Missouri Law Review

Volume 1
Issue 1 *January 1936*

Article 11

1936

Comments

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Part of the Law Commons

Recommended Citation
Comments , 1 Mo. L. Rev. (1936)
Available at: https://scholarship.law.missouri.edu/mlr/vol1/iss1/11

This Comment is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Comments

CONSTITUTIONAL LAW—REGULATION OF THE PRICE OF MILK IN INTERSTATE COMMERCE—Due to wide-spread economic distress among the dairy farmers of the state, resultant from the economic depression and its attendant evil of ruinous price-cutting, the legislature of the State of New York in 1933 and 1934 enacted statutes[1] which had the effect of regulating the price at which milk could be bought and sold when intended for consumption in New York. In *Nebbia v. New York*,[2] the Supreme Court of the United States in upholding these measures as valid exercises of the police power, said that because of the great importance of the dairy industry to the people of New York, and because of the fact that the entire industry was facing bankruptcy, the legislature was free to adopt some scheme of regulation to correct the evils; that "price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

When the regulation was sought to be extended to milk bought outside the state at less than the minimum price designated and brought into New York in interstate commerce, there resulted immediately an attack upon the constitutionality of the regulation, as being violative of the commerce clause of the Federal Constitution. The problem was presented to the Federal Courts by *Seelig v. Baldwin*,[3] in which Seelig, an incorporated milk dealer buying his milk from a Vermont corporation, sought an injunction against the enforcement of the acts. His practice was to ship the milk from Vermont to New York in large cans; there, the bulk of the milk was sold by the can, and the remaining small quantity was bottled and then sold. The price paid in Vermont was below the minimum price set by the legislation in question. The United States District Court for the Southern District of New York, holding the regulation valid as to that bottled in New York, and invalid as to that sold in the cans, and speaking through Circuit Judge Learned Hand, said, ". . . the venture on which the state is engaged may at times excuse its interference. . .its intervention is not always condemned because it interposes 'directly' upon the goods while they are still a part of interstate commerce. Assuming for argument that there may be such instances, the motive in the case at bar will not serve." However, the court treated the bottled milk in a different fashion. It has generally been held that when the interstate journey is over, and the goods have become a part of the mass of goods of the state, the state may regulate. One test of this which has been commonly used is that of the original package doctrine set forth first in *Brown v. Maryland*,[4] which is, in effect, that when the bulk is broken, the interstate transportation is over. And so, "As to the bottled milk, the opposite is true; the state may control it at its pleasure; it is part of the mass of its domestic goods; and although in so doing the state in effect fixes the price at which milk shall be bought elsewhere, the sanction is local and it is otherwise unobjectionable."

1. N. Y. Laws 1933, c. 158; *ibid.* 1934, c. 126.
2. 291 U. S. 502 (1934).
3. 7 F. Supp. 776 (1934).
4. 114 U. S. 598 (1827).

In the cross-appeals[5] from this decision to the Supreme Court, the State of New York contended that the regulation, as well of the milk in cans as of that which was bottled, is a valid exercise of the New York internal police power to serve the ends of economic security to the dairy farmer of New York. Admitting that this alone perhaps should not be sufficient to cause the Court to relieve that state from its duty under the commerce clause, it was further argued that in addition the end to be served is the maintenance of a regular supply of milk; and unless the farmer's economic security is protected, the regularity of the supply is threatened. Moreover, it was urged, an underpaid farmer is likely to neglect expensive sanitary precautions, and that this temptation is presented to the Vermont as well as to the New York dairyman. On these arguments the State of New York contended that there was a definite relation between the regulation imposed and the health of the people of New York—and thus that the regulation should be held valid as an exercise of the police power even though the intervention incidentally obstructed interstate commerce.

In answer, the Court advanced two arguments: the first, that the ends sought to be reached can be better served by a more direct measure of repression than establishing a parity of prices. New York, can, according to the Court, establish a system of inspection or certification of health whereby impure milk may be totally excluded; the second, the Court says, "whatever relation there may be between earnings and sanitation, it is too remote and indirect to justify obstructions to the normal flow of commerce in its movements between the states." It is submitted that whatever the value of the second argument may be, the first is merely a make-weight, since it seems obvious that the mere fact that there exist other ways of doing the thing sought which the Supreme Court may think wiser than the one chosen, that fact could hardly have any bearing on the inherent constitutionality of the method selected by the legislature.

Turning to the question of the milk taken from the original packages and bottled in New York, the Court also refused to hold the regulation valid when applied to it. For the present it is sufficient to say that the Court refused to apply the original package doctrine literally, saying, "In brief, the test of the original package is not an ultimate principle. It marks a convenient boundary and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation . . . . Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. . . .The form of the package is immaterial, whether they are original or broken."[6]

The particular problem here presented has never before confronted the Supreme Court. Price fixing, in itself, as contrasted with rate regulation, without considering the interstate phases at all, is an extremely modern innovation, and is regarded in many quarters as being an extremely dangerous innovation. The problem is new, and it obviously follows that the Court had no direct authority to aid it in its decision, since *Nebbia v. New York*[7] and the cases following it, did not pass upon the interstate

5. Baldwin v. Seelig, 294 U. S. 511 (1935).

6. Welton v. Missouri, 91 U. S. 275 (1875); Brennan v. City of Titusville, 153 U. S. 289 (1894); Caldwell v. North Carolina, 187 U. S. 622 (1902); Rearick v. Pennsylvania, 203 U. S. 507 (1906); Dozier v. Alabama, 298 U. S. 124 (1909); Real Silk Hosiery Mills v. City of Portland, 268 U. S. 325 (1925).

