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Article 8

Notes and Comment

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vency or bankruptcy laws, and therefor is not suspended by the Federal Bankruptcy Act. 2. Where the voluntary assignment laws contain a release of the debtor from his personal liability on those debts, after one year, etc., that part is clearly within the insolvency feature and is suspended during the operation of a Federal act.

The Wisconsin Supreme Court in *In Re Tarnowski*[11] answered these questions to the same effect. In that case, the debtor, pursuant to the statute assigned all his property for the benefit of his creditors; all of them came in and received their *pro rata* share; at the end of the year the debtor, under sections 128.19 and 20 Statutes, 1925, sought to be discharged from personal liability on the debts. One of the creditors, who had received his share, objected to the discharge on the ground that the circuit court had no jurisdiction and that the section was suspended so long as the Federal Bankruptcy Act was in force.

Our court in upholding this contention said, that the laws regulating voluntary assignments do not come within the purview of the bankruptcy act, therefore, those sections are still in operation; while that part of the statutes which discharge the debtor is part of the bankruptcy act, and that though there could be a voluntary assignment for the benefit of creditors, there could be no discharge of the debtor from his debts by the circuit court judge as chapter 128 of the statutes provides.

The reasoning of the court was based on preceding Wisconsin cases[12] which held to the effect that at common law the right to a voluntary assignment existed but did not, *ipso facto,* discharge the total debt, being merely a release of the amount paid. However, the discharging of the debtor's personal liability changed the voluntary assignments aspect and had the legal effect of making that part of the assignment law a bankrupt law.

The practical effect of this decision will be: 1. The circuit court of Wisconsin will no longer find voluntary assignment cases on its calendar, because the only effect in the future, of such a proceeding would be to decide the claims of creditors, and add to the burdens of the debtor; he will no longer be able to be released from personal liability for his debts, which, after all, is the only object sought by this proceeding. 2. The composition of creditors, whereby all the cerditors come in, and consent to take an agreed *pro rata* share, for the release of the debtor's further liability, will be used more extensively. 3. The Federal bankrupcty proceedings will be more frequently used, even though they are slower and more costly.

ISIDORE E. GOLDBERG

On October 25, 1926, the Supreme Court of the United States ruled on an unusually close constitutional question,[1] the facts of the case being substantially as follows: One Meyers was appointed, by and with the consent of the Senate, to be a postmaster of the first class in Portland, Oregon, for a term of four years. The appointment was made on July 21, 1917, and on January 20, 1920, his resignation was demanded by the President. Myers refused to leave office. The Post-

[11] 210 N. W., 836, 190 Wis.

[12] *Duryea v. Muse,* 117 Wis. 339, 94 N. W. 365.
Segnitz v. Garden City, B. & T. Co., 107 Wis. 176, 83 N. W. 329.

[1] *Myers v. United States,* 71 L. ed. (adv. 27).

master-General removed him on orders from the President, and in August, 1920, the President made a recess appointment. Myers protested to the Senate Committee on Postoffices and also petitioned the Committee and the President for a hearing. On April 21, 1921, he brought this suit in the court of claims for his salary up to date, and this claim by a supplemental petition was brought up to the entire amount of the salary which would be due at the end of the term. The court of claims gave judgment for the United States on the ground that Myers did not start his action in time, but upon this appeal it was admitted by the Solicitor-General that Myers was guilty of no laches. The question on appeal then resolved itself around the constitutionality of section 6 of the Act of Congress of July 12, 1876,[2] under which Myers was appointed, and which provides: "Postmasters of the first, second, and third classes shall be appointed and may be removed by the President, by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law." The Senate did not approve or consent to the removal of Myers during his term. The Court then points out the issue to be the validity of the Act, and that if it is found valid, the plaintiff is entitled to judgment.

