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FORTESCUE'S DE LAUDIBUS: A REVIEW

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COMMENTS

ADMINISTRATIVE LAW—PRICE CONTROL ACT—RECENT AMENDMENTS—On July 1, 1944, the "Stabilization Extension Act of 1944"¹ became effective, thereby introducing several important changes in the

¹ Pub. L. 383, 78th Cong., 2d sess., approved June 30, 1944, hereinafter cited as the "Extension Act." Hearings were held before the House Committee on Banking and Currency, 78th Cong., 2d sess., Brent Spence, Ky., chairman, between April 12 and May 19, 1944, on H.R. 4376, "A Bill to Extend the period of Operation of the Emergency Price Control Act of 1942 and of the Act of October 2, 1942," hereinafter cited as "H. Hearings." Similar hearings were held before the Senate Committee on Banking and Currency, 78th Cong., 2d sess., Robert F. Wagner, N.Y., chairman, between March 15 and April 28, 1944 on S. 1764, "A Bill to Amend the Emergency Price Control Act of 1942, as amended." H.R. 4376 was superseded in the House by H.R. 4941, which was reported upon favorably by the Committee on Banking and Currency on June 3, 1944; H. Rep. No. 1593, 78th Cong., 2d sess. S. 1764 with amendments was reported upon favorably by the Senate Committee on May 30, 1944; S. Rep. No. 922, 78th Cong., 2d sess. S. 1764 passed the Senate with amendments on June 9, 1944. The House, after tabling H.R. 4941, also passed S. 1764, but with further amendments, on June 14, 1944. Conferees were appointed and the Committee of Conference reported favorably upon S. 1764 in a compromise form on June 20, 1944; H. Rep. No. 1698, 78th Cong., 2d sess. Both Houses passed the conference bill on June 21, 1944, and the President signed it on June 30, 1944. On April 24,

field of price control law.² Many of these changes have the effect of granting relief to persons subject to price control, while others are designed to aid the price administrator in his enforcement of the Price Control Act.

Time Limit

The Emergency Price Control Act of 1942³ provided for the termination of price control "on June 30, 1943, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier."⁴ By the amendatory act of October 2, 1942, the original act was extended to June 30, 1944.⁵ The Stabilization Extension Act has now extended the original act to June 30, 1945, although the authority of the President by proclamation and of the Congress by concurrent resolution to terminate the act at an earlier date continues.⁶

Prices, Rents, and Market and Renting Practices

Established Accounting Methods. Section 2(a) of the original act,⁷ which gives the price administrator the authority, consistent with certain standards of guidance, to establish maximum prices by regulation or order, has been amended by the addition of the following proviso:⁸

1944, the House Select Committee to Investigate Executive Agencies, hereinafter cited as the "Smith Committee," Howard W. Smith, Va., chairman, in its Fifth Intermediate Report, reported favorably upon H.R. 4647, "A Bill to Amend the Emergency Price Control Act of 1942, as amended;" H. Rep. No. 1366, 78th Cong., 2d sess. However, H.R. 4647 was tabled.

² The Stabilization Extension Act of 1944 amended the Emergency Price Control Act of 1942, approved January 30, 1942, 56 Stat. L. 23, 50 U.S.C.A. (1943 Supp.) App. § 901 et seq. and the Inflation Control Act of 1942, approved October 2, 1942, 56 Stat. L. 765, 50 U.S.C.A. (1943 Supp.) App. § 961 et seq., now known as the "Stabilization Act of 1942." Price and rent control were held constitutional in *Yakus v. United States*, 321 U.S. 414, 64 S. Ct. 660 (1944) and *Bowles v. Willingham*, 321 U.S. 503, 64 S. Ct. 641 (1944). For an analysis of litigation under the Emergency Price Control Act of 1942, see Sprecher, "Price Control in the Courts," 44 *Col. L. Rev.* 34 (1944).

³ Hereinafter cited as the "original act" or the "Price Control Act."

⁴ Section 1(b), 50 U.S.C.A. (1943 Supp.) App. § 901(b).