7. *Supra* note 2.

feature. However, it might be worthwhile to consider several classes of cases previously decided to note their possible effect on the determination here.

The first group of cases involves the taxing power of the state of destination.[8] The leading case on this subject is *Sonneborn Brothers v. Cureton.*[9] In this case, a Texas statute imposed a tax on all wholesale dealers in oil, measured by a per cent of their gross sales within the state. The Court, in upholding the validity of the tax, when applied to one bringing in oil in interstate commerce, said, "The oil had come to a state of rest in Plaintiffs' warehouse, and had become a part of their stock. . . . The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil as property, or upon its sale in the state, if the state law levied the same tax on all oil, or all sales of it, without regard to origin, would be neither a regulation nor a burden of interstate commerce of which this oil had been the subject." It is to be noted that the decision practically eliminates from the field of state taxation the original package doctrine as a test of whether the interstate journey is over, and places the emphasis on whether or not the tax was discriminatory." It is apparent that the fact situations in this case and in *Baldwin v. Seelig*[10] are identical except for the milk bottled, and that makes an even stronger case for the state, since breaking bulk and bottling the milk shows clearly, under the original package doctrine, that the interstate journey was over. It is equally clear that the regulation here involved was nondiscriminatory, and therefore the case falls squarely under the *Sonneborn* case. Nevertheless, the distinction remains that there the statute involved was one of taxation which had no substantial effect by way of retarding the importation of oil from outside the state, while here it creates a police regulation and serves to restrict somewhat the purchase of milk in other states.

The next group of cases involves the police power of the state to exclude from its territory diseased animals.[11] Here, in *Railroad Company v. Husen,*[12] the Supreme Court stated, in effect, that it was exclusively in the power of Congress to determine just what articles were proper subjects of interstate commerce, and therefore held a Missouri statute which forbade the introduction, in certain periods of the year, of any Texas, Mexican or Indian cattle, invalid as a usurpation by the state of that exclusive power. However, in *Reid v. Colorado,*[13] and later in *Mintz v. Baldwin,*[14] there was recognized in each state the existence of a valid self-protective police power to protect its own cattle from disease; that therefore, diseased cattle are not proper articles of interstate commerce; and finally, that each state might exclude any cattle unless certain quarantine or inspection provisions had been complied with. This doctrine, which is well-established, depends primarily upon the inherent right of each state to protect its people and property from extra-state dangers detrimental to the health, morals, and safety of the citizenry. One striking difference between *Baldwin v. Seelig*[15] and these cases is that the milk in itself was pure and harmless, while in the diseased animal cases, the product sought to be excluded was definitely dangerous in itself. In addition, it might be well to point out that the diseased cattle

8. American Steel & Wire Co. v. Speed 192 U. S. 500 (1904); Sonneborn Bros. v. Cureton, 262 U. S. 506 (1922); Wiloil Corporation v. Pennsylvania, 55 S. Ct. 358, 79 L. ed. 382 (1934); *cf.* Texas Company v. Brown, 258 U. S. 466 (1921).

9. *Supra* note 8.

10. *Supra* note 5.

11. Railroad Company v. Husen, 95 U. S. 465 (1878); Reid v. Colorado, 187 U. S. 137 (1902); Asbell v. State of Kansas, 209 U. S. 251 (1908); Mintz v. Baldwin, 289 U. S. 346 (1933). For a group of very analogous cases, see Savage v. Jones, 225 U. S. 501 (1912); Crossman v. Lurman, 192 U. S. 189 (1904); McDermott v. Wisconsin, 228 U. S. 115 (1913); Price v. Illinois, 238 U. S. 446 (1915).

12. *Supra* note 11.

13. *Supra* note 11.

14. *Supra* note 11.

15. *Supra* note 5.

were excluded primarily because of the effect they would have on health within the state, while in *Baldwin v. Seelig*,[16] the attempted regulation was based largely upon a desire to protect economic interests. It appears, then, that in the latter case the Court felt that the regulation by the state to serve the economic needs of its dairy farmers was not sufficiently necessary as a self-protective measure to validate the interference with interstate commerce.

Having decided that the validity of the exercise of the state police power contained in the statute held valid in *Nebbia v. New York*[17] rested almost exclusively on the promotion of economic security in the dairy industry, it seems that the case added "protection of the economic security of the people" to our previous definition or limitation of state police power. Conceding this, we have here in *Baldwin v. Seelig*[18] a very similar regulation to that imposed in *Reid v. Colorado*.[19] Then, it seems logically to follow that the Supreme Court thought in *Baldwin v. Seelig*[20] that the necessity for self-protection was not as great as it was in *Reid v. Colorado*[21]—that protection of animals from disease is more necessary to the adequate protection of the people of the state than is protection of the dairy farmer from insolvency. However, this is not surprising, since in *Leisy v. Hardin*[22] it refused to allow the State of Iowa to protect its internal morals and good order by outlawing intoxicating liquors sold in the original package, saying, in part, that the states have an undoubted right to "control their purely internal affairs. . .but whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity or its disposition before it has ceased to become an article of trade. . .it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void." This, again, seems to run counter to the doctrine laid down in *Sonneborn Brothers v. Cureton*.[23] Further, the court says, "whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, *if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them*." (Italics the writers). The legislature of the State of Iowa had determined that liquor *was* dangerous in itself to the morals and good order of the people of Iowa. Is the Supreme Court here saying that that legislative determination is so clearly unreasonable that it renders the statute void, or is it attempting to limit the police power of the state to regulation of matters involving health directly, and only to those? In any event, the decision stands and furnishes some authority for the holding in *Baldwin v. Seelig*.[24]

