraised value, acquiring title thereto as well as immediate possession, by agreeing to make deferred payments as follows: 2 ½ per cent. within two years; 2 ½ per cent. within three years; 5 per cent. within four years; 5 per cent. within five years; the balance within six years. All deferred payments to bear interest at the rate of 1 per cent. per annum.

2. By paragraph 7, the bankrupt may, if the mortgagee refuses his assent to the immediate purchase on the above basis, require the bankruptcy court to ‘stay all proceedings for a period of five years, during which five years the debtor shall retain possession of all or any part of his property, under the control of the court, provided he pays a reasonable rental annually for that part of the property of which he retains possession; the first payment of such rental to be made within six months of the date of the order staying proceedings, such rental to be distributed among the secured and unsecured creditors, as their interests may appear, under the provisions of this Act

(title). At the end of five years, or prior thereto, the debtor may pay into court the appraised price of the property of which he retains possession: Provided, That upon request of any lien holder on real estate the court shall cause a reappraisal of such real estate and the debtor may then pay the reappraised price, if acceptable to the lien holder, into the court, otherwise the original appraisal price shall be paid into court, and thereupon the court shall, by an order, turn over full possession and title of said property to the debtor and he may apply for his discharge as provided for by this Act (title): Provided, however, That the provisions of this Act (subsection) shall apply only to debts existing at the time this Act becomes effective (on June 28, 1934).'

Answering the amended petition, the Bank duly claimed that the Frazier-Lemke Act is, and the relief sought would be, unconstitutional. It prayed that Radford's amended petition be dismissed; that the Bank be permitted to pursue its remedies in the state court; and that it be allowed to proceed with the foreclosure sale in accordance with the judgment of that court. It refused to accept the composition and extension proposal offered by Radford; declined to consent to the proposed sale of that property to Radford at the appraised value or any value on the terms set forth in paragraph 3; and also objected to his retaining possession thereof with the privilege of purchasing the same provided by paragraph 7. The federal court overruled the Bank's objections; denied its prayers; adjudged Radford a bankrupt within the meaning of the Frazier-Lemke Act; and appointed a referee to take proceedings thereunder. There was no claim that the farm was exempt as a homestead or otherwise.

The referee ordered an appraisal of all of Radford's property, encumbered and unencumbered. The appraisers found that 'the fair and reasonable value of the property of the debtor on which Louisville Joint Stock Bank has a mortgage' and also the 'market value of said land' was then $4,445.5 The referee approved the appraisal, although the Bank offered in open court to pay $9,205.09 in cash for the mortgaged property; and counsel for the bankrupt admitted that the Bank had a valid lien upon it for the amount so offered to be paid, and that, under the law, if the Bank's offer to purchase the property were accepted, all the money paid in cash would be immediately returned to it in satisfaction of the mortgage indebtedness.

The Bank refused to consent to a sale of the mortgaged property to Radford at the appraised value and filed written objections to such sale and to the manner of payments prescribed by paragraph 3 of subsection (s). Thereupon, the referee ordered that, for the period of five years, all proceedings for the enforcement of the mortgages be stayed; and that the possession of the mortgaged property, subject to liens, remain in Radford, under the control of the court, as provided in paragraph 7 of subsection (s). The referee fixed the rental for the first year at $325; and ordered that for each subsequent year the rental be fixed by the court. It was stipulated, that the *578 annual taxes and insurance premium amount to $105; and admitted that administration charges said to amount to $22.75 must be paid from the rental. All the orders of the referee were, upon a petition for a review, duly approved by the District Court; and its decree was affirmed by the Circuit Court of Appeals on February 11, 1935.

Since entry of the judgment of the Court of Appeals, this Court has held unconstitutional provisions of state legislation in some respects comparable to the Frazier-Lemke Act. W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 55 S.Ct. 555, 557, 79 L.Ed. 1298. There we said: 'With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor,' and, 'So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security.' The Bank insists, among other things, that the Frazier-Lemke Act has been here applied with like result; that the provisions of the act, even if applied solely to mortgages thereafter executed, would transcend the bankruptcy power; and that, in any event, to apply them to pre-existing mortgages violates the Fifth Amendment of the Federal Constitution. Radford contends that the Frazier-Lemke Act is valid because it is a proper exercise of the power conferred by article 1, s 8 of the Constitution, which declares: 'Congress shall have Power * * * To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States.' Before discussing these contentions, it will be helpful to consider the position occupied generally by mortgagees prior to the enactment here challenged.

First. For centuries efforts to protect necessitous mortgagors have been persistent. Gradually the mortgage of real estate was transformed from a conveyance upon condition into a lien; and failure of the mortgagor to pay on the day fixed ceased to effect an automatic foreclosure. *579 Courts of equity, applying their established jurisdiction to relieve against penalties and forfeitures, created the equity of redemption. Thus the mortgagor was given a reasonable time to cure the default and to require a reconveyance of the property. Legislation in many states carried this development further, and preserved the mortgagor's right to possession, even after default, until the conclusion of foreclosure proceedings.6 But the statutory command that the mortgagor should not lose his property on default had always rested on the assumption that the mortgagee would be compensated for the default by a later payment, with interest, of the debt for which the security was given; and the protection afforded the mortgagor was, in effect, the granting of a stay. No instance has been found, except under the Frazier-Lemke Act (11 USCA s 203(s), of either a statute or decision compelling the mortgagee to relinquish the property to the mortgagor free of the lien unless the debt was paid in full.7

This right of the mortgagee to insist upon full payment before giving up his security has been deemed of the essence of a mortgage. His position in this respect was not changed when foreclosure by public sale superseded strict foreclosure or when the Legislatures of many states created a right of redemption at the sale price. To protect his right to full payment or the mortgaged property, the mortgagee was allowed to bid at the judicial sale on foreclosure.8 In many states other statutory changes were made in the form and detail of foreclosure and redemption.9 But practically always the measures adopted for the mortgagor's relief, including moratorium legislation enacted by the several states during the present depression,10 resulted primarily in a stay; and the relief afforded rested, as theretofore, upon the assumption that no substantive right of the mortgagee was being impaired, since payment in full of the debt with interest would fully compensate him.

Statutes for the relief of mortgagors, when applied to pre-existing mortgages, have given rise, from time to time, to serious constitutional questions. The statutes were sustained by this court when, as in Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481, they were found to preserve substantially the right of the mortgagee to obtain, through application of the security, payment of the indebtedness. They were stricken down, as in W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 55 S.Ct. 555, 79 L.Ed. 1298, when it appeared that this substantive right was substantially abridged. Compare W.B. Worthen Co. v. Thomas, 292 U.S. 426, 54 S.Ct. 816, 78 L.Ed. 1344, 93 A.L.R. 173.

Second. Although each of our national bankruptcy acts followed a major or minor depression,11 none had prior to the Frazier-Lemke amendment, sought to compel the holder of a mortgage to surrender to the bankrupt either the possession of the mortgaged property or the title, so long as any part of the debt thereby secured remained unpaid. The earlier bankruptcy acts created some exemptions of unencumbered property;12 but none had attempted to enlarge the rights or privileges of the mortgagor as against the mortgagee. The provisions of the acts, so far as concerned the debtor, were aimed to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes,' and to give him 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.' Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230, 93 A.L.R. 195. No bankruptcy act had undertaken to supply him capital with which to engage in business in the future. Some states had granted to debtors extensive exemptions of unencumbered property from liability to seizure in satisfaction of debts; and these exemptions were recognized by the Bankruptcy Act of 1867, as well as that of 1898. But unless the mortgagee released his security, in order to prove in bankruptcy for the full amount of the debt, a *583 mortgage even of exempt property was not disturbed by bankruptcy proceedings. Long v. Bullard, 117 U.S. 617, 6 S.Ct. 917, 29 L.Ed. 1004.13

No bankruptcy act had undertaken to modify in the interest of either the debtor or other creditors any substantive right of the holder of a mortgage valid under federal law. Supervening bankruptcy had, in the interest of other creditors, affected in some respects the remedies available to lienholders. In Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry., 294 U.S. 648, 55 S.Ct. 595, 606, 79 L.Ed. 1110, where, in a proceeding for reorganization of a railroad under section 77 of the Bankruptcy Act (11 USCA s 205) the District Court was held to have the power to enjoin temporarily the sale of pledged securities, this court said: 'The injunction here in no ways impairs the lien, or disturbs the preferred rank of the pledgees. It does not more than suspend the enforcement of the lien by a sale of the collateral pending further action. It may be, as suggested, that during the period of restraint the collateral will decline in value; but the same may be said in respect of an injunction against the sale of real estate upon foreclosure of a mortgage; and such an injunction may issue in an ordinary proceeding in bankruptcy. Straton v. New, 283 U.S. 318, 321, 51 S.Ct. 465, 75 L.Ed. 1060, and cases cited.' 'The injunction here goes no further than to delay the enforcement of the contract. It affects only the remedy.'

