THE VALIDITY OF THE N.R.A. CODES.

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THE recent decision of the Supreme Court of the United States that codes promulgated under the National Industrial Recovery Act are unconstitutional, was from a political standpoint, probably one of the most important it has delivered. The National Industrial Recovery Act, by Section 3, authorized the President to approve "codes of fair competition" for each particular industry. The codes were submitted to the President by representative trade or industrial associations or groups, and he could approve them if they did not promote monopolies or discriminate against small enterprises, and provided they tended to effectuate Title I of the Act. Title I as set forth in Section 1 declared that the policy of the Act was "(a) to 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 co-operative action among trade groups; (c) to eliminate unfair competitive practices; (d) to promote the fullest possible utilization of the present productive capacities 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." A live poultry code was prescribed for the metropolitan area in and about the City of New York. It fixed hours of labour, wages, minimum ages for employment and minimum numbers of employees in certain industries, provided for administration through an industry advisory committee and prohibited trade practices which were said to constitute unfair methods of competition, which practices were enumerated. The code had been properly approved and promulgated in accordance with the provisions of the Act. Neither the Act nor the code in any way limited the live poultry industries to which the code would apply, but the enforcement clause in the Act stated that violation of any provision of a code "in any transaction in or affecting interstate or foreign commerce" was a misdemeanour punishable by fine.

The defendants, Al. A. Schechter Poultry Corporation and Schechter Live Poultry Market, both companies, were convicted on eighteen counts of an indictment by the Government, charging violations of the code, and on additional counts for conspiring to commit such violations. The eighteen convictions included violations of minimum wage and maximum hour provisions and of trade practice provisions. The matters came before the Supreme Court by way of review.

Two main points were considered by the Supreme Court in holding the legislation *ultra vires*—first the question of the delegation of legislative power, and secondly the question of the application of the provisions of the code to interstate transactions. Other points were mentioned. Thus the contention of the Government that the legisla-

tion should be interpreted "in the light of the grave national crisis" was referred to, and summarily dismissed. Likewise the Court did not find it necessary to discuss "the validity of certain provisions of the code under the due process clause of the fifth amendment" in view of its determination on other points.

The first main issue, the question of the validity of the delegation of legislative power to the President, was considered in the light of a long line of American decisions. Article 1, Section 1, of the Constitution provides that "all legislative powers herein granted shall be vested in a Congress of the United States," and by Article 1, Section 8, Paragraph 18, Congress is authorized to "make all laws which shall be necessary and proper for carrying into execution" its general powers. The Court pointed out that it recognized the necessity of "adapting legislation to complex conditions involving a host of details," and accordingly it had been decided that it could perform its legislative 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, Hughes C.J. continued in delivering the judgment of the Court, the legislation must be examined to see "whether Congress in authorizing codes of fair competition has itself established the standards of legal obligation, thus performing its essential legislative function, or by failing to enact such standards has attempted to transfer that function to others."

The Court then proceeded to examine the concept of fair competition as used in the Act, and concluded that it was meant to include more than the converse of "unfair competition"—a concept which, as the Chief Justice picturesquely expressed it, "as known to the Common Law relates to the palming off one's goods as those of a rival trader." The Court's conclusion was that fair competition—a term not defined by the Act—was not a technical legal one, and that it could give no precise meaning to it. That being so, it was held that "Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade industry or activity. Instead of prescribing rules of conduct it authorizes the making of codes to prescribe them. The discretion of the President . . . in 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."

This part of the decision bears interesting contrast with the line of authorities decided by our High Court, culminating in *Meaks v. Dignan*,[1] where it was decided that "a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of Parliament is a law with respect to that subject"—per Dixon J.[2] In his comprehensive judgment, Dixon J. contrasts the American rule with the one the High Court was adopting, and the *Schechter Live Poultry Case* is

1. (1931) 46 C.L.R. 73.
2. *Ibid*, p. 101.

but an important application (from a political point of view) of the well-established American principle. The two lines of authority demonstrate how the superior courts of two extremely similar legal systems can, in making constitutional interpretations, reach entirely opposite conclusions in construing almost identically worded grants of power.

The second point under review raised clearly the issue, controversial both in America and the Commonwealth, of the powers of the federal organ with respect to interstate commerce. As stated above, Section 3 (a) of the National Recovery Act was not in any way limited to interstate and foreign commerce, although the penalty clause, Section 3 (f) was. Article 1, Section 8, Clause 3, of the United States Constitution grants power "to regulate commerce with foreign countries and among the several States."

The Court first discussed the question of fact arising out of the circumstances of the particular prosecutions under review. Were those transactions "in" interstate commerce? The poultry retailed by the defendants was all sent to New York from other States. But once it had reached New York, it was not "held used or sold by the defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other States." The Court held that in such circumstances, "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 becomes commingled with the mass of property within the State, and is there held solely for local disposition and use." Accordingly, a code which regulated hours of labour and wages of persons occupied in the retail of such goods was not a code regulating conditions of persons engaged "in" interstate commerce.