Probably the most closely analogous cases to the present situation, are those commonly designated as the "oleomargarine cases." In *Plumley v. Massachusetts*,[25] a Massachusetts statute forbade the sale within the state of oleo colored so as to resemble butter, even though it was sold in the original package. The Court said, "we are of the opinion that it is within the power of a State to exclude from its

---

16. *Supra* note 5.
17. *Supra* note 2.
18. *Supra* note 5.
19. *Supra* note 11.
20. *Supra* note 5.
21. *Supra* note 11.
22. 135 U. S. 100 (1890).
23. *Supra* note 8.
24. *Supra* note 5.
25. 155 U. S. 461 (1894); *cf.* Hebe Co. v. Shaw, 248 U. S. 297 (1919); Hygrade Provision Co. v. Sherman, 266 U. S. 497 (1925).

markets any compound manufactured in another state, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy." The Court then distinguished the case from *Leisy v. Hardin*,[26] saying, "So far as the record disclosed, and so far as the contentions of the parties were concerned, the article there in question was what it appeared to be, namely, genuine beer, and not a liquid or drink colored artificially so as to cause it to look like beer." It appears, then, that the Court leaned heavily on the possibility of fraud which it thought might arise from permitting the sale of colored oleomargarine. Since it seems obvious that the danger of fraud would be very slight, apparently the reason for the statute and the hidden reason the Court sustained it, was the desire to protect the local dairy interests from competition by the cheaper oleomargarine. Assuming this basis, the case really goes farther than was attempted in *Baldwin v. Seelig*,[27] since both articles were inherently harmless, and in *Baldwin v. Seelig*,[28] the milk was excluded only if certain conditions were not complied with, while in *Plumley v. Massachusetts*,[29] the oleomargarine was absolutely outlawed. In addition, it seems that the Court should have given some weight to the fact that the need of protecting the dairy farmer was much greater in the former case than it was in the latter. Nevertheless, the Court did not openly proceed on the basis that it was protecting the dairymen of Massachusetts, and so the case can furnish little authority for an opposite holding in *Baldwin v. Seelig*.[30] The element of fraud has since been treated[31] as the basis of the decision in the *Plumley* case.[32]

Assuming the soundness of *Nebbia v. New York*,[33] it is to be suggested that the opposite decision in *Baldwin v. Seelig*[34] would have been more desirable. It could be argued that if the police justification were sufficient ground on which to base that decision,[35] that it should be sufficient here, especially since the holding of the latter case completely destroys the plan of the legislature, approved of by the former. Nevertheless, the proposition stands that a state cannot regulate the price of milk while still in the original package, nor can it regulate that in broken packages, when the effect of the regulation would be to reach out into another state and control a transaction occurring there.[36]

Sikeston, Mo. CONLY L. PURCELL, LL. B., '35.

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE AUTHORITY—There have been many cases before the Supreme Court of the United States attacking the constitutionality of acts of Congress on the ground that they contained

---

26. *Supra* note 22.
27. *Supra* note 5.
28. *Supra* note 5.
29. *Supra* note 25.
30. *Supra* note 5.
31. Schollenberger v. Pennsylvania, 171 U. S. 1 (1897).
32. *Supra* note 25.
33. *Supra* note 2.
34. *Supra* note 5.
35. *Supra* note 2, Hageman Farms Corporation v. Baldwin, 293 U.S. 163 (1934); Borden's Farm Products Company v. Baldwin, 293 U. S. 194 (1934); *cf* Home Building & Loan Association v. Blaisdell, 290 U. S. 398 (1934).
36. For a case holding that a state may not regulate contracts made outside its borders, see Allgeyer v. Louisiana, 165 U. S. 578 (1897).

unconstitutional delegations by the legislative branch of the government to the executive. From 1813 until 1935, a period of one hundred and twenty-two years, the Court had always refused this argument. But in the past year the Court ruled that Congress had gone too far in the National Industrial Recovery Act and that the Act involved an unconstitutional delegation of legislative power to the President.[1]

The early cases dealing with this problem avoided any direct ruling on the question of such delegation by holding that the particular act under attack did not amount to a delegation of power of a legislative character, but involved merely a simple ascertainment by an executive officer of a fact upon which the act was to go into effect or cease to operate.[2] Other cases have recognized the inevitability and practical necessity of delegated legislation in our present complex and ever-changing society and have upheld such enactments. These rulings have recognized the inherent dangers in such practices, however, and have required that Congress set forth clearly its policy and set up more or less definite standards to guide and check the administrative officer or commission designated in carrying out the provisions of the Act.

The case of *Union Bridge Co. v. United States*[3] may be cited as typical. One of the provisions of the Rivers and Harbors Act of 1899[4] authorized the Secretary of War, after due hearing, to order the alteration or removal of bridges over navigable streams when found to be obstructions to navigation. The Supreme Court upheld the constitutionality of the Act.[5]

The same court has also upheld delegation of a similar nature covering a wide field,—from the right to prescribe regulations governing the use and occupation of forest preserves to authority to set up a uniform accounting system for common carriers.[6]

The outstanding decision of the Supreme Court in recent years, prior to 1935, which dealt with this problem is the case of *J. W. Hampton, Jr. & Co. v. United States*.[7] Congress by the so-called flexible tariff provision in the Tariff Act of 1922[8] authorized the President to raise or lower the rates fixed by the Act by as much as fifty per cent, by proclaiming new rates and classifications as to certain designated commodities whenever he found that the rates in force did not equalize the cost of production here and abroad. The Court upheld the validity of this Act. The broad discretion thus vested in the President was a very real delegation of legislative power. In view of this decision, one certainly should have a reasonable basis for the belief