Bankruptcy acts had, either expressly, or by implication, as was held in Van Huffel v. Harkelrode, 284 U.S. 225, 227, 52 S.Ct. 115, 116, 76 L.Ed. 256, 78 A.L.R. 453, authorized the court to direct, in the interest of other creditors, that all liens upon property forming a part of the bankrupt's estate be marshaled; that the property be sold free of encumbrances; and that the *584 rights of all lienholders be transferred to the proceeds of the sale—a power which 'had long been exercised by federal courts sitting in equity when ordering sales by receivers or on foreclosure.' First National Bank v. Shedd, 121 U.S. 74, 87, 7 S.Ct. 807, 30 L.Ed. 877, Mellen v. Moline Malleable Iron Works, 131 U.S. 352, 367, 9 S.Ct. 781, 33 L.Ed. 178. Compare Ray v. Norse-worthy, 23 Wall. 128, 135, 23 L.Ed. 116. But there had been no suggestion that such a sale could be made to the prejudice of the lienor, in the interest of either the debtor or of other creditors. By the settled practice, a sale free of liens will not be ordered by the bankruptcy court if it appears that the amount of the encumbrance exceeds the value of the property.14 And the sale is always made so as to obtain for the property the highest possible price. No court appears ever to have authorized a sale at a price less than that which the lien creditor offered to pay for the property in cash.15 Thus, a sale free of liens in no way impairs any substantive right of the mortgagor; and such a sale is not analogous to the sale to the bankrupt provided for by paragraph 7 of the Frazier-Lemke Act 11 USCA s 203(s)(7).

Nor do the provisions of the bankruptcy acts concerning compositions afford any analogy to the provisions of paragraph 7. So far as concerns the debtor, the composition is an agreement with the creditors in lieu of a distribution of the property in bankruptcy—an agreement which 'originates in a voluntary offer by the bankrupt, and results, in the main, from voluntary acceptance by his creditors.' Nassau Smelting & Refining Works, Ltd. v. Brightwood Bronze Foundry Co., 265 U.S. 269, 271, 44 S.Ct. 506, 507, 68 L.Ed. 1013; Myers v. International Trust Co., 273 U.S. 380, 383, 47 S.Ct. 372, 71 L.Ed. 692. So far as concerns dissenting creditors, the composition is a method of adjusting among creditors rights in property in which all are interested. In ordering the adjustment, the bankruptcy court exercises a power similar to that long exercised by courts of law, Head v. Amoskeag Manufacturing Co., 113 U.S. 9, 21, 5 S.Ct. 441, 28 L.Ed. 889; and of admiralty, The Orleans v. Phoebus, 11 Pet. 175, 183, 9 L.Ed. 677. It is the same power which a court of equity exercises when it compels dissenting creditors, in effect, to submit to a plan of reorganization approved by it as beneficial and assented to by the requisite majority of the creditors. Shaw v. Railroad Co., 100 U.S. 605, 25 L.Ed. 757; Kansas City Terminal Ry. Co. v. Central Union Trust Co., 271 U.S. 445, 46 S.Ct. 549, 70 L.Ed. 1028. Compare National Surety Co. v. Coriell, 289 U.S. 426, 53 S.Ct. 678, 77 L.Ed. 1300, 88 A.L.R. 1231; First National Bank of Cincinnati v. Flershem, 290 U.S. 504, 54 S.Ct. 298, 78 L.Ed. 465, 90 A.L.R. 391. In no case of composition is a secured claim affected except when the holder is a member of a class; and then only when the composition is desired by the requisite majority and is approved by the court.16 Never, so far as appears, has any composition affected a secured claim held by a single creditor. Compositions are comparable to the voluntary adjustment with the mortgagee provided for in paragraph 3 of the Frazier-Lemke amendment (11 USCA s 203(s)(3). They are not analogous to the so-called adjustment compelled by paragraph 7 (11 USCA s 203(s)(7).

Third. The bank contends that the Frazier-Lemke Act is void, because it is not a law 'on the subject of Bankruptcies'; that it does not deal with that subject; and hence, that it is in contravention of the Tenth Amendment, which declares: '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.' The argument is that the essential features of a bankruptcy law are these: The surrender by the debtor of his property for ratable distribution among his creditors, except so far as encumbered or exempt, and the discharge by his creditors of all claims against the debtor; that, on the other hand, the main purpose and the effect of the Frazier-Lemke Act is to prevent distribution of the farmer-mortgagor's property; to enable him to remain in possession despite persisting default; to scale down the mortgage debt; and to give the mortgagor the option to acquire the full title to the property upon paying the reduced amount. Thus, it is urged, the act effects a fundamental change in the relative rights of mortgagor and mortgagee *587 of real property as determined by the law of the state in which the property is located. The bank argues that, if the bankruptcy clause were construed to permit the making of such fundamental changes, Congress could deal with every phase of the relations between an insolvent or nonpaying debtor and his creditors; that it might, among other things, divest state courts of jurisdiction over suits upon promissory notes between citizens of the same state; that commercial controversies arising from breach of contract might be brought under like control; that the obtaining of goods or credits by false pretenses, for example, could be made a crime against the United States, despite the rule declared in United States v. Fox, 95 U.S. 670, 24 L.Ed. 538; that the commercial and financial life of each state would be in large measure subject to federal regulation; and that the lines between state and federal government could thus be redrawn by Congress.

It is true that the original purpose of our bankruptcy acts was the equal distribution of the debtor's property among his creditors; and that the aim of the legislation was to do this promptly.17 But, the scope of the bankruptcy power conferred upon Congress is not necessarily limited to that which has been exercised. The first act provided only for compulsory proceedings against traders, bankers, brokers, and underwriters. The operation of later ones has been gradually extended so as to include practically all insolvent debtors; to provide for voluntary petitions; and to permit compositions with creditors, even without an adjudication of bankruptcy. The discharge of the debtor has come to be an object of no less concern than the distribution of his property. Hanover National Bank v. Moyses, 186 U.S. 181, 22 S.Ct. 857, 46 L.Ed. 1113. As was said in Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co., 294 U.S. 648, 55 S.Ct. 595, 604, 79 L.Ed. 1110: 'The fundamental and radically progressive nature of these extensions becomes apparent upon their mere statement;

but all have been judicially approved or accepted as falling within the power conferred by the bankruptcy clause of the Constitution.'18

It is true that the position of a secured creditor, who has rights in specific property, differs fundamentally from that of an unsecured creditor, who has none; and that the *589 Frazier-Lemke Act (11 USCA s 203(s) is the first instance of an attempt, by a bankruptcy act, to abridge, solely in the interest of the mortgagor, a substantive right of the mortgagee in specific property held as security. But we have no occasion to decide in this case whether the bankruptcy clause confers upon Congress generally the power to abridge the mortgagee's rights in specific property. Paragraph 7, 11 USCA s 203(s)(7), declares that 'the provisions of this Act (subsection) shall apply only to debts existing at the time this Act becomes effective (on June 28, 1934).' The power over property pledged as security after the date of the act may be greater than over property pledged before; and this act deals only with pre-existing mortgages. Because the act is retroactive, in terms, and, as here applied, purports to take away rights of the mortgagee in specific property, another provision of the Constitution is controlling.

Fourth. The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment.19 Under the bankruptcy power Congress may discharge the debtor's personal obligation, because, unlike the states, it is not prohibited from impairing the obligations of contracts. Compare Mitchell v. Clark, 110 U.S. 633, 643, 4 S.Ct. 170, 312, 28 L.Ed. 279. But the effect of the act here complained of is not the discharge of Radford's personal obligation. It is the taking of substantive rights in specific property acquired by the bank prior to the act. In order to determine whether right of that nature have been taken, we must ascertain what the mortgagee's rights were before the passage of the Act. We turn, therefore, first to the law of the state.

Under the law of Kentucky, a mortgage creates a lien which may be foreclosed only by suit resulting in a judicial sale of the property. Civil Code of Practice, ss 375, 376; Insurance Co. of North America v. Cheathem, 221 Ky. 668, 672, 299 S.W. 545. While mere default does not entitle the mortgagee to possession, Newport & Cincinnati Bridge Co. v. Douglass, 12 Bush (Ky.) 673, 705, section 299 of the Civil Code of Practice provides that, in an action for the sale of mortgaged property a receiver may be appointed if it appears 'that the property is probably insufficient to discharge the mortgage debt,' Mortgage Union of Penn v. King, 245 Ky. 691, 54 S.W.(2d) 49; and where there is (as here) a pledge in the mortgage of rents, issues, and profits, and provision for appointment of a receiver, the mortgagee is entitled as of right to have a receiver appointed to collect them for his benefit, Brasfield & Son v. Northwestern Mutual Life Insurance Co., 233 Ky. 94, 25 S.W.(2d) 72; Watt's Adm'r v. Smith, 250 Ky. 617, 630, 63 S.W.(2d) 796, 91 A.L.R. 1206. Under section 374 of the Civil Code of Practice a sale may be ordered at **864 any time after default. Under Carroll's Ky. St. (1930), ss 2362, 2364, there must be an appraisal before the sale; and if the sale brings less than two-thirds of the appraised value, the mortgagor may redeem within a year by paying the original purchase money and interest at 10 per cent. But inadequacy of price is not alone ground for setting aside a sale. Kentucky Joint Land Bank of Lexington v. Fitzpatrick, 237 Ky. 624, 36 S.W. (2d) 25. No provision permits the mortgagor to obtain a release or surrender of the property before foreclosure without paying in full the indebtedness secured. Nor does any provision prohibit a mortgagee from protecting his interest in the property by bidding at the foreclosure sale. Thus, the controlling purpose of the law of Kentucky was and is that mortgaged property shall be devoted primarily to the satisfaction of the debt secured; and the provisions of its law are appropriate to ensure that result.