⁵ Section 7(a), 50 U.S.C.A. (1943 Supp.) App. § 967; *Yakus v. United States*, 321 U.S. 414 at 419 (1944).

⁶ Section 101 of Extension Act; H. Rep. No. 1593 on H.R. 4941, 78th Cong., 2d sess., p. 2. By § 203 of the Extension Act, § 6 of the Stabilization Act of 1942 has also been amended to extend that act to June 30, 1945.

⁷ 50 U.S.C.A. (1943 Supp.) App. § 902(a).

⁸ Section 102 of Extension Act.

“Provided, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods.”

Industry Advisory Committees. Section 2(a) of the original act, provided that the administrator “so far as practicable, advise and consult with representative members of the industry which will be affected” by a proposed regulation or order, and that, in cases where an industry advisory committee had been appointed by the administrator, the committee “may make such recommendations to the Administrator as it deems advisable.”⁹ The extension act provides that the administrator “shall give consideration” to the recommendations of representative members of the affected industry and to the recommendations of industry advisory committees.¹⁰

Termination of Rent Control Under Certain Circumstances. Section 2(b) of the original act¹¹ has been amended to provide that the administrator shall abolish rent controls whenever he finds in any defense-rental area or in any portion thereof that “the availability of adequate rental housing accommodations and other relevant factors are such as to make rent control unnecessary for the purpose of eliminating speculative, unwarranted, and abnormal increases in rents and of preventing profiteering, and speculative and other disruptive practices resulting from abnormal market conditions caused by congestion.”¹² But whenever, in the judgment of the administrator, it is necessary or proper to re-establish rent control in any defense-rental area or portion thereof, he may do so in accordance with the standards set forth in the original act.

Individual Rent Adjustments In Hardship Cases. Section 2(c) of the original act stated that the administrator “may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act.”¹³ The extension act adds the following:

“Under regulations to be prescribed by the Administrator, he shall provide for the making of individual adjustments in those classes of cases where the rent on the maximum rent date for any housing accommodations is, due to peculiar circumstances, substantially higher or lower than the rents generally prevailing in the defense-rental area for comparable housing accommodations, and in those classes of cases where substantial hardship has re-

⁹ 50 U.S.C.A. (1943 Supp.) App. § 902(a).

¹⁰ Section 102 of Extension Act.

¹¹ 50 U.S.C.A. (1943 Supp.) App. § 902(b).

¹² Section 102 of Extension Act.

¹³ 50 U.S.C.A. (1943 Supp.) App. § 902(c). (Italics supplied.)

sulted since the maximum rent date from a substantial and unavoidable increase in property taxes or operating costs."¹⁴

The administrator had previously provided in his various rent regulations for individual adjustments of maximum rents in certain enumerated classes of cases.¹⁵ The amendment requires him to add to those classes of cases, the following classes: (1) Where the rent on the "maximum rent date"¹⁶ is *substantially* lower than rents generally prevailing in the defense-rental area for comparable housing accommodations;¹⁷ (2) where *substantial* hardship has resulted since the maximum rent date from a *substantial* and unavoidable increase in property taxes; and (3) where *substantial* hardship has resulted from a *substantial* increase in operating costs. The Emergency Court of Appeals, created by the original act, had held that, under the language of the original act, none of the three classes of cases mentioned above was entitled to relief.¹⁸ However, liberal use of the word "substantial" in the extension act precludes any wholesale granting of relief to landlords under the amended act.

Subsidy Payments. Section 2(e) of the original act gave the administrator the power to buy and sell domestic and imported commodities and to make subsidy payments to domestic producers.¹⁹ However,

¹⁴ Section 102 of Extension Act. (Italics supplied.) See also H. Hearings, pp. 2160-2163.

¹⁵ See § 5, Standard Maximum Rent Regulation, C.C.H. WAR LAW SERVICE, PRICES, ¶ 49, 128.