---

1. Panama Refining Co. v. Ryan, 293 U. S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935).
2. The Brig Aurora, 2 U. S. 583 (1813); Field v. Clark, 143 U. S. 649 (1892).
3. 204 U. S. 364 (1906).
4. 30 STAT. 1121 (1899).
5. Monongahela Bridge Co. v. United States, 216 U. S. 177 (1909); Miller v. Mayor of New York, 109 U. S. 385 (1883); Rider v. United States, 178 U. S. 251 (1900); Hannibal Bridge Co. v. United States, 221 U. S. 194 (1911).
6. United States v. Grimaud, 220 U. S. 506 (1911); St. Louis & I. M. Ry. v. Taylor, 210 U. S. 281 (1908); Morrill v. Jones, 106 U. S. 466 (1882); American Sugar Refining Co. v. United States, 211 U. S. 155 (1908); United States v. Light, 220 U. S. 523 (1910); United States v. United Verde Copper Co., 196 U. S. 207 (1905); United States ex rel. West v. Hitchcock, 205 U. S. 80 (1907); Buttfield v. Stranahan, 192 U. S. 470 (1904); Norwegian Nitrogen Co. v. United States, 288 U. S. 294 (1933); Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194 (1912); Kansas City S. Ry. Co. v. United States, 231 U. S. 423 (1913); Houston E. & W. Texas Ry. Co. v. United States, 234 U. S. 342 (1914); United States et al. v. Atchison et al. (Intermountain Rate Case), 234 U. S. 476 (1914); Radio Commission v. Nelson Brothers Co., 289 U. S. 266 (1933).
7. 276 U. S. 394 (1928).
8. 42 STAT. 858, 941 (1922), 19 U. S. C. A. § 153 *et seq.*

that the Supreme Court might look without disfavor on the "new deal" legislation of the present administration so far as delegation of authority was concerned.

However, in the first case to come before the Court involving the constitutionality of the National Industrial Recovery Act,[9] the Court made it clear that there is a point beyond which Congress must not go in delegating functions of a legislative nature to the President. Sec. 9(c) of the Act authorized the President to prohibit the transportation in interstate and foreign commerce of petroleum and its products which had been produced or withdrawn from storage in excess of the amount allowed by state law or valid regulation. In the case of *Panama Refining Co. v. Ryan*[10] (popularly referred to as the "Hot Oil" case), the majority of the Court ruled the Act to be an unconstitutional delegation of legislative authority to the President and invalid. The majority based its decision on three grounds: (1) no general policy was expressed by Congress in the Act; (2) there was no fixing of standards by Congress; (3) no finding of fact and proclamation of the same was required to be made by the President. Mr. Justice Cardozo, in a vigorous dissenting opinion, took the position that the Act as a whole set forth a general policy on the part of Congress to prohibit transportation of "hot oil" in interstate commerce. He also pointed out in his opinion that there were sufficient standards indicated to guide the action of the President, in that the act authorized him to forbid the interstate transportation of such oil "when he believes, in the light of the conditions of the industry as disclosed from time to time, that the prohibition will tend to effectuate the disclosed policies of the Act" set out in section 1. The dissent clearly showed the need for flexibility in dealing with this type of problem effectively. The Justice declared it would not be desirable for Congress to make such prohibition absolute, as a whole, because market conditions change, and since Congress had inserted flexible provisions the Court should not declare the Act unconstitutional.

After the decision in the *Panama Refining Company* case, Congress enacted a law which was designed to meet the three objections of the Court to the provisions of the NRA which were held void in that case.[11] This new Act declared it to be the policy of Congress to protect interestate and foreign commerce from the burden and harmful effect of contraband oil, prohibited its transportation in interstate commerce, and then provided that whenever the President finds the amount of petroleum moving in interstate commerce so limited as to cause a lack of parity between supply and consumptive demand, he shall by proclamation declare such finding, and that, thereupon, the provisions of the Act shall be inoperative until such time as the President shall find and by proclamation declare that the conditions which gave rise to the suspension of the provisions of the Act no longer exist. The President is then authorized to prescribe such regulations as he finds necessary to enforce the provisions of the Act. The Court has not as yet been called upon to pass on the validity of this legislation, but it would seem that Congress has effectively met the objections expressed by the Court to the former Act.

In the case of *Schechter Poultry Corp. v. United States*,[12] the second to come before the Supreme Court questioning the constitutionality of the NRA, the Court again ruled the Act invalid as an illegal delegation of power to the President. Congress had authorized the President to approve codes of fair competition as presented to him by representatives of various industries, or drawn up on his own motion, provided that the groups which propose the respective codes "impose no inequitable restrictions on admission to membership" and are "truly representative". A further

---

9. 48 STAT. 195 (1933), 15 U. S. C. A. § 701 *et seq.*
10. 293 U. S. 389 (1935).
11. P. L. No. 14, 74th Cong. (1935).
12. 295 U. S. 495 (1935).

requirement was that the code should not permit monopolies nor oppress small enterprises.[13] The Court ruled that under the broad general terms of the Act the President and the formulators of the codes were left with almost no check, and that they were in practical effect free to roam at will. The term "fair competition"—unlike "unfair competition",—had no limited meaning at all under the common law, and therefore its use in the NRA, the Court found, did not set up any standard to guide the conduct of the framers of the codes and the President, but meant only what they might hold it to mean.