For the rights acquired and possessed by the mortgagee under the law of Kentucky, the act substituted only the following alternatives:

(A) Under paragraph 3, 11 USCA s 203(s)(3), the mortgagee may, if the bankrupt so requests, assent to a so-called sale by the trustee to the bankrupt at a so-called appraised value; and upon such assent an implied promise arises to purchase the property on the terms prescribed in that paragraph. But, the transaction would not confer upon the mortgagee the ordinary fruits of an immediate sale; nor would the agreement of sale, if performed by the bankrupt, result in payment at the appraised value. The mortgagee would not get the ordinary fruits of an immediate sale on deferred payments; for the bankrupt would make no down payment at the time of taking possession and would give no other assurance that the payments promised would in fact be made. And, if all such payments were duly made, the sale would not be at the appraised value; for the value of money 'even if there were no risk) is obviously more than one per cent.20 By restricting, throughout the period of six years, the annual interest on the deferred payments to 1 per cent., a sale at much less than the appraised value is prescribed. The aggregate payments of principal and interest prescribed would in no year before the end of the sixth be as much as 6 per cent. on the appraised value.21 Moreover, before any deferred payment of the purchase price is made, there is serious danger that the bank's investment might be further impaired. The mortgaged property might be lessened in value by waste. It might become burdened with the liens for accruing unpaid taxes;22 for, while interest at the rate of 1 per cent. of the appraised value of the Radford farm is $44.45, the present annual taxes (plus insurance premium) are, as stipulated, $105. Thus if the alternative offered by paragraph 3 were accepted, the transaction would result merely in a transfer of possession to the bankrupt for six years with an otherwise unsecured promise to purchase at the end of the period for a price less than the appraised value.

(B) If the mortgagee refuses to consent to the agreement to sell under paragraph 3, he is compelled, by paragraph 7, to surrender to the bankrupt possession of the property for the period of five years; and during those years, the bankrupt's only monetary obligation is to pay a reasonable rental fixed by the court. There is no provision for the payment of insurance or taxes, save as these may be paid from the rental received. During that period the bankrupt has an option to purchase the farm at any time at its appraised, or reappraised, value.23 The mortgagee is not only compelled to submit to the sale to the bankrupt, but to a sale made at such time as the latter may choose. Thus, the bankrupt may leave it uncertain for years whether he will purchase; and in the end he may decline to buy. Meanwhile the mortgagee may have had (and been obliged to decline) an offer from some other person to take the farm at a price sufficient to satisfy the full amount then due by the debtor. The mortgagee cannot require a reappraisal when, in its judgment, the time comes to sell; it may ask for a reappraisal only if and when the bankrupt requests a sale. Thus the mortgagee is afforded no protection if the request is made when values are depressed to a point lower than the original appraisal. While paragraph 7 declares that the bankrupt's possession is 'under the control of the court,' this clause gives merely supervisory power. Such control leaves the court powerless to terminate the option unless there has been the commission of waste or failure to pay the prescribed rent.

Fifth. The controlling purpose of the act is to preserve to the mortgagor the ownership and enjoyment of the farm property. It does not seek primarily a discharge of all personal obligations; a function with which alone bankruptcy acts have heretofore dealt. Nor does it make provision of that nature by prohibiting, limiting, or postponing deficiency judgments, as do some state laws.24 Its avowed object is to take from the mortgagee rights in the specific property held as security; and to that end 'to scale down the indebtedness' to the present value of the property.25 As here applied it has taken from the Bank the following property rights recognized by the law of Kentucky:

(1) The right to retain the lien until the indebtedness thereby secured is paid.

(2) The right to realize upon the security by a judicial public sale.

(3) The right to determine when such sale shall be held, subject only to the discretion of the court.

(4) The right to protect its interest in the property by bidding at such sale whenever

held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.

(5) The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.

Strong evidence that the taking of these rights from the mortgagee effects a substantial impairment of the security is furnished by the occurrences in the Senate which led to the adoption there of the amendment to the bill declaring that the act 'shall apply only to debts existing at the time this Act becomes effective.' The bill as passed by the House applied to both pre-existing and future mortgages. It was amended in the Senate so as to limit it to existing mortgages; and, as so amended, was adopted by both Houses pursuant to the report of the Conference Committee.26 This was done because, in the Senate, it was pointed out that the bill, if made applicable to future mortgages, would destroy the farmer's future mortgage credit.27

Sixth. Radford contends that these changes in the position of the bank, wrought pursuant to the act, do not impair substantive rights, because the bank retains every right in the property to which it is entitled. The contention rests upon the unfounded assertion that its only substantive right under the mortgage is to have the value of the security applied to the satisfaction of the debt. It would be more accurate to say that the only right under the mortgage left to the bank is the right to retain its lien until the mortgagor, some time within the five-year period, chooses to release it by paying the appraised value of the property. A mortgage lien so limited in character and incident is of course legally conceivable. It might be created by contract under existing law.28 If a part of the mortgaged property were taken by eminent domain, a mortgagee would receive payment on a similar basis.29 But the Frazier-Lemke Act does not purport to exercise the right of eminent domain; and neither the law of Kentucky nor Radford's mortgages contain any provision conferring upon the mortgagor an option to compel, at any time within five years, a release of the farm upon payment of its appraised value and a right to retain meanwhile possession, upon paying a rental to be fixed by the bankruptcy courts.

Equally unfounded is the contention that the mortgagee is not injured by the denial of possession for the five years, since it receives the rental value of the property.30 It **867 is argued that experience has proved that five years is not unreasonably long, since a longer period is commonly required to complete a voluntary contract for the sale and purchase of a farm; or to close a bankruptcy estate; or to close a railroad receivership. And it is asserted that Radford is, in effect, acting as receiver for the bankruptcy court. Radford's argument ignores the fact that in ordinary bankruptcy proceedings and in equity receiverships, the court may in its discretion order an immediate sale and closing of the estate; and it ignores, also, the fundamental difference in purpose between the delay permitted in those proceedings and that prescribed by Congress. When a court of equity allows a receivership to continue, it does so to prevent a sacrifice of the creditor's interest. Under the act, the purpose of the delay in making a sale and of the prolonged possession accorded the mortgagor is to promote his interests at the expense of the mortgagee.

Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481, upon which Radford relies, lends no support to his contention. There the statute left the period of the extension of the right of redemption to be determined by the court within the maximum limit of two years. Even after the period had been decided upon, it could, as was pointed out, 'be reduced by the order of the court under the statute, in case of a change in circumstances. * * *' (290 U.S. 398, page 447, 54 S.Ct. 231, 243, 78 L.Ed. 413, 88 A.L.R. 1481); and at the close of the period, the mortgagee was free to apply the mortgaged property to the satisfaction of the mortgage debt. Here, the option and the possession would continue although the emergency which is relied upon as justifying the act ended before November 30, 1939.31

Seventh. Radford contends further that the changes in the mortgagee's rights in the property, even if substantial, are not arbitrary and unreasonable, because they were made for a permissible public purpose. That claim appears to rest primarily upon the following propositions: (1) The welfare of the nation demands that our farms be individually owned by those who operate them. (2) To permit widespread foreclosure of farm mortgages would result in transferring ownership, in large measure, to great corporations; would transform farmer owners into tenants or farm laborers; and would tend to create a peasant class. (3) There was grave danger at the time of the passage of the act that foreclosure of farms would become widespread. The persistent decline in the prices of agricultural products, as compared with the prices of articles which farmers are obliged to purchase, had been accentuated by the long continued depression and had made it impossible for farmers to pay the charges accruing under existing mortgages. (4) Thus had arisen an emergency requiring congressional action. To avert the threatened calamity the act presented an appropriate remedy. Extensive economic data, of which in large part we may take judicial notice, were submitted in support of these propositions.