¹⁶ The "maximum rent date" method of rent stabilization, used by the administrator and approved by the Emergency Court of Appeals [Northwood Apartments v. Brown, (Emer. Ct. App. 1943) 137 F. (2d) 809; Spaeth v. Brown, (Emer. Ct. App. 1943) 137 F. (2d) 669; Hillcrest Terrace Corp. v. Brown, (Emer. Ct. App. 1943) 137 F. (2d) 663; Taylor v. Brown, (Emer. Ct. App. 1943) 137 F. (2d) 654; Lakemore Co. v. Brown, (Emer. Ct. App. 1943), 137 F. (2d) 355; Chatlos v. Brown, (Emer. Ct. App. 1943) 136 F. (2d) 490], is thus approved in principle by Congress.

¹⁷ The administrator had previously provided in rent regulations that he could "on his own initiative or on application of the tenant" order a *decrease* of the maximum rent in cases where it was *higher* than the rent generally prevailing in the defense-rental area for comparable accommodations. See § 5(c)(1), Standard Maximum Rent Regulation, C.C.H. WAR LAW SERVICE, PRICES, ¶ 49, 128. This provision was thus expressly approved by Congress. For probable effect of provision requiring increase where rent is lower than comparable rents, see H. Hearings, p. 115.

¹⁸ Class (1): Madison Park Corporation v. Bowles, (Emer. Ct. App. 1943) 140 F. (2d) 316; Machen v. Bowles, (Emer. Ct. App. 1943) 139 F. (2d) 359.

Class (2): Avant v. Bowles, (Emer. Ct. App. 1943) 139 F. (2d) 702; Lakemore Co. v. Brown, (Emer. Ct. App. 1943) 137 F. (2d) 355.

Class (3): Avant v. Bowles, (Emer. Ct. App. 1943) 139 F. (2d) 702; Spaeth v. Brown, (Emer. Ct. App. 1943) 137 F. (2d) 669; Chatlos v. Brown, (Emer. Ct. App. 1943, 136 F. (2d) 490.

¹⁹ 50 U.S.C.A. (1943 Supp.) App. § 902(e).

the operation of this provision was dependent upon the willingness of Congress to appropriate sufficient funds to enable the administrator to buy commodities or make subsidy payments.²⁰ The extension act has made such dependence express and continuing by adding the following provision:²¹

“After June 30, 1945, neither the Price Administrator nor the Reconstruction Finance Corporation nor any other Government corporation shall make any subsidy payments, or buy any commodities for the purpose of selling them at a loss and thereby subsidizing directly or indirectly the sale of commodities, unless the money required for such subsidies, or sale at a loss, has been appropriated by Congress for such purpose; and appropriations for such purpose are hereby authorized to be made.”

Section 2(e) of the original act also provided that any commodity defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act could be bought and sold, and subsidy payments could be paid, only by corporations created pursuant to section 5d, after a determination by the federal loan administrator, with the approval of the President, that the maximum necessary production is not being obtained or may not be obtained during the ensuing year.²² The extension act adds a proviso to the effect that no agricultural commodity or commodity manufactured or processed in whole or in substantial part from any agricultural commodity intended to be used as food for human consumption shall be defined as a strategic or critical material, unless it has been so defined prior to the effective date of the amendatory proviso.²³

Business Practices. Section 2(h) of the original price control act provided that the powers granted to the administrator “shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion” of a regulation or order.²⁴ This prohibition against the administrator has been

²⁰ Ginsburg, “The Emergency Price Control Act of 1942: Basic Authority and Sanctions,” 9 L. AND CONTEMP. PROB. 22 at 45 (1942). The appropriation act for the operation of the Office of Price Administration for the fiscal year ending June 30, 1943, expressly provided “that no part of this appropriation shall be available for making any subsidy payments.” First Supplemental National Defense Appropriation Act, 1943, approved July 25, 1942, Pub. L. 678, 77th Cong., 2d sess., 56 Stat. L. 704 at 712. Beginning in June 1943, however, the Office of Price Administration began to make subsidy payments. H. Hearings, p. 1807.