The decision in the *Schechter* case,[14] when viewed in the light of the holding in *Panama Refining Company v. Ryan*,[15] is not surprising. The latter was a case involving a much greater limitation on the scope of the President's action, and the field attempted to be regulated dealt with only a single commodity, viz., petroleum and its products. In the former case, the President and the framers of the codes were given almost unlimited and unrestricted discretion in drawing up codes of fair competition, which dealt with all industries. This broad delegation of power was without precedent, and the Court drew the line against it.

At this writing, the Supreme Court has under consideration a case involving the validity of the Agricultural Adjustment Act.[16] It is the expressed intention of the Act to restore to agricultural commodities the purchasing power which they had in the base period of August, 1909, to July, 1914. In order to provide funds with which to make the benefit or rental payments to the farmers, a processing tax is levied. The rate of the tax is to be determined in such a way as to equal the difference between the current average farm price for the commodity and the fair exchange value of that commodity. This fair exchange value is declared to be the price which will give to the commodity the same purchasing power with respect to articles farmers buy as it had in the base period of 1909 to 1914. The Secretary of Agriculture is to proclaim the processing taxes and is to adjust the rate from time to time. One of the chief grounds of attack on the validity of the Act is the alleged unconstitutional delegation of legislative power to the Secretary of Agriculture by vesting him with the taxing power.

The *Hoosac Mills* case which is now pending before the Supreme Court involves the constitutionality of the processing tax provisions of the AAA as originally enacted. The District Court, after hearing this case, ruled that no provision of the constitution was violated by imposition of the taxes on the processing of cotton.[17] This decision was reversed in the Circuit Court of Appeals with one member of the Court dissenting. The statute was here held invalid chiefly on the ground that Congress had delegated its legislative power to tax to the executive branch of the government.[18] The Court of Appeals rested its decision largely on the ground of the decisions in the *Schechter*[19] and *Panama Refining Co.*[20] cases, finding that the Act did not set forth

13. Sec. 3, National Industrial Recovery Act, 48 STAT. 195 (1933), 15 U. S. C. A. § 701 *et seq.*
14. 295 U. S. 495 (1935), cited note 12, *supra.*
15. 293 U. S. 389 (1935), cited note 10, *supra.*
16. 48 STAT. 31, 7 U. S. C. A. § 601 *et seq.* (1933).
17. Franklin Process Co. v. Hoosac Mills Corp., 8 F. Supp. 552 (D. C. Mass., 1934).
18. Butler v. United States, 78 F. (2d) 1 (C. C. A. 1st, 1935).
19. 295 U. S. 495 (1935), cited note 12, *supra.*
20. 293 U. S. 389 (1935), cited note 12, *supra.*

a sufficient standard to guide the action of the Secretary of Agriculture. Decisions in the District Courts have been split on this question of constitutionality.[21]

On August 24th, 1935, Congress attempted to meet the objection which had been made that the AAA involved an unconstitutional delegation of legislative power by amending the Agricultural Adjustment Act. By this amendment, Congress expressly ratified the processing tax rates which the Secretary of Agriculture had established in the past. Secondly, the Congress provided that the rates in force at the time of the amendment (August 24, 1935) should stand as the levy for future processing taxes.[22] Judge Merrill E. Otis, sitting in the Western District of Missouri, ruled that the amendment was valid as to future rates, but void as to past assessments, saying that the amendment did not legalize taxing rates which in the first instance could not have been constitutional for the reason that Congress could not authorize the Secretary of Agriculture to fix them.[23]

The Government in its brief in the *Hoosac Mills* case[24] discusses fully the question of alleged unconstitutional delegation of legislative power. It is alleged that the Act does not delegate the taxing power because Congress has provided a definite and ascertainable method for fixing the rates: the difference between the current average farm price and the fair exchange value of the commodity which may be accurately determined from the available statistics in the Department of Agriculture. It is further contended that the Act is limited in scope to the named commodities, and that there is a definite standard fixed in the declared policy of Congress. The Government concludes on this point of delegation that any discussion as to its invalidity is immaterial because Congress (by the Amendment of August 24, 1935) has expressly ratified the assessment and collection of these taxes. By this ratification, Congress has exercised its own discretion as to the fixing of rates.

The processor in the *Hoosac Mills* case[25] contends that "even if Congress had the power to levy the taxes in question, that the power was a power in trust, the exercise of which could not be delegated," and that the scope of the authority given to the Secretary of Agriculture is so broad as to amount to an unconstitutional delegation of the taxing power. Further, the brief of the Hoosac Mills Corporation urges that the Amendment of August 24, 1935, was ineffective to validate the prior exactions of the Secretary of Agriculture because "Congress, being without power to appoint him an agent to levy a tax, was without power to ratify the exaction which, without proper authority, he had attempted to make."

It would be inappropriate to prophesy what the action of the Court will be on the constitutionality of the AAA, but it might be pointed out that from the standpoint of delegation of legislative power there are two reasonable possibilities. The Court may lean heavily on the decisions in the *Schechter*[26] and *Panama Refining Co.*[27] cases, as did the Circuit Court of Appeals, and hold the Act unconstitutional. The delegation to the Secretary of Agriculture does not seem to be as extensive as that given to the President under the power passed on to him in approving and supervising the codes. Also, it should be noted that in the AAA only the single industry,

---

21. Representative cases: La Croix v. United States, 11 F. Supp. 817 (D. C. Tenn., 1935) (constitutional); Vogt & Sons, Inc. v. Rothensies, 11 F. Supp. 225 (D. C. Pa., 1935) (unconstitutional).

22. 48 STAT. 35, 7 U. S. C. A. § 609 (1935).