The bank calls attention, among other things, to the fact that the act is not limited to mortgages of farms operated by the owners; that the finding of the lower courts that Radford is a farmer within the meaning of the act does not necessarily imply that he operates his farm; and that at least part of it must have been rented to another, since a tenant is joined as defendant in the foreclosure suit. Section 75 of the Bankruptcy Act (to which this act is an amendment), provides, in sub-section (r), 11 USCA s 203 (r), that ‘the term ‘farmer’ means any individual who is personally bona fide engaged primarily in farming operations or the principal part of whose income is derived from farming operations.' Thus, the act affords relief not only to those owners who operate their farms, but also to all individual landlords the ‘principal part of whose income is derived’ from the ‘farming operations' of share croppers or other tenants; and, among these landlords, to persons who are merely capitalist absentees.32

It has been suggested that the number of farms operated by tenants was very large before the present depression;33 that the increase of tenancy had been progressive for more than half a century;34 that the increase has not been attributable, in the main, to foreclosures;35 and that, in some regions, the increase in tenancy has been marked during the period when farm incomes were large and farm values, farm taxes and farm mortgages were rising rapidly.36

We have no occasion to consider either the causes or the extent of farm tenancy; or whether its progressive increase would be arrested by the provisions of the act. Nor need we consider the occupations of the beneficiaries of the legislation. These are matters for the consideration of Congress; and the extensive provision for the refinancing of farm mortgages which Congress has already made, shows that the gravity of the situation has been appreciated.37 The province of the Court is limited to deciding whether the Frazier-Lemke Act (11 USCA s 203(s) as applied has taken from the bank without compensation, and given to Radford, rights in specific property which are of substantial value. Compare Ochoa v. Hernandez y Morales, 230 U.S. 139, 161, 33 S.Ct. 1033, 57 L.Ed. 1427; Citizens' Savings & Loan Association v. Topeka, 20 Wall. 655, 662, 664, 22 L.Ed. 455; In re Dillard, 7 Fed. Cas. page 706, No. 3,912. As we conclude that the act as applied has done so, we must hold it void; for the Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.

Reversed.

All Citations
295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1593, 97 A.L.R. 1106, 2 O.O. 537
Footnotes
*
Motion for stay of mandate denied 55 S.Ct. 918, 79 L.Ed. —-.
1 Section 75 had been added to the Bankruptcy Act on March 3, 1933, by C. 204, 47 Stat. 1470 (see 11 USCA s 203).
2 Bradford, Jr., v. Fahey, 76 F.(2d) 628 (4 C.C.A.); In re Cope (D.C. Colo.) 8 F.Supp. 778; In re Constitutionality of Frazier-Lemke Act (Galloway v. Union Trust Co.) (D.C.E.D. Ark.) 9 F.Supp. 575; In re Plumer (D.C.S.D. Cal.) 9 F.Supp. 923; In re Cyr (D.C.N.D. Ind.) 9 F.Supp. 697; In re Jones (D.C.W. Mo.) 10 F.Supp. 165. Compare In re Bradford (D.C.) 7 F.Supp. 665, reversed in Bradford, Jr. v. Fahey; In re Moore (D.C.) 8 F.Supp. 393; Paine v. Capitol Freehold Land & Trust Co. (D.C.) 8 F.Supp. 500; In re Miner (D.C.) 9 F.Supp. 1; In re Duffy (D.C.) 9 F.Supp. 166; In re Doty (D.C.) 10 F.Supp. 195; In re Payne (D.C. Tex., May 9, 1935) 10 F.Supp. 649 (holding the Act unconstitutional).
3 The Bank was organized under the Federal Farm Loan Act of July 17, 1916, c. 245, 39 Stat. 360. Section 12 of the act (12 USCA s 771) provided that loans should not exceed 50 per cent of the value of the land mortgaged and 20 per cent of the value of permanent insured improvement thereon. The Bank loaned the Radfords $8,000 in 1922 and an additional $1,000 in 1924. The stocks and bonds of the Bank are privately owned. The bonds 'being instrumentalities of the Government of the United States' are tax exempt. Compare Smith v. Kansas City Title Co., 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577; Federal Land Bank of New Orleans v. Crosland, 261 U.S. 374, 43 S.Ct. 385, 67 L.Ed. 703, 29 A.L.R. 1; Act of May 12, 1933, c. 25, s 29, 48 Stat. 46 (12 USCA s 810).
4 That Act empowered the Federal Land Banks and the Land Bank Commissioner to lend farmers 75 per cent. of the normal value of their land, at 4 ½ per cent. interest for the first five years and 5 per cent. thereafter; no repayment of principal to be required for five years. Act of May 12, 1933, c. 25, ss 24, 32, 48 Stat. 43, 48 (12 USCA ss 771, subd. 12, 1016); Act of June 16, 1933, c. 98, s 80, 48 Stat. 273 (12 USCA s 638); Act of Jan. 31, 1934, c. 7, s 10, 48 Stat. 347, 12 USCA s 1016(b). Mortgage loans made to farmers by the institutions subject to the Farm Credit Administration outstanding June 30, 1934, aggregated $2,029,305,081. As of March 31, 1935, the loans had been increased to $2,661,558,017. Farm Credit Administration, Monthly Reports on Loans and Discounts, March, 1935. 'The proceeds of the loans closed (in 1933— 34) both by the land banks and by the Land Bank Commissioner were used principally to refinance existing indebtedness. Of the loans closed by the land banks, approximately 86.8 per cent were used for this purpose, and of those closed by the Commissioner, 92 per cent were so used.' The Farm Real Estate Situation, 1933—34. Circular No. 354 of United States Department of Agriculture, April, 1935, p. 5.
5 The appraisal dated December 1, 1934 recited originally that $4,445 was the 'fair and reasonable value,' without mentioning the market value. It was, by leave of court, amended on December 4, 1934, to read as stated in the text. Besides the mortgaged property, Radford had a one-half interest in a half-acre lot and house thereon appraised at $150; exempt personal property appraised at $568; and nonexempt personal property at $831.50. The amount of the indebtedness other than to the Bank, and the terms of the composition offered do not appear.
6 [1, 2] See Pomeroy's Equity Jurisprudence, ss 162—3, 376, 381—2, 1180, 1186—1190, 1219; H.W. Chaplin, The Story of Mortgage Law, 4 Harv. Law Rev. 4; William F. Walsh, Development of the Title and Lien Theories of Mortgages, 9 New York University Law Quarterly Rev. 280.
7 It is the general rule that a holder of the equity of redemption can redeem from the mortgagee only on paying the entire mortgage debt. Collins v. Riggs, 14 Wall. 491, 20

L.Ed. 723; Jones v. Van Doren, 130 U.S. 684, 692, 9 S.Ct. 685, 32 L.Ed. 1077; American Loan & Trust Co. v. Atlanta Electric Ry. Co. (C.C.) 99 F. 313, 315, 316; Lomas & Nettleton Co. v. Di Francesco, 116 Conn. 253, 258, 164 A. 495; Palk v. Lord Clinton, 12 Ves.Jr. 48, 58. The rule is for the protection of the mortgagee, and unless waived by him, applies even when the redeemer has an interest in only part of the mortgaged property. Bank of Luverne v. Turk, 222 Ala. 549, 133 So. 52 (1931); Quinn Plumbing Co. v. New Miami Shores Corp., 100 Fla. 413, 129 So. 690, 73 A.L.R. 600; Shinn v. Barrie, 182 Ark. 366, 31 S.W.(2d) 540. Recognized exceptions to the rule are based on the action of the mortgagee in himself causing the lien on a part of the mortgaged property to be extinguished, Dexter v. Arnold, Fed. Cas. No. 3,857, 1 Sumn. 109, 118; Welch v. Beers, 8 Allen (Mass.) 151; George v. Wood, 11 Allen (Mass.) 41; Meacham v. Steele, 93 Ill. 135; Coffin v. Parker, 127 N.Y. 117, 27 N.E. 814, or on the right of eminent domain, Dows v. Congdon, 16 How. Prac. (N.Y.) 571; Mutual Life Insurance Co. v. Easton & Amboy R.R., 38 N.J. Eq. 132. Where the right of redemption after foreclosure sale is based entirely on statute, a different rule may be prescribed. Compare Northwestern Mutual Life Ins. Co. v. Hansen, 205 Iowa, 789, 218 N.W. 502; Tuttle v. Dewey, 44 Iowa, 306; State v. Carpenter, 19 Wash. 378, 53 P. 342; see Dougherty v. Kubat, 67 Neb. 269, 273, 93 N.W. 317. For collections of cases, see 2 Jones, Mortgages (8th Ed. 1928) ss 1370—1377; 2 Wiltsie, Mortgage Foreclosure (4th Ed. 1927) ss 1196—1213, 1071.