The issue is similar to that in *Huddart Parker Limited v. The Commonwealth*,[3] where the High Court held that Section 3 of the Transport Workers Act 1928-1929, which is expressed to empower the Governor-General to make regulations not inconsistent with that Act, with respect to the employment of transport workers, and in particular for regulating the engagement, service and the discharge of transport workers, and the licensing of persons as transport workers, and for regulating or prohibiting the employment of unlicensed persons as transport workers, and for the protection of transport workers, authorizes a regulation requiring that in the employment, engagement or picking up of transport workers (being waterside workers) for oversea and interstate vessels, priority shall be given to those workers available for employment, engagement or picking up who are members of the Waterside Workers' Federation. Section 51 (i) of the Constitution gives the Commonwealth Parliament "power to make laws for the peace, order and good government of the Commonwealth with respect to trade and commerce with other countries and among the States." One question at issue in the case was whether the Section of the Act and the Regulation were a valid exercise of the

3. (1931) 44 C.L.R. 492.

powers granted by Section 51 (i). The operations which the law in question regulated were the loading of goods onto, and the fuelling of a ship which was to carry them to another country or State, and the unloading of goods from a ship which had carried them from another country or State. The Court decided that such operations were "an essential part of sea commerce."[4] The operations under review in the American decision were not such an integral part of interstate commerce.

Section 92 of the Commonwealth Constitution, as interpreted by the High Court, makes it necessary in interpreting State powers also to decide whether an act or a series of acts is part of interstate trade commerce and intercourse, for in deciding whether trade commerce or intercourse among the States has been left absolutely free, it is necessary to first decide whether the State legislation is in any way related to an act which is part of interstate trade commerce and intercourse. The case of *Roughley v. New South Wales, ex parte Beavis*,[5] provides an interesting example on this point.

The other aspect of the interstate commerce issue went to the root of the decision. The American Constitution contains no provision resembling Section 92 of the Commonwealth Constitution, but Article 1, Section 8, Clause 3, is almost identically worded with Section 51 (i) of our Constitution.

The Supreme Court enunciated the principle it had adopted in a series of cases interpreting the interstate powers of the Federal Government—that, if a transaction dirctly "affected" interstate commerce, it was a subject for Federal regulation. Numerous interesting instances of Federal legislating protecting interstate transactions were cited. But, concluded Hughes C.J., in determining how far the Federal Government may go in controlling interstate 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. It was put by the Government that hours and wages affect prices which affect trade and therefore interstate commerce. The Court's answer to this was that it proved too much, that control could, according to that argument, be logically exerted over all other elements of cost, and the extent of the regulation of cost would be a question of discretion and not of power. This, said the Court, is at the most an indirect effect on interstate commerce, and the legislation authorizing codes which thus regulated costs was therefore *ultra vires*. As Cardozo J. expressed it in a concurring opinion, this was an "objection far-reaching and incurable."

This portion of the decision is interesting both as an aspect of American constitutional law, and by way of contrast with Australian constitutional principles. Although the United States' Constitution contains no parallel to our Section 92, the Supreme Court, in a long line of decisions, has interpreted Article 1, Section 8, Clause 3, as

4. *Ibid*, per Dixon J. at p. 515.
5. (1928) 42 C.L.R. 162.

granting exclusive power to the Federal legislature over interstate commerce. The effect resembles the interpretation put by the High Court on our Sections 51 (i) and 92. The usual mode in which the question has come before the American Supreme Court has been in determining the validity of State legislation, and the rule has been enunciated that State legislation which only indirectly affects interstate commerce is valid, and does not encroach on Congress's exclusive power with respect to interstate commerce. The decision on the N.I.R.A. states the converse of this well-established rule, and the Chief Justice cites cases of Federal anti-trust legislation and Federal legislation dealing with labour disputes, where such legislation was held to apply to acts which directly affected interstate commerce. He states that although those cases were with respect, not to constitutional validity, but to the extent of the application of the Statutes, the rule applies equally to questions of validity. Further, as in all those cases the basis of the decisions was that the acts directly affected interstate commerce, by implication indirect effects are beyond the Federal powers of legislation. The American courts have experienced the difficulty our courts have experienced in defining interstate powers, and have seized hold of what, as a principle, is clear—that legislation on transactions directly affecting interstate commerce is within the powers of the Federal legislature but not of the States, while legislation on transactions indirectly affecting interstate commerce is *ultra vires* the Federal legislature and *intra vires* State legislatures. Whether the application of such a principle is equally clear is another matter.

It is with a great deal of hesitation and much temerity that one expresses any opinion on the interpretation of Section 51 (i) of the Commonwealth Constitution, bound up, as the interpretation of that Section is, with the interpretation of Section 92. The varying tests which have been applied by different members of the High Court render it extremely difficult to enunciate any principles of interpretation of either Section 51 (i) or 92, which can be said to have been formulated by the Court as a whole. However, it is submitted that at no time has an interpretation been put on Section 51 (i) by the High Court which would enable the Commonwealth Parliament to enact a law similar to the National Industrial Recovery Act or the Live Poultry Code formulated under it.