23. Washburn Crosby Co. v. Nee, ------F. Supp.------ (W. D. Mo., 1925), 2 U. S. LAW WEEK 1090, 3 *ibid.* 65 (now pending before the Supreme Court).

24. 3 U. S. LAW WEEK 211 (Nov. 26, 1935).

25. *Ibid.* at 227 (Dec. 3, 1935).

26. 295 U. S. 495 (1935), cited note 12, *supra.*

27. 293 U. S. 389 (1935), cited note 10, *supra.*

Missouri Law Review, Vol. 1, Iss. 1 [1936], Art. 11

agriculture, is dealt with and even there only certain named commodities are affected. By way of contrast, the NRA dealt with all industries and the development of codes of fair competition.

A second possibility would be for the Supreme Court to hold the Act to be a valid exercise of the power of Congress to make use of administrative officers to carry out its will. In the flexible tariff case[28] the Court upheld the provisions of the protective tariff which were aimed to secure flexibility and make effective the Act which was designed to protect domestic industries. In the AAA we have a similar provision which is aimed at the protection and restoration of domestic agriculture. It should be noted that in each of these statutes the guide set up by Congress for checking the administrative officer is equally indefinite. Under the provisions of the flexible tariff act the President was to act whenever he should find that the present tariff rates in force were not such as to equalize the cost of production at home and abroad, while in the AAA it is provided that the Secretary of Agriculture is to determine the tax rate so as to equalize the difference between the current average farm prices for the commodities in question and the fair exchange value of those commodities. Under this latter analysis, which seems to be a better analogy than the NRA cases, the Agricultural Adjustment Act probably should be upheld, so far as the question of delegation is concerned.[28a]

There are many other cases growing out of present day legislation in which the question of alleged unconstitutional delegation by Congress of its legislative power has been raised,[29] but the limitations of space will not allow further discussion. Suffice it to say that since the beginning of the year 1935 the problem of delegation of legislative authority has come to have a new significance.

HOWARD B. LANG, JR.

PLEADING AND PRACTICE—PLEADING AND SUBMITTING PERSONAL INJURY CASE IN MISSOURI COURTS ON THE DOUBLE THEORY OF ORDINARY NEGLIGENCE AND THE HUMANITARIAN DOCTRINE—The recent Missouri Supreme Court decision in *Williams v. St. Louis Public Service Company*[1] calls attention again to the problem of pleading in a single case facts tending to support a recovery under the theory of primary negligence, and under the theory of the humanitarian doctrine. The problem necessarily presents itself in a double aspect: (1) the form and sufficiency of the pleadings, and (2) the manner of submitting the case to the jury.

---

28. J. W. Hampton Jr., & Co. v. United States, 276 U. S. 394 (1938), cited note 7, *supra.*

28a. The AAA was held unconstitutional on other grounds, in United States v. Butler, Receivers of Hoosac Mills Corp., 56 S. Ct. 312 (Jan. 6, 1936).

29. United States v. Certain Lands in Louisville, Ky., 78 F. (2d) 684 (C. C. A. 6th, 1935) (slum clearance case); Duke Power Co. v. Greenwood County, 10 F. Supp. 854 (D. C. S. C. 1935) (delegation to Public Works Administrator); R. C. Tway Coal Co. v. Glenn, ------F. Supp. ------ (D. C. Ky. 1935), 3 U. S. LAW WEEK 193, 219, 225, 321 (delegation in Guffey coal bill upheld).

1. 73 S. W. (2d) 199 (1934).

There seems to be no question but that it is sound pleading to include in a single count allegations of specific acts of negligence of the type generally known as "primary", "common law", or "ordinary" negligence, such as excessive speed, careless driving, failure to sound the horn or whistle, etc., and also allegations setting forth a right of action under the humanitarian doctrine. A favorite practice of lawyers is to allege that the collision, etc., resulting in the plaintiff's injuries, was caused by the negligence of the defendant, the negligence consisting of various negligent acts which are then set out, and some of these negligent acts may be acts of primary negligence, and some may show a violation of the humanitarian rule.

Clark v. St. Joseph Terminal Railroad Co.[2] was a suit to recover for injuries, alleged to have been received through the negligent acts of the defendant. Some of the acts set out were acts of primary negligence, but the last allegation was that the defendant negligently failed to stop the train after the plaintiff was in a perilous position. The court considered the petition as being in one count. Graves, J. delivered the opinion, saying, ". . . after all, it is negligence and negligent acts with which we are dealing. A number of negligent acts may go toward producing the same injury. . .Several acts of negligence of the same general nature, all of which may be true, and either of which or all may have caused the accident or injury may be placed in one count of a petition. . . If so, then we can see no reason why the act of negligence which brings the case within the so-called humanitarian rule, may not be alleged with other acts of negligence in the one count of the petition."

It is probably true that when the humanitarian rule is mentioned, the first thought is that it is invoked as a means of avoiding the effect of the plaintiff's own negligence. Perhaps this is a result of confusing the rule with the last clear chance doctrine, where it does seem to be true that the plaintiff must first have been negligent.[3] However, as a matter of substantive law, the humanitarian rule, as we know it in Missouri, is not restricted to cases where the plaintiff has been negligent himself, and the introduction of the doctrine into the pleadings does not necessarily mean that the issue of contributory negligence has been removed from the case.