8 Compare Pewabic Mining Co. v. Mason, 145 U.S. 349, 361, 362, 12 S.Ct. 887, 36 L.Ed. 732; Easton v. German-American Bank, 127 U.S. 532, 8 S.Ct. 1297, 32 L.Ed. 210; Twin-Lick Oil Co. v. Marbury, 91 U.S. 587, 590, 23 L.Ed. 328; Buchler v. Black (C.C.A.) 226 F. 703; Caldwell v. Caldwell, 173 Ala. 216, 55 So. 515; Felton v. Le Breton, 92 Cal. 457, 28 P. 490; Chillicothe Paper Co. v. Wheeler, 68 Ill.App. 343; Kock v. Burgess, 176 Iowa 493, 156 N.W. 174, 158 N.W. 534; McNair v. Biddle, 8 Mo. 257; Stover v. Stark, 61 Neb. 374, 85 N.W. 286, 87 Am.St.Rep. 460; Paulson v. Oregon Surety & Cas. Co., 70 Or. 175, 138 P. 838; Blythe v. Richards, 10 Serg. & R. (Pa.) 261, 13 Ma.Dec. 672; Archambault v. Pierce, 46 R.I. 295, 127 A. 146. Some states have abolished by statute the general rule that a mortgagee, exercising a power of sale conferred in the mortgage, may not purchase at his own sale. See Heighe v. Sale of Real Estate, 164 Md. 259, 164 A. 671, 676, 93 A.L.R. 81 (1933); Ten Eyck v. Craig, 62 N.Y. 406, 421; Galvin v. Newton, 19 R.I. 176, 178, 36 A. 3; 2 Wiltsie, Mortgage Foreclosure (4th Ed. 1927) s 869.

In England, the power conferred upon the court in foreclosure proceedings, to order a sale, instead of strict foreclosure (15 & 16 Vict., c. 86, s 48; 44 & 45 Vict., c. 41, s 25) will not be exercised over the mortgagee's objection, when the property is not likely to bring the full amount of the mortgage debt, Merchant Banking Co. v. London & Hanseatic Bank, 55 L.J. Ch. 479; Provident Clerks' Mutual Ass'n v. Lewis, 62 L.J. Ch. 89; at least, not unless security is put up to protect the objecting mortgagee; Cripps v. Wood, 51 L.J. Ch. 584; or a bidding reserved sufficient to cover the amount due the mortgagee, Whitfield v. Roberts, 5 Jur. N.S. 113. Compare Corsellis v. Patman, L.R. 4 Eq. 156; Wooley v. Colman, L.R. 21 Ch.Div. 169; Hurst v. Hurst, 16 Beav. 372.

9 See 3 Jones, Mortgages (8th Ed. 1928) c. 30.

10 See A. H. Feller, Moratory Legislation (1933), 46 Harv. Law Rev. 1061, 1081; Commerce Clearing House, Bank Law Federal Service—'L.' Unit—128 C.C.H., pp. 7802—7809.

11 See John Hanna, Agriculture and the Bankruptcy Act (1934), 19 Minn. Law Review 1. The first Bankruptcy Act, April 4, 1800, c. 19, 2 Stat. 19, followed the minor depression of 1798. The second Bankruptcy Act, August 19, 1841, c. 9, 5 Stat. 440, followed the severe depression of 1837. The third Bankruptcy Act, March 3, 1867, c. 176, 14 Stat. 517, followed the financial disturbances incident to the Civil War. The fourth Bankruptcy Act, July 1, 1898, c. 541, 30 Stat. 544 (see 11 USCA) followed the depression of 1893. Farmers were first brought within the scope of our

bankruptcy laws by the act of 1841, which made voluntary bankruptcy available to all. In the act of 1867, farmers were not, as in the act of 1898, excluded from involuntary bankruptcy.

12 Act of 1800, c. 19, ss 34, 35, 2 Stat. 19, 30, 31; Act of 1841, c. 9, s 3, 5 Stat. 440, 443; Act of 1867, c. 176, s 14, 14 Stat. 517, 522.

13 Compare Hook, Does the Frazier-Lemke Amendment Grant Relief as to Debts Secured by Liens on Exempt Property (1934), 11 American Bankruptcy Review 21.

14 Federal Land Bank of Baltimore v. Kurtz (C.C.A.) 70 F.(2d) 46; New Liberty Loan & Savings Ass'n v. Nusbaum (C.C.A.) 70 F.(2d) 49; In re American Magnestone Co. (D.C.) 34 F.(2d) 681; In re Fayetteville Wagon-Wood & Lumber Co. (D.C.) 197 F. 180; In re Foster (D.C.) 181 F. 703; In re Gibbs (D.C.) 109 F. 627; In re Cogley (D.C.) 107 F. 73; In re Shaeffer (D.C.) 105 F. 352; In re Styer (D.C.) 98 F. 290; In re Taliafero, Fed. Cas. No. 13,736 (Chief Justice Waite); see Kimmel v. Crocker (C.C.A.) 72 F.(2d) 599, 601; In re National Grain Corp. (C.C.A.) 9 F.(2d) 802, 803; In re Franklin Brewing Co. (C.C.A.) 249 F. 333, 335; In re Roger Brown & Co. (C.C.A.) 196 F. 758, 761; In re Pittelkow (D.C.) 92 F. 901, 903; Citizens' Savings Bank of Paducah v. City of Paducah, 159 Ky. 583, 585, 167 S.W. 870; Dugan v. Logan, 229 Ky. 5, 12, 16 S.W.(2d) 763. Compare In re Sloterbeck Chevrolet Co. (D.C.) 8 F.Supp. 1023; In re Carl (D.C.) 5 F.Supp. 215; In re Civic Center Realty Co. (D.C.) 26 F.(2d) 825. Where the mortgaged property is sold free of liens for less than the amount of the liens, the bankrupt estate and not the lienholders must bear the costs of the sale. In re Harralson (C.C.A.) 179 F. 490, 29 L.R.A.(N.S.) 737; In re Holmes Lumber Co. (D.C.) 189 F. 178, 181. Compare Rubenstein v. Nourse (C.C.A.) 70 F.(2d) 482; In re Dawkins (D.C.) 34 F.(2d) 581.

15 In English bankruptcy proceedings, where mortgaged property is sold under order of the commissioners, the mortgagee is permitted to bid, to prevent a sacrifice of the property, sometimes even without previous leave of court. Ex parte Ashley, 3 Deac. & C. 510; Ex parte Pedder, 3 Deac. & C. 622; compare Ex parte Davis, 3 Deac. & C. 504; Ex parte Bacon, 2 Deac. & C. 181; Ex parte Du Cane, 1 Buck. 18; Ex parte Marsh, 1 Madd. 89.

16 The principle of composition was first applied to the interest of secured creditors in their security, by section 74, added to the Bankruptcy Act, by Act of March 3, 1933, c. 204, s 1, 47 Stat. 1467, see 11 USCA s 202 (individual debtors); by section 75, Act of March 3, 1933, c. 204, s 1, 47 Stat. 1470, see 11 USCA s 203 (agricultural compositions); by section 77, Act of March 3, 1933, c. 204, s 1, 47 Stat. 1474, 11 USCA s 205 (railroads engaged in interstate commerce); by section 77B, Act of June 7, 1934, c. 424, s 1, 48 Stat. 912, 11 USCA s 207 (corporations); and by section 80, as added by Act of May 24, 1934, c. 345, 48 Stat. 798, 11 USCA s 303 (public debtors). The constitutionality of such provision in section 74 was considered in Re Landquist (C.C.A.) 70 F.(2d) 929, 933.

17 See Bailey v. Glover, 21 Wall. 342, 346, 22 L.Ed. 636; Mayer v. Hellman, 91 U.S. 496, 501, 23 L.Ed. 377; Wiswall v. Campbell, 93 U.S. 347, 350, 23 L.Ed. 923; Hanover National Bank v. Moyses, 186 U.S. 181, 186, 22 S.Ct. 857, 46 L.Ed. 1113; Acme Harvester Co. v. Beekman Lumber Co., 222 U.S. 300, 307, 32 S.Ct. 96, 56 L.Ed. 208; Williams v. U.S. Fidelity & Guaranty Co., 236 U.S. 549, 554, 35 S.Ct. 289, 59 L.Ed. 713; Straton v. New, 283 U.S. 318, 320, 51 S.Ct. 465, 75 L.Ed. 1060. Also In re California Pacific R.R. Co., Fed. Cas. No. 2,315; In re Jordan, Fed. Cas. No. 7,514; In re Reiman, Fed. Cas. No. 11,673; In re Vogler, Fed. Cas. No. 16,986; Leidigh Carriage Co. v. Stengel (C.C.A.) 95 F. 637, 647; In re Swofford Bros. Dry-Goods Co. (D.C.) 180 F. 549, 556; Story on The Constitution (4th Ed.) s 1106; Olmstead, Bankruptcy, A Commercial Regulation, 15 Harv. Law Rev. 829; Levinthal, The Early History of Bankruptcy Law, 66 U. of Pa. Law Rev. 223, 225.

18 The oft-quoted definitions of the bankruptcy power indicate its broad scope. When in Re Klein (reported in a note to Nelson v. Carland, 1 How. 265, 277, 11 L.Ed. 126),

the constitutionality of the Bankruptcy Act of 1841 was challenged because it brought within its scope insolvent debtors other than traders and provided for voluntary proceeding, Mr. Justice Catron, sitting in Circuit said: 'I hold, it (the bankruptcy power) extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest, is a discharge of the debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress.' Judge Blatchford, when sustaining the provision for composition in Re Reiman, 20 Fed.Cas. 490, 496, No. 11,673, said that the subject of bankruptcy cannot properly be defined as 'anything less than the subject of the relations between an insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief.' And Mr. Justice Hunt, sitting in that case, on appeal to the Circuit Court said that 'whatever relates to the subject of bankruptcy is within the jurisdiction of congress.' In re Reiman, 20 Fed.Cas. 500, 501, No. 11,675.