Chief Justice Taft delivered the opinion, and no doubt was influential in determining its trend. It is very apparent that a determined effort was made to uphold the so-called inherent power of the executive branch. The majority opinion holds that the power of appointment as provided by art. 2, sec. 2, par. 2, of the Constitution, necessarily carries with it the power of removal. The history of this theory is thoroughly developed, and much weight is given to a legislative construction of the above par. 2. On May 18, 1789, Madison introduced a bill creating three executive departments, one of Foreign Affairs, another of the Treasury, and one of War. The bill provided for a head of each department, but a discussion arose over the removal of such officers. The original bill provided that the secretaries be appointed by the President, by and with the consent of the Senate and to be removable by the President. Mr. Benson, during the discussion, took issue with the phrase "to be removable by the President," declaring that it appeared as a legislative grant of power to the President, "whereas he was well satisfied that in his own mind by a fair legislative construction of the Constitution."[3] An amendment was offered by Mr. Benson to the effect that the clause "to be removable by the President" be stricken, and it was seconded by Madison, the author of the bill. The amendment was passed, and the Court holds it to be "a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone, and until the Johnson impeachment trial in 1868, its meaning was not doubted even by those who questioned its soundness." The opinion also emphasizes that the purpose of the limitation on the appointing power of the President[4] was to assure the smaller states that too many appointments would not go to the larger states. The opinion states further that if

[2] 19 Stat. at L. 80-81, Chap. 179.

[3] p. 31-1 Annals of Congress 578.

[4] Art. 2, Sec. 2, par. 2., Constitution.

it had been intended to limit the power of removal it would have been specifically included in the Constitution, and since an express limit was not provided, "it is apparent that none was intended."

The political aspect of the situation also presents itself in the opinion. The Court in considering the clause in art. 2, sec. 2, par. 3, to the effect that "he (President) shall take care that the laws be faithfully executed," comes to the conclusion that any limitation of the power of removal would hinder the effective administration of the office of President. The Court then goes on to show that the duties of officers appointed by the President by force of statutes come under the administrative control of the President by virtue of the grant of executive power by art. 2, sec. 1, of the Constitution, and if he cannot effectively supervise these duties by reason of his power of removal, then he is substantially hampered in the faithful execution of the laws.

A formidable barrier presented itself to the Court in way of the famous case of *Marbury v. Madison.*[5] In that case, Chief Justice Marshall held as to Marbury's right to the office of Justice of the Peace, that "as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights which are protected by the laws of this country." The Court declares this to be obiter dictum, because the question of the President's power to remove was not in issue, and the Court cites *Parsons v. United States*[6] which holds that the above language of *Marbury v. Madison* did not apply to a United States district attorney appointed pursuant a statute giving no express power to remove, and who was summarily dismissed and removed by the President. It is also suggested that the language of *Marbury v. Madison* is applicable only to officers in the District of Columbia, and that Chief Justice Marshall changed his mind in his later writings and agreed with the legislative decision of 1789.

The Court was compelled to consider the contention that the case concerns the removal of an inferior officer. The grounds of the contention were that the legislative decision of 1789 did not include inferior officers, and that was the distinction Chief Justice Marshall had in mind in *Marbury v. Madison.* The opinion holds that this distinction is not apparent in *Marbury v. Madison,* and that by force of the *Parsons Case* above, it was established that the legislative decision of 1789 did apply to inferior officers. Nevertheless there is an excepting clause in art. 2, sec. 2, par. 2, which is as follows: "but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." In the case of *Perkins v. United States,*[7] the court held that a cadet appointed by the Secretary of the Navy may be removed by the Secretary in conformance with the statute placing the power of appointment in the head of the department. The opinion holds that the above case has no bearing on the issue, because Congress having placed the power of appointment into the hands of the President, cannot designate as to how such officer shall be removed. The

[5] 1 Cranch 137.
[6] 167 U. S. 324.
[7] 116 U. S. 483.

power of removal of officers is inherent to the general grant of executive power, and when the power to appoint inferior officers is once given to the President, the duties of such officers come within his constitutional responsibility to see that the laws are fully executed,[8] and any interference with such inherent power is invalid.

In further support of its opinion, the Court refers to the Tenure of Office Act of March 2, 1867,[9] which provided that certain executive officers be removed by the consent of the Senate, and the subsequent failure of the impeachment of President Johnson for refusing to comply with the law, and the subsequent repeal of the law in 1887. In summing up, the Court shows the importance of the legislative decision of 1789, and the advisability for following it. In conclusion it holds the Act of 1876, by which the unrestricted power of removal of first class postmasters is denied to the President, unconstitutional.