The crux of the matter in a humanitarian case is that the plaintiff was in peril, and the defendant knew of this in time to have avoided the injury, but negligently failed to do so. Logically, then, what caused the plaintiff to be in peril should make no difference, and this is the view the Missouri Supreme Court has taken. In *Banks v. Morris & Co.*,[4] the defendant had challenged the sufficiency of the petition, and Ragland, J. undertook to set out the constitutive facts of a cause of action under the humanitarian rule, saying they were contained in this formula: "(1) Plaintiff was in a position of peril. (2) Defendant had notice thereof (if it was the duty of the defendant to have been on the lookout, constructive notice sufficed). (3) Defendant, after receiving such notice, had the ability, with the means at hand, to have averted the impending injury without injury to himself or others. (4) He failed to exercise ordinary care to avert such impending injury, and (5) By reason thereof, plaintiff was injured." As can be seen, nothing was said to indicate that the plaintiff must have reached his position of peril through his own negligence.

In *Shipley v. Metropolitan St. Ry. Co.*,[5] the court instructed first, that the peril of the deceased was created by the sole negligence of the defendant without the aid of contributory negligence, and second, that the death was caused by the negligence of

2. 242 Mo. 570, 148 S. W. 472 (1912).
3. Smith v. Heibel, 157 Mo. App. 177, 137 S. W. 70 (1911).
4. 302 Mo. 254, 257 S. W. 482 (1923).
5. 144 Mo. App. 7, 128 S. W. 768 (1910).

the defendant under the humanitarian rule. The defendant argued that these hypotheses were so inconsistent that they could not be considered in the same case. Johnson, J. answered by saying that ". . . the misunderstanding of this question probably has been caused by the erroneous idea that in a cause of action based on the humanitarian doctrine, necessarily the court must start with the presumption that the peril was created either by the sole negligence of the injured person, or, at least, in part by his contributory negligence. The humanitarian doctrine does not take into account the question of how the peril was created, . . . but takes the imperiled man where it finds him, regardless of whose fault placed him there. . . ." To the same effect are *Smith v. Heibel*,[6] *Sandry v. Hines*,[7] and *Freeman v. Berberich*.[8]

The doctrine of these cases seems perfectly sound. It is not difficult to conceive of situations where the requirement that the plaintiff, to avail himself of the humanitarian rule, must first have been guilty of negligence himself, would either leave a plaintiff without redress or require him to allege untruths. The plaintiff might be in a perilous situation through no fault of his own, and it might be, at the same time, that the only negligence which could be charged against the defendant is that after he saw the plaintiff in danger, he negligently failed to stop or avoid the accident, even though he had time and the means to do so. Such a situation is found in at least one Missouri case. *O'Keefe v. United Rys. Co. of St. Louis*[9] is a case where the plaintiff, a postman, while walking on the street, was stricken with disease, instantly became unconscious and fell across the defendant's street car track, where he lay helpless, and shortly thereafter was run upon by the defendant's car. He sued on the theory that the defendant failed to exercise ordinary care to discover his presence on the track and stop the car so as to avert the injury, when, by exercise of due care on its part, it had ample time and means to do so. The plaintiff prevailed below and the appellate court affirmed the judgment. No question was raised on the application of the humanitarian doctrine to the case.

So far this discussion has dealt with petitions which contain allegations of specific acts of negligence in one count, some of them being acts of primary negligence and some violations of the humanitarian rule, but it appears that what has been said of these petitions would apply equally well to a petition which contains allegations of general negligence and allegations of a violation of the humanitarian rule in one count. Certainly it would after a certain stage in the action has been reached.

The rule in Missouri is that a general charge of negligence in a petition or answer is sufficient unless such pleading is properly assailed before verdict for want of definiteness.[10] So if specific allegations of primary negligent acts and allegations setting forth a violation of the humanitarian rule, all in one count, are proper, it would seem to follow that allegations of general negligence, unchallenged before verdict, and allegations of the violation of the humanitarian rule, all in one count, would be proper, also.

Now, from the standpoint of pleading, what group of facts "constitutes a cause of action" is determined pragmatically, with simplicity of issues and convenience of trial balanced against a definitely observable policy to dispose of the largest pos-

6. *Supra* note 3.
7. 226 S. W. 646 (Mo. App. 1920).
8. 332 Mo. 381, 60 S.W. (2d) 393 (1933).
9. 124 Mo. App. 613, 101 S. W. 1144 (1907).
10. State ex rel. Hopkins v. Daues, 319 Mo. 1137, 6 S. W. (2d) 893 (1928); Kincaid v. Birt, 29 S. W. (2d) 97 (Mo. 1930); State ex rel. Schroeder & Tremayne Inc. v. Haid 328 Mo. 307, 41 S. W. (2d) 789 (1930); Murphy v. Fidelity Nat. Bank & Trust Co., 226 Mo.App. 1181, 49 S.W. (2d) 668 (1932); Zilcher v. St. Louis Public Service Co., 332 Mo. 631, 59 S. W. (2d) 654 (1933); Taylor v. Cleveland, C. C. & St. L. Ry. Co., 333 Mo. 650, 63 S. W. (2d) 69 (1933).

sible number of related issues at once. So when the plaintiff sets out several acts, or pleads so that several acts may be shown in evidence if his pleading goes unchallenged, the courts search for some unifying element among these facts or acts, so that it would be economical for all concerned to try the whole matter at one time. If the court finds this common thread running through the whole pattern of the plaintiff's case, the court will make the existence of this common thread the test of what the single cause of action is, and say that any fact attaching to it is included within the cause of action.