19 For instance, the war power, Ex parte Milligan, 4 Wall. 2, 119, 18 L.Ed. 281; Ochoa v. Hernandez, 230 U.S. 139, 153, 154, 33 S.Ct. 1033, 57 L.Ed. 1427; Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 155, 40 S.Ct. 106, 64 L.Ed. 194. The power to tax, United States v. Railroad Co., 17 Wall. 322, 21 L.Ed. 579; Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746; Nichols v. Coolidge, 274 U.S. 531, 542, 47 S.Ct. 710, 71 L.Ed. 1184, 52 A.L.R. 1081; Blodgett v. Holden, 275 U.S. 142, 147, 276 U.S. 594, 48 S.Ct. 105, 72 L.Ed. 206; Barclay & Co. v. Edwards, 267 U.S. 442, 450, 45 S.Ct. 348, 69 L.Ed. 703; Heiner v. Donnan, 285 U.S. 312, 326, 52 S.Ct. 358, 76 L.Ed. 772. The power to regulate commerce, Monongahela Navigation Co. v. United States, 148 U.S. 312, 336, 13 S.Ct. 622, 37 L.Ed. 463; United States v. Joint Traffic Association, 171 U.S. 505, 571, 19 S.Ct. 25, 43 L.Ed. 259; Carrol v. Greenwich Insurance Co., 199 U.S. 401, 410, 26 S.Ct. 66, 50 L.Ed. 246; United States v. Lynah, 188 U.S. 445, 471, 23 S.Ct. 349, 47 L.Ed. 539; United States v. Cress, 243 U.S. 316, 326, 37 S.Ct. 380, 61 L.Ed. 746. The power to exclude aliens, Wong Wing v. United States, 163 U.S. 228, 236, 237, 238, 16 S.Ct. 977, 41 L.Ed. 140. Compare Perry v. United States, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912, 95 A.L.R. 1335.

20 In no state of the Union, in 1921, was the maximum lawful rate of interest less than 6 per cent. per annum; and in only two states was the legal rate as low as 5 per cent. Ryan, Usury and Usury Laws (1924), pp. 28—31. In Kentucky, 6 per cent. is both the legal and the lawful rate. Carroll's Ky. St. ss 2218, 2219.

21 The prescribed payment (interest) for the first year is 1 per cent. on the appraised value. The prescribed payment for the second year is 3 ½ per cent. thereof (1 per cent. for interest, 2 ½ per cent. on account of principal). The prescribed payment for the third year is 2 ½ per cent. of the principal and as interest 1 per cent. on 97 ½ per cent. of the principal. The prescribed payment for the fourth year is 5 per cent. on account of the principal, and as interest, 1 per cent. on 95 per cent. of the principal. The prescribed payment for the fifth year is 5 per cent. on account of principal, and as interest, 1 per cent. on 90 per cent. of the principal. The prescribed payment at the end of the sixth year is 85 per cent. of the principal, and as interest 1 per cent. of 85 per cent. of the principal. The present value calculated on a 6 per cent. basis, of all deferred payments (principal and interest) would be only 76.6 per cent. of the appraised value. In other words, the agreement to sell if assented to by the mortgagee would require him to relinquish his security not for its appraised value in cash, but for deferred payments which, if met, would yield (on a 6 per cent. basis) only 76.6 per cent. of the appraised value.

22 When the decree complained of was issued there had already been defaults in tax payments continuing more than two years. See page 1.

23 This is the construction given to paragraph 7 by both of the lower courts, by both of the parties in their briefs and oral arguments here, and, so far as appears, by all other

courts and judges that have passed upon the act, except District Judge Lindley, who, in Re Miner (D.C.) 9 F.Supp. 1, held that paragraph 7, as well as paragraph 3, was conditioned upon the mortgagee's consent to a sale to the debtor at the appraised value. See, also, John Hanna, Agriculture and the Bankruptcy Act, 19 Minn.L.Rev. 1, 19, 20; Report of Judiciary Committee, No. 370, p. 2, 74th Congress, 1st Session, April 1, 1935 on H.R. 5452. We refrain from discussing this question of construction as well as some others raised which are deemed unfounded.

24 This has been done by recent state legislation. Compare Arizona Laws, 1933, c. 88; Arkansas, Acts 1933, Act No. 57; see Adams v. Spillyards, 187 Ark. 641, 61 S.W.(2d) 686, 86 A.L.R. 1493; California St. 1933, c. 793, p. 2118; Idaho, Laws 1933, c. 150; Kansas, Laws 1935, H.B. 299; Louisiana, Act No. 28 of 1934; Minnesota, Laws 1933, c. 339; Montana, Laws 1935, H.B. 16; Nebraska, Laws 1933, c. 41; New Jersey, P.L., 1933, c. 82 (N.J.St. Annual 1933, ss 134—48, 134—49); see Vanderbilt v. Brunton Piano Co., 111 N.J. Law, 596, 169 A. 177, 89 A.L.R. 1080; New York, Laws 1933, Ex. Sess., c. 794; 1934, c. 277; 1935, c. 2; North Carolina, Pub. Laws 1933, c. 36; North Dakota, Laws 1933, c. 155; South Carolina, Act May 2, 1933, Act No. 264 (38 St. at Large, p. 350); South Dakota, Laws 1933, c. 138; 1935, H.B. 109; Texas 1933, c. 92 (Vernon's Ann. Civ. St. arts. 2218 , 2218a); see Langever v. Miller (Tex. Sup.) 76 S.W.(2d) 1025, 96 A.L.R. 836.

25 See Senate Report No. 1215 on S. 3580, May 28, 1934, p. 3; House Report No. 1898 on H.R. 9865, June 4, 1934, p. 4, incorporating as a part thereof a memorandum of Representative Lemke.

26 See Conference Report, June 18, 1934, 73d Cong., 2d Sess., 78 Cong. Rec., pp. 12,376, 12,491.

27 Senator Bankhead said: ‘If it applied only to existing mortgages, I should be glad to support it; but here is a program presented, not limited to existing mortgages, but a permanent program for the composition of mortgages. When a farmer goes to his advancing merchant, or goes to his banker, or applies to an insurance company for a loan under this bill, I want to know; and I am inquiring with earnest anxiety about it, what effect is it going to have upon those credit facilities for the farmers of this country.’ Id. p. 12.074.

Senator Fess: ‘It does seem to me that we might destroy the credit which he insists the farmers have, because everyone realizes that by the passage of this bill we may be making it impossible for the farmer in the future to borrow money.’ Id. p. 12,075.

Representative Peyser expressed the same view: ‘I believe that many of the Members are overlooking a very vital point in connection with this legislation—that is the fact that you are removing from the farmer the possibility of securing any mortgage assistance in the future. I believe in the enactment of this law and the scaling down of values you are going to take away the possibility of help that may be needed by these farmers in the future.’ Id. p. 12,137.

28 Many instances can be found of mortgages which provide that parcels of the mortgaged property shall be released upon payment of fixed amounts or upon payment of their value upon an appraisal therein provided for. See 1 Jones, Mortgages (8th Ed. 1928), s 98. Compare Clarke v. Cowan, 206 Mass. 252, 92 N.E. 474, 138 Am.St.Rep. 388.

29 See 2 Jones, Mortgages (8th Ed. 1928), s 843.

30 Counsel for the debtor suggests that the reasonable rental provided for in paragraph 7, is more than the secured creditor ordinarily receives in bankruptcy, since interest on secured as well as unsecured claims ceases with the filing of the petition. But the rule relied upon applies only when the secured creditor, having realized upon his security, is seeking as a general creditor to prove for the deficiency against the bankrupt estate. Sexton v. Dreyfus, 219 U.S. 339, 31 S.Ct. 256, 55 L.Ed. 244. It has no application when the mortgagee has a preferred claim against proceeds realized by the trustee from a sale of the security free of liens. Coder v. Arts, 213 U.S. 223, 228, 245, 29 S.Ct. 436,

53 L.Ed. 772, 16 Ann.Cas. 1008, affirming (C.C.A.) 152 F. 943, 950, 15 L.R.A. (N.S.) 372; People's Homestead Ass'n v. Bartlette (C.C.A.) 33 F.(2d) 561; Mortgage Loan Co. v. Livingston (C.C.A.) 45 F.(2d) 28, 34.

31 As by section 75 the petition of the farmer mortgagor may be filed at any time within five years after March 3, 1933, and the period of the possession and of the option extends for five years, the provision might bar enforcement of an existing mortgage until 1943.