The dissenting opinions of Justices Holmes, McReynolds, and Brandeis are extremely effective to show that the question is necessarily a very close one. The short opinion of Justice Holmes agrees completely with the opinions of Justices McReynolds and Brandeis. Some of the highlights of the opinion of Justice McReynolds are: 1. "That this is a government of limited powers definitely enumerated and granted by a written Constitution"; 2. "That the Constitution contains no words which specifically grant to the President power to remove duly appointed officers"; 3. That *Marbury v. Madison* is controlling; 4. "that the power of Congress to restrict removals by the President was recognized by this Court as late as 1903 in *Shurtleff v. United States*";[10] 5. That the Constitution by vesting the executive power in the President did not give him an absolute power over the removal of inferior officers.

The opinion states: "We have no such thing as three totally distinct and independent departments; the others must look to the legislative for direction and support," and quoting from *Gibbons v. Ogden*.[11] "This instrument (the Constitution) contains an enumeration of powers expressly granted." It is then stated that the matter of ousting an officer is executive, but the conditions under which such ouster can be made is purely legislative. It is also emphasized that the present case deals with an inferior officer; and that the power of appointment is subject to be lodged in either of two branches of government, but that the power to remove is incidental to the power to appoint unless the law provides otherwise. "From its first session down to the last one, Congress has consistently asserted its power to prescribe conditions concerning the removal of inferior officers." The opinion further contends that since the power to appoint inferior officers flows from Congress,[12] the power to remove them cannot flow from "the President's duty to take care that the laws be faithfully executed."

Justice McReynolds deplores the holding of the majority opinion to the effect that *Marbury v. Madison* is not controlling. He shows wherein

[8] Art. 2, Sec. 2, par. 3, Constitution.

[9] 14 Stat. at L. 430, chap. 154.

[10] 189 U. S. 311.

[11] Wheat 1 at 187.

[12] Art. 2, Sec. 2, par. 2, Constitution.

Chief Justice Marshall deemed it important to find that *Marbury* had an absolute right to his office. The importance is that an absolute right had to be established in *Marbury* before there could be a controversy before the court in which the constitutionality of a Congressional act could be ascertained. Consequently this opinion holds that the finding in *Marbury v. Madison* to the effect that an inferior officer could not be removed by the President was germane to the issue of that case and as such should be controlling in this case. The opinion also stresses the holding of *Shurtleff v. United States*,[13] which in effect is that Congress may determine the conditions of removal of inferior officers when it places the appointment of such officers in the hands of the President. Considerable weight is laid to the fact that "if the framers of the Constitution had intended the executive power in art. 2, par. 1, to include all power of an executive nature, they would not have added the carefully defined grants of par. 2." This is to show that the inherent power of the executive is not all inclusive, and that by art. 2, sec. 2, par. 2, his power is specifically limited as to inferior officers, and that the President has only those powers which are conferred by the Constitution itself.[14]

The opinion of Justice Brandeis follows much along the lines of the preceding opinion going more into detail as to specific instances of Congress limiting the power of removal by legislative act. In conclusion of his opinion, Justice Brandeis states that the excepting clause of art. 2, sec. 2, par. 2, limits the executive power of removal as to inferior officers; and that all proposals to give the President uncontrollable power to remove were rejected at the Constitutional Convention of 1787; "and protection of the individual, even if he be an official from the arbitrary or capricious exercise of power was then believed to be an essential of free government."

BENJAMIN W. POSS

Constitutional Law; Police Power; Classification; Licenses. The Supreme Court, in a splendid fit of generosity, reviews as part of its decision in *State v. Levitan*[1] the Wisconsin doctrine of classification under the police power only to declare Sec. 99, 32 of the Wis. Stats. invalid for indefiniteness in the use of the word "principally" as applied to wholesale dealers who buy produce "for re-sale principally to others than consumers," etc.[2] In holding that it was proper for the legislature to distinguish between wholesalers and retailers of produce to require the former to be licensed the court reviewed that line of cases which declare that the classification may be unwise from the popular viewpoint; "it may be unscientific or illogical; . . . . it need not be all-inclusive, or extend to all cases which it might legitimately include; but it must "apply equally to each member of a class."[3]

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[13] 189 U. S. 311.

[14] p. 58. Justice McReynolds quoting from a speech of Mr. Clay upon the powers of the President.

[1] 210 N. W. 111.

[2] Stat. 1925, Sec. 99.32 (1) (Laws 1925, c. 389).

[3] *Kreutzer v. Westfahl*, 187 Wis. 463, 482, 204 N. W. 595, 603; *State v. Evans*, 130 Wis. 381, 110 N. W. 241; *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209,