When a plaintiff is injured in an automobile or train collision, which is the typical case, there may be several negligent acts which caused it, such as excessive speed, failure to have lights burning, failure to sound a horn or whistle, or failure to avoid the injury after the defendant saw the plaintiff's peril, when the defendant could have avoided it, had he acted reasonably. Very likely the plaintiff is not sure which act was the cause, or he feels that they all contributed, so that he wants to allege them all. What common thread is there running through all these acts, so that the court can say they constitute but one cause of action, and so can properly be pleaded in a single count?

After all, it seems that the plaintiff has had but one primary right invaded. He is complaining of a violation of his right to be free from negligent touchings, and this is the common thread running through the whole pattern. On the other side, the facts touching the separate grounds of negligence probably will not be so unrelated that the inconvenience of trying them together would outweigh the convenience and saving of time and effort which a single inquiry centering around a single injury affords. Very likely the whole affair occurred in one short space of time, and the same witnesses saw all the different acts. The common sense conclusion is that the plaintiff should state all this together, and whether he proves his acts of primary negligence under specific allegations setting them out, or whether he proves then under an allegation of general negligence, which goes unchallenged, should make no difference. The plaintiff has a single cause of action, and when he alleges the facts supporting the two theories of negligence at once, he is not commingling two "causes of action", but rather, if he put them in separate counts, he would be, in one sense, splitting his cause of action, and also unnecessarily encumbering the record and complicating the trial.

Throughout this note, when a petition is described as containing, in one count, allegations of general negligence and allegations of the humanitarian doctrine, the writer means, for example, one where the plaintiff alleges that the defendant, through negligent operation of the instrumentality, struck and injured the plaintiff, and that although the defendant knew of the plaintiff's peril in time, with the means at hand to have avoided the injury with safety to the defendant and others, he negligently failed to do so. It does not seem that there is any reasonable chance that a defendant would be misled by such a petition into thinking that the allegation concerning the humanitarian doctrine was meant to limit the allegation of negligent operation, so that the defendant would be unfairly surprised when the plaintiff brought in evidence of primary negligence.

Some other matters must be briefly considered from the standpoint of the notice function of the pleadings. In a negligence case, we have, of course, no question of notice to the defendant as to the legal consequences attached by the plaintiff to the facts alleged. Nor would there be a different rule of damages, depending upon whether the plaintiff recovers for primary or humanitarian negligence. So the defendant cannot successfully argue that a petition containing facts supporting both theories would mislead him in either of these respects.

The pleading questions being answered, it remains to consider the manner of submitting the case to the jury.

Where the plaintiff has alleged and sought to prove one or several acts of primary negligence and also acts entitling him to recover under the humanitarian rule, the action of the trial court, in submitting these separate theories of negligence to the jury in separate instructions, and allowing them to predicate a recovery upon either or both, has frequently and strenuously been assailed. But the Missouri courts have realized that there is no element in the humanitarian rule which necessarily means that it must be inconsistent with the existence of a theory of primary negligence in the same case, so that the two cannot be submitted to the jury at once. The courts have looked to the facts upon which the instructions are based, and, if it is possible for both sets of facts to exist at once, they have held the plaintiff entitled to have the jury instructed on both theories. For a case where the plaintiff was so entitled, see *Taylor v. Metropolitan St. Ry. Co.*[11]; where not, see *Elliott v. Richardson.*[12]

As earlier intimated, it is questionable whether the rule which the Missouri courts have applied, namely, that the facts on which the plaintiff's instructions, covering the two theories, are based must be consistent, has a proper application in negligence cases of the type discussed. Assume there has been an automobile accident and the plaintiff is injured. He may well be ignorant of how it happened. The plaintiff may call a witness who testifies to a state of facts tending to show the plaintiff was in the exercise of due care and that the other party was travelling at an excessive speed, with his car out of control. Then, in perfect good faith, the plaintiff may call a witness who testifies to a state of facts tending to show that the plaintiff was negligent, but that the defendant failed to stop or turn his car in time to avoid the accident, although he could have done so with safety to himself and others.

Now the plaintiff may not know which one of these witnesses to believe, yet one is essential to his recovery. He should not be forced to make a choice. It is the peculiar province of the jury to decide which witness is to be believed and the plaintiff should be allowed to present both versions to them for their consideration.[13]

JOPLIN, MO. ROBERT E. SEILER, LL. B., '35.

---

11. 256 Mo. 191, 165 S. W. 327 (1914); also Shipley v. Metropolitan St. Ry. Co., 144 Mo. App. 7, 128 S. W. 768 (1910); Wilder v. Wabash Railroad Co., 164 Mo. App. 114, 146 S. W. 837 (1912); Taylor v. Metropolitan St. Ry. Co., 256 Mo. 191, 165 S. W. 327 (1914); Bay v. Missouri Southern R. Co., 183 S. W. 344 (Mo. App. 1916); Montague v. Missouri & K. I. Ry. Co., 305 Mo. 269, 264 S. W. 813 (1924); Beal v. Chicago, B. & Q. R. Co., 285 S. W. 482 (Mo. 1926).

12. 28 S. W. (2d) 408 (Mo. App. 1930).

13. Judged by the principles discussed herein, the court's decision in Williams v. St. Louis Public Service Company appears to be sound. The case was one under the wrongful death statute, and the petition counted on two grounds of negligence, one being primary negligence and the other a violation of the humanitarian rule. Defendant did not contend that it was error to submit the case to the jury under both theories if the evidence was sufficient, but insisted that the facts made the two theories inconsistent in this particular case. The court expressly stated that a charge of negligence under the humanitarian rule and a charge of negligent speed are not necessarily inconsistent, and, upon examination of the evidence, concluded they were not inconsistent in this case.

It does not appear whether the court considered the petition as being in one count or two, and defendant did not raise any question as to the form of the pleading.