²¹ Section 102 of Extension Act.

²² 50 U.S.C.A. (1943 Supp.) App. § 902(e).

²³ Section 102 of Extension Act.

²⁴ 50 U.S.C.A. (1943 Supp.) App. § 902(h).

strengthened somewhat by the amendment of the exception to provide "except where such action is affirmatively found by the Administrator to be necessary to prevent circumvention or evasion" of a regulation or order.²⁵ Furthermore, to the catalog of changes prohibited has been added "changes in established rental practices."²⁶

Fishery Commodities. The extension act provides that "no maximum price shall be established for any fishery commodity below the average price of such commodity in the year 1942,"²⁷ whereas the original act used the year "1941."²⁸

Highest Price Line. In order that consumers could continue to purchase clothing at customary price levels, the administrator provided in several clothing price regulations a "highest price line limitation" or an "over-all ceiling rule,"²⁹ which prevented sellers from selling garments at a price higher than the highest price at which similar garments were sold during the base period determined by the regulation.³⁰ Thus vendors of clothing were unable to sell higher grades of clothing than they sold during the base period. Such a regulation resulted in unfairness to long-established businesses and in enrichment for newcomers who were not under any such restrictions and could therefore offer higher priced goods.³¹ The extension act prohibits the administrator from requiring any retail seller "to limit his sales with reference to any highest price line offered for sale by him at any prior time."³² The administrator may still require manufacturers and wholesalers to limit their sales to a previous highest price line, however.

²⁵ Section 102 of Extension Act. A similar provision was recommended by the Smith Committee. H. Rep. No. 1366, 78th Cong., 2d sess., pp. 7-8.

²⁶ Section 102 of Extension Act.

²⁷ *Ibid.*

²⁸ Section 2(i), 50 U.S.C.A. (1943 Supp.) App. § 902 (i). Actually, the Office of Price Administration "aimed at the average of 1942" even under the prior provision. H. Hearings, p. 1923.

²⁹ See M.P.R. 330, Women's and Children's Outerwear Garments, § 1389.553, C.C.H. WAR LAW SERVICE, PRICES, ¶ 43,530.

³⁰ M.P.R. 177, Men's and Boy's Tailored Clothing, § 1389.103(c), C.C.H. WAR LAW SERVICE, PRICES, ¶ 43,377; M.P.R. 178, Women's Fur Garments, § 1389.152(a) (2), C.C.H. WAR LAW SERVICE, PRICES, ¶ 43,378; M.P.R. 287, Women's, Girls', Children's and Toddlers' Outerwear Garments, § 1389.351 (15) (a), C.C.H. WAR LAW SERVICE, PRICES, ¶ 43,487; M.P.R. 438, Fall and Winter Outerwear, § 1389.603(b), C.C.H. WAR LAW SERVICE, PRICES, ¶ 43,638. See also, *Montgomery Ward & Co. v. Bowles*, (Emer. Ct. App. 1943) 138 F. (2d) 669; *Brown v. W. T. Grant Co.*, (S.D.N.Y. 1943) 53 F. Supp. 182.

³¹ H. Rep. No. 1366, 78th Cong., 2d sess., p. 10; H. Hearings, pp. 447-448, 459-460, 516-519, 523, 531-539, 567, 1074-1075, 1387, 2146-2148, 2191-2198, 2221, 2286-2287.

³² Section 102 of Extension Act, adding § 1(k) to the original act.