Counsel for Radford contends that the five-year provision of paragraph 7 is not inflexible, because, under the rule of Chastleton Corporation v. Sinclair, 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841, it would cease to be effective on the termination of the emergency which is relied upon to justify the act. But the act does not make the five-year option period dependent upon the continuance of a national emergency; and the options conferred upon the farmer owner show that it was the needs of the particular debtor to which consideration was given.

32 In 1930, only 56 per cent. of the farm mortgage debt of the country rested on farms operated by their owners. The Farm Debt Problem, Letter from the Secretary of Agriculture, House Doc. No. 9, p. 9, 73d Cong., 1st Sess. Of the landlords of farms throughout United States: 'More than a third are engaged in agricultural occupations, nearly another third are retired farmers, and the remaining third are in non-agricultural occupations, mostly country bankers, merchants and professional men in the country towns and villages who have either come into farm ownership through inheritance or marriage, or have purchased farms for purposes of investment or speculation.' Yearbook of Agriculture (1923), p. 538. 'Furthermore, the percentage of cases in which landlords were remote from their farms is higher in some of the more recently developed farming regions than in some of the older farming regions. Thus in eastern North Dakota 40 per cent of the tenant farms were owned by landlords not residing in the same county and the proportion is nearly as large in central Kansas and in Oklahoma.' Id. p. 535.

33 Of the 6,288,648 farms in 1930, 42.4 per cent. were operated by tenants. The percentage in Kentucky operated by tenants was 35.9 per cent.; in Iowa, 47.3 per cent.; in Georgia, 68.2 per cent. In the South, 1,790,783 families were working as tenant farmers. See Hearings, March 5, 1935, on S. 2367, the Bill to create the Farm Tenant Homes Corporation, pp. 6, 14, 15, 16, 18, 39, 70, 72, 75, and Sen. Rep. 446, 74th Cong., 1st Sess., April 11, 1935.

34 During the half century prior to the present business depression, every decennial census recorded a progressive increase in farm tenancy. Of the 4,008,907 farms in the United States in 1880, 25.6 per cent. were operated by tenants; of the 6,448,343 farms in 1920, 38.1 per cent. were operated by tenants. Farm Tenure, Census of 1920, Agriculture, vol. V, p. 133, T. 11. The percentage of improved farm land operated by owners in 1920 was only 46.8. Farm Ownership & Tenancy, Yearbook of Agriculture (1923), p. 509.

35 'Causes underlying this upward trend of tenancy are complex and obscure. The trend has apparently continued through the various shades of adversity and prosperity. Farms operated by managers are not classed with tenancy. As has been pointed out before, the best, most productive lands have the greatest tenancy. Apparently tenancy does not thrive on poor lands. It is hardly thinkable that high productiveness is a result of tenancy. It is a fact, however, that the largest uptrend in the yield of corn per acre is in the area of greatest tenancy.' Iowa Year Book of Agriculture (1931), p. 349. In Iowa, 1927, tenant operated acres were 53.9 per cent. of the total acres in farms. In 1930, the percentage was 54.8; in 1931, it was 55.4. In 1932, it was 57.7; in 1933, 58.6. Id. (1932) p. 168; (1933) p. 213. See, also, Yearbook of Agriculture (1923), pp. 539—547; Turner, Ownership of Tenant Farms in the United States. Bull. No. 1432, and Ownership of Tenant Farms in North Central States, Bull. No. 1433, U.S. Dep't of Agriculture (1926).

36 'The increase in tenancy in the West North Central States is without doubt the result of the price situation. Land bought in the period of high prices could not be paid for, with the result that it is now operated by tenants.' Yearbook of Agriculture, 1932, p. 494. From 1910 to 1920, farm mortgage debt increased from $3,320,470,000 to $7,857,700,000. See The Farm Debt Problem, House Doc. No. 9, p. 5, 73d Cong., 1st Sess. In 1910, the total acreage of farm land was 878,798,325; in 1920, it was 955,883,715. Census of 1920, Agriculture, vol. V, p. 32, T. 3. The greatly increased local tax rate, in connection with increased land values, has been suggested as being an important cause of increasing farm tenancy. Hearings on S. 2367, p. 16. The average value of farm property per acre in 1880, was $22.72; in 1920, $81,52; in 1930, $58.01. Census of 1930, Agriculture, vol. II, p. 10, T.I. Farm property taxes in 1910 amounted to approximately $268 millions; in 1920, to $452 millions; in 1932, to $629 millions. See The Farm Debt Problem, supra, p. 21.

37 See note 4.

HUMPHREY'S EX'R
v.
UNITED STATES.
RATHBUN
v.
SAME.

No. 667.

Argued May 1, 1935.

Decided May 27, 1935.

Synopsis

On Certificate from the Court of Claims.

Suit by Samuel F. Rathbun, as executor of the estate of William E. Humphrey, deceased, against the United States, in which the Court of Claims certified questions to the United States Supreme Court.

Questions answered.

Attorneys and Law Firms

Mr. William J. Donovan, of Washington, D.C. (Messrs. Henry H. Bond and Ralstone R. Irvine, both of Washington, D.C., of counsel), for plaintiff.

The Attorney General and Mr. Stanley F. Reed, Sol. Gen., of Washington, D.C., for the United States.

Opinion

Mr. Justice SUTHERLAND delivered the opinion of the Court.

Plaintiff brought suit in the Court of Claims against the United States to recover a sum of money alleged to be due the deceased for salary as a Federal Trade Commissioner from October 8, 1933, when the President undertook to remove him from office, to the time of his death on February 14, 1934. The court below has certified to this court two questions (Act of February 13, 1925, s 3(a), c. 229, 43 Stat. 936, 939, 28 U.S.C. s 288 (28 USCA s 288)), in respect of the power of the President to make the removal. The material facts which give rise to the questions are as follows:

William E. Humphrey, the decedent, on December 10, 1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate. He was duly commissioned for a term of seven years, expiring September 25, 1938; and, after taking the required oath of office, entered upon his duties. On July 25, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground 'that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection,' but disclaiming any reflection upon the commissioner personally or upon his services. The commissioner replied, asking time to consult his friends. After some further correspondence upon the subject, the President on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forthcoming, and saying: 'You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence.'

The commissioner declined to resign; and on October 7, 1933, the President wrote him: 'Effecti ve as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission.'

Humphrey never acquiesced in this action, but continued thereafter to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law at the rate of $10,000 per annum. Upon these and other facts set forth in the certificate, which we deem it unnecessary to recite, the following questions are certified:

'1. Do the provisions of section 1 of the Federal Trade Commission Act, stating that 'any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office', restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named?

'If the foregoing question is answered in the affirmative, then—

'2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States?'

The Federal Trade Commission Act, c. 311, 38 Stat. 717, 718, ss 1, 2, 15 U.S.C. ss 41, 42 (15 USCA ss 41, 42), creates a commission of five members to be appointed by the President by and with the advice and consent of the Senate, and section 1 provides: 'Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act (September 26, 1914), the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency. neglect of duty, or malfeasance in office. * * *'

Section 5 of the act (15 USCA s 45) in part provides that:

'Unfair methods of competition in commerce are declared unlawful.

'The commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.'

In exercising this power, the commission must issue a complaint stating its charges and giving notice of hearing upon a day to be fixed. A person, partnership, or corporation proceeded against is given the right to appear at the time and place fixed and show cause why an order to cease and desist should not be issued. There is provision for intervention by others interested. If the commission finds the method of competition is one prohibited by the act, it is directed to make a report in writing stating its findings as to the facts, and to issue and cause to be served a cease and desist order. If the order is disobeyed, the commission may apply to the appropriate Circuit Court of Appeals for its enforcement. The party subject to the order may seek and obtain a review in the Circuit Court of Appeals in a manner provided by the act.

Section 6 (15 USCA s 46), among other things, gives the commission wide powers of investigation in respect of certain corporations subject to the act, and in respect of other matters, upon which it must report to Congress with recommendations. Many such investigations have been made, and some have served as the basis of congressional legislation.

Section 7 (15 USCA s 47), provides that: ‘In any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.’

First. The question first to be considered is whether, by the provisions of section 1 of the Federal Trade Commission Act already quoted, the President's power is limited to removal for the specific causes enumerated therein. The negative contention of the government is based principally upon the decision of this court in Shurtleff v. United States, 189 U.S. 311, 23 S.Ct. 535, 537, 47 L.Ed. 828. That case involved the power of the President to remove a general appraiser of merchandise appointed under the Act of June 10, 1890, 26 Stat. 131. Section 12 of the act provided for the appointment by the President, by and with the advice and consent of the Senate, of nine general appraisers of merchandise, who ‘may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office.’ The President removed Shurtleff without assigning any cause therefor. The Court of Claims dismissed plaintiff's petition to recover salary, upholding the President's power to remove for causes other than those stated. In this court Shurtleff relied upon the maxim expressio unius est exclusio alterius; but this court held that, while the rule expressed in the maxim was a very proper one and founded upon justifiable reasoning in many instances, it ‘should not be accorded controlling weight when to do so would involve the alteration of the universal practice of the government for over a century, and the consequent curtailment of the powers of the Executive in such an unusual manner.’ What the court meant by this expression appears from a reading of the opinion. That opinion, after saying that no term of office was fixed by the act and that, with the exception of judicial officers provided for by the Constitution, no civil officer had ever held office by life tenure since the foundation of the government, points out that to construe the statute as contended for by Shurtleff would give the appraiser the right to hold office during his life or until found guilty of some act specified in the statute, the result of which would be a complete revolution in respect of the general tenure of office, effected by implication with regard to that particular office only.