Agricultural Commodities. The extension act makes several amendments relating to agricultural commodities:

1. A new subsection is added requiring the administrator, before growers' maximum prices are established or lowered for any agricultural commodity which is the product of annual or seasonal planting, to give notice of the proposed maximum prices not less than fifteen days prior to the normal planting season in each major producing area affected.³³

2. A new subsection is added prohibiting any governmental agency or officer, in the payment of sums relating to the production or sale of, or in contracts for the purchase of, or in fixing quotas for the production or sale of, agricultural commodities under the Price Control Act or any other act of Congress, from imposing any conditions or penalties not authorized by the provisions of the act which authorize the particular activity being engaged in. Any person aggrieved by any action taken contrary to this provision may petition the district court of the district in which he resides or has his place of business for an order or declaratory judgment as to the lawfulness of the action, and such court may grant appropriate relief in the event such action is found to contravene this provision.³⁴

3. Section 3(e) of the original act has been amended to make it clear that the administrator is not required to obtain the approval of the secretary of agriculture before instituting any kind of enforcement action under section 205 of the act.³⁵

4. A new subsection is added requiring the administrator to adjust

³³ Section 102 of Extension Act, adding § 1(1) to the original act. The notice required need not be given, however, more than twelve months prior to the beginning of the normal marketing season in each area. Publication of the notice in the FEDERAL REGISTER is satisfactory, but the administrator is directed to utilize appropriate means to insure general publicity in the areas affected. The subsection does not apply to the 1944 crop of any agricultural commodity, the normal planting season of which occurs prior to July 31, 1944.

³⁴ Section 102 of Extension Act, adding § 1(m) to the original act. The provisions of the Judicial Code as to the monetary amount involved necessary to give jurisdiction to a district court shall not be applicable in such a case. See, in connection with the new provision, H. Hearings, p. 1471 et seq.

³⁵ Section 103(a) of Extension Act. Prior to the amendment, the section provided that the approval of the secretary of agriculture was not necessary prior to the institution of an action under § 205 (a) (injunction proceedings) and § 205 (b) (criminal proceedings). The amendment makes it clear that no approval is necessary prior to treble damage proceedings or license revocation proceedings, as well as the other types of enforcement actions. The amendment was suggested by the administrator. H. Hearings, pp. 2428-2429. In *Bowles v. Strickland*, (M.D. Go. 1944) 55 F. Supp. 132, the district court had dismissed a treble damage suit brought by the administrator on the ground that prior approval had not been obtained from the secretary of agriculture.

the maximum prices of fresh fruits and vegetables from time to time in order to make "appropriate allowances for substantial reductions in merchantable crop yields, unusual increases in costs of production, and other factors which result from hazards occurring in connection with the production and marketing of such commodity."³⁶

5. The Stabilization Act of 1942 provided that maximum prices for agricultural commodities and for commodities processed or manufactured in whole or in substantial part from agricultural commodities should not be established below a price which would reflect to producers of agricultural commodities the higher of (1) an adjusted parity price or (2) the highest price received by such producers for such commodity between January 1 and September 15, 1942.³⁷ The extension act reaffirms these standards but requires that they be "applied separately to each major item in the case of products made in whole or major part from cotton or cotton yarn."³⁸

6. Section 8(a)(1) of the Stabilization Act, relating to loans upon cotton, corn, wheat, rice, tobacco, and peanuts at the rate of ninety per centum of parity price³⁹ has been amended to provide for loans upon cotton at ninety-two and one-half per centum, applicable with respect to crops harvested after December 31, 1943.⁴⁰

7. The proviso in the Stabilization Act permitting the President in his discretion to adjust the maximum prices of agricultural commodities "to correct gross inequities"⁴¹ has been made mandatory upon him.⁴²

Administration

Purchases by Administrator as Evidence of Violation. In the enforcement of his regulations and orders, the administrator had no express authority to make purchases of commodities for use as evidence of violations.⁴³ The extension act amends section 201(c) of the original act⁴⁴ to provide that the administrator's authority to make expenditures expressly includes the "purchase of commodities in order to obtain in-

³⁶ Section 103(b) of Extension Act, adding § 3(g). The original senate bill expressly included "potatoes." Elimination of the word should not affect future determination of whether "fresh vegetables" includes "potatoes." H. Rep. No. 1698, 78th Cong., 2d sess., p. 20.

³⁷ Section 3, 50 U.S.C.A. (1943 Supp.) App. § 963.

³⁸ Section 201(b) of Extension Act.

³⁹ 50 U.S.C.A. (App.) § 968 (a) (1).

⁴⁰ Section 204 of Extension Act. Loans already made upon any of the 1944 crop are authorized to be increased.

⁴¹ Section 3, 50 U.S.C.A. (1943 Supp.) App. § 963.

⁴² Section 201(a) of Extension Act.

⁴³ Similar authority is possessed by every comparable enforcement agency. H. Rep. No. 1698, 78th Cong., 2d sess., p. 20.

⁴⁴ 50 U.S.C.A. (1943 Supp.) App. § 921(c).

formation or evidence of violations of price, rent, or rationing regulations or orders or price schedules."⁴⁵

Formal, Written and Published Orders by Administrative Agencies. The extension act adds a new section 201(e) to the original act, requiring all agencies or officers of the government exercising supervisory or policy-making powers over the Office of Price Administration, War Food Administration, or War Production Board to exercise such powers "only through formal written orders or regulations which shall be promptly published in the Federal Register."⁴⁶

Investigations

Hearings. Section 202(a) of the original act, authorizing the administrator to make investigations,⁴⁷ has been amended to authorize him further to "conduct such hearings" as he deems necessary or proper to assist him in prescribing regulations or administering or enforcing the act or regulations thereunder.⁴⁸

Rights of Party Subpoenaed. In *Bowles v. Baer*,⁴⁹ the Circuit Court of Appeals for the Seventh Circuit held that witnesses subpoenaed to testify at an inquiry into possible violations of maximum price regulations were not entitled to representation by counsel of their own choosing nor entitled to be attended by a court reporter or stenographer of their own choosing. The extension act adds a new section 202(i) which provides as follows:⁵⁰

"Any person subpoenaed under this section shall have the right to make a record of his testimony and to be represented by counsel."

Procedure

Time Within Which to Challenge Validity of Regulation. In *Yakus v. United States*, the Supreme Court of the United States held that a court could not consider the validity of a maximum price regulation as a defense to a criminal prosecution for its violation.⁵¹ Considered together with the Court's earlier decision in *Lockerty v. Phillips*,⁵² the

⁴⁵ Section 104(a) of Extension Act.

⁴⁶ Section 104(b) of Extension Act. However, such orders or regulations are not otherwise subject to the Federal Register Act, and no order or regulation shall be published if it contains information relating to military security.

⁴⁷ 50 U.S.C.A. (1943 Supp.) App. § 922(a).

⁴⁸ Section 105 (a). In *Bowles v. Baer*, (C.C.A. 7th, 1944) 142 F. (2d) 787, the court held that an investigation under § 202(a) was not a hearing but was similar to a grand jury investigation.

⁴⁹ (C.C.A. 7th, 1944) 142 F. (2d) 787, rev'g., (N.D. Ill. E.D. 1943) 54 F. Supp. 887.

⁵⁰ Section 105(b) of Extension Act.

⁵¹ *Yakus v. United States*, 321 U.S. 414 (1944).

⁵² 319 U.S. 182, 63 S. Ct. 1019 (1943).

Supreme Court entirely approved the administrative and review provisions of the original act which required that all attacks upon the validity of a regulation of the administrator be brought within sixty days after the issuance of the regulation and only by means of a protest to the administrator followed by an appeal to the Emergency Court of Appeals.⁵³ In his dissent in the *Yakus* case, Mr. Justice Rutledge said:⁵⁴

“The statute thus affords the individual, to question a regulation’s validity, one route and that a very narrow one, open only briefly. The administrator and others, to enforce it, have many.”

In the extension act, Congress has sought to relieve somewhat the situation described, by opening to the individual for all time, the route formerly “open only briefly.” Section 203(a)⁵⁵ has been amended to provide that any person subject to any provision of a regulation, order or price schedule may file a protest challenging its validity “at any time” instead of “within a period of sixty days” after its issuance.⁵⁶ The right to file a protest at any time applies to regulations or orders issued prior or subsequent to the effective date of the extension act.⁵⁷

This amendment not only provides relief for protestants, but