‘We think it quite inadmissible,’ the court said (189 U.S. 311, at pages 316, 318, 23 S.Ct. 535, 537, 47 L.Ed. 828), ‘to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences. * * * We cannot bring ourselves to the belief that Congress ever intended this result while omitting to use language which would put that intention beyond doubt.’

These circumstances, which led the court to reject the maxim as inapplicable, are exceptional. In the face of the unbroken precedent against life tenure, except in the case of the judiciary, the conclusion that Congress intended that, from among all other civil officers, appraisers alone should be selected to hold office for life was so extreme as to forbid, in the opinion of the court, any ruling which would produce that result if it reasonably could be avoided. The situation here presented is plainly and wholly different. The statute fixes a term of office, in accordance with many precedents. The first commissioners appointed are to continue in office for terms of three, four, five, six, and seven years, respectively; and their successors are to be appointed for terms of seven years—any commissioner being subject to removal by the President for inefficiency, neglect of duty, or malfeasance in office. The words of the act are definite and unambiguous.

The government says the phrase 'continue in office' is of no legal significance and, moreover, applies only to the first Commissioners. We think it has significance. It may be that, literally, its application is restricted as suggested; but it, nevertheless, lends support to a view contrary to that of the government as to the meaning of the entire requirement in respect of tenure; for it is not easy to suppose that Congress intended to secure the first commissioners against removal except for the causes specified and deny like security to their successors. Putting this phrase aside, however, the fixing of a definite term subject to removal for cause, unless there be some countervailing provision or circumstance indicating the contrary, which here we are unable to find, is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause. But if the intention of Congress that no removal should be made during the specified term except for one or more of the enumerated causes were not clear upon the face of the statute, as we think it is, it would be made clear by a consideration of the character of the commission and the legislative history which accompanied and preceded the passage of the act.

The commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi judicial and quasi legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.' Illinois Cent. &c. R.R. v. Inter. Com. Comm., 206 U.S. 441, 454, 27 S.Ct. 700, 704, 51 L.Ed. 1128; Standard Oil Co. v. United States, 283 U.S. 235, 238, 239, 51 S.Ct. 429, 75 L.Ed. 999.

The legislative reports in both houses of Congress clearly reflect the view that a fixed term was necessary to the effective and fair administration of the law. In the report to the Senate (No. 597, 63d Cong., 2d Sess., pp. 10, 11) the Senate Committee on Interstate Commerce, in support of the bill which afterwards became the act in question, after referring to the provision fixing the term of office at seven years, so arranged that the membership would not be subject to complete change at any one time, said: 'The work of this commission will be of a most exacting and difficult character, demanding persons who have experience in the problems to be met—that is, a proper knowledge of both the public requirements and the practical affairs of industry. It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.'

The report declares that one advantage which the commission possessed over the Bureau of Corporations (an executive subdivision in the Department of Commerce which was abolished by the act) lay in the fact of its independence, and that it was essential that the commission should not be open to the suspicion of partisan direction. The report quotes (p. 22) a statement to the committee by Senator Newlands, who reported the bill, that the tribunal should be of high character and 'independent of any department of the government. * * * a board or commission of dignity, permanence, and ability, independent of executive authority, except in its selection, and independent in character.'

The debates in both houses demonstrate that the prevailing view was that the Commission was not to be 'subject to anybody in the government but * * * only to the people of the United States'; free from 'political domination or control' or the 'probability or possibility of such a thing'; to be 'separate and apart from any existing department of the government—not subject to the orders of the President.'

More to the same effect appears in the debates, which were long and thorough and contain nothing to the contrary. While the general rule precludes the use of these debates to explain the meaning of the words of the statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy. Federal Trade Commission v. Raladam Co., 283 U.S. 643, 650, 51 S.Ct. 587, 75 L.Ed. 1324, 79 A.L.R. 1191.

Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the congressional intent to create a body of experts who shall gain experience by length of service; a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official *626 or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

We conclude that the intent of the act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here; and we pass to the second question.

Second. To support its contention that the removal provision of section 1, as we have just construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is Myers v. United States, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160. That case has been so recently decided, and the prevailing and dissenting opinions so fully review the general subject of the power of executive removal, that further discussion would add little of value to the wealth of material there collected. These opinions examine at length the historical, legislative, and judicial data bearing upon the question, beginning with what is called 'the decision of 1789' in the first Congress and coming down almost to the day when the opinions were delivered. They occupy 243 pages of the volume in which they are printed. Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved. A like situation was presented in the case of Cohens v. Virginia, 6 Wheat. 264, 399, 5 L.Ed. 257, in respect of certain general expressions in the opinion in Marbury v. Madison, 1 Cranch, 137, 2 L.Ed. 60. Chief Justice Marshall, who delivered the opinion in the Marbury Case, speaking again for the court in the Cohens Case, said: 'It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.'

And he added that these general expressions in the case of Marbury v. Madison were to be understood with the limitations put upon them by the opinion in the Cohens Case. See, also, Carroll v. Lessee of Carroll et al., 16 How. 275, 286—287, 14 L.Ed. 936; O'Donoghue v. United States, 289 U.S. 516, 550, 53 S.Ct. 740, 77 L.Ed. 1356.

The office of a postmaster is so essentially unlike the office now involved that the decision in the Myers Case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the Myers Case finds support in the theory that such an officer is merely one **874 of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of 'unfair methods of competition,' that is to say, in filling in and administering the details embodied by that general standard, the commission acts in part quasi legislatively and in part quasi judicially. In making investigations and reports thereon for the information of Congress under section 6, in aid of the legislative power, it acts as a legislative agency. Under section 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government.[1]

If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, at the bar, apparently recognizing this to be true, with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether not only the members of these quasi legislative and quasi judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power (Williams v. United States, 289 U.S. 553, 565—567, 53 S.Ct. 751, 77 L.Ed. 1372), continue in office only at the pleasure of the President.

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential coequality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings 'should be free from the remotest influence, direct or indirect, of either of the other two powers.' Andrews, The Works of James Wilson (1896), vol. 1, p. 367. And Mr. Justice Story in the first volume of his work on the Constitution (4th Ed.) s 530, citing No. 48 of the Federalist, said that neither of the departments in reference to each other 'ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.' And see O'Donoghue v. United States, supra, 289 U.S. 516, at pages 530-531, 53 S.Ct. 740, 77 L.Ed. 1356.

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

In the light of the question now under consideration, we have re-examined the precedents referred to in the Myers Case, and find nothing in them to justify a conclusion contrary to that which we have reached. The so-called 'decision of 1789' had relation to a bill proposed by Mr. Madison to establish an executive Department of Foreign Affairs. The bill provided that the principal officer was 'to be removable from office by the President of the United States.' This clause was changed to read 'whenever the principal officer shall be removed from office by the President of the United States,' certain things should follow, thereby, in connection with the debates, recognizing and confirming, as the court thought in the Myers Case, the sole power of the President in the matter. We shall not discuss the subject further, since it is so fully covered by the opinions in the Myers Case, except to say that the office under consideration by Congress was not only purely executive, but the officer one who was responsible to the President, and to him alone, in a very definite sense. A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers. And it is pertinent to observe that when, at a later time, the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply. 1 Annals of Congress, cols. 611-612.

In Marbury v. Madison, supra, 1 Cranch, 137, at pages 162, 165-166, 2 L.Ed. 60, it is made clear that Chief Justice Marshall was of opinion that a justice of the peace for the District of Columbia was not removable at the will of the President; and that there was a distinction between such an officer and officers appointed to aid the President in the performance of his constitutional duties. In the latter case, the distinction he saw was that 'their acts are his acts' and his will, therefore, controls; and, by way of illustration, he adverted to the act establishing the Department of Foreign Affairs, which was the subject of the 'decision of 1789.'

The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

To the extent that, between the decision in the Myers Case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

In accordance with the foregoing, the questions submitted are answered:

Question No. 1, Yes.

Question No. 2, Yes.

Mr. Justice McREYNOLDS agrees that both questions should be answered in the affirmative. A separate opinion in Myers v. United States, 272 U.S. 52, at page 178, 47 S.Ct. 21, at page 46, 71 L.Ed. 160, states his views concerning the power of the President to remove appointees.

All Citations

295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611

Footnotes

1 The provision of section 6(d) of the act (15 USCA s 46(d) which authorizes the President to direct an investigation and report by the commission in relation to alleged violations of the anti-trust acts, is so obviously collateral to the main design of the act as not to detract from the force of this general statement as to the character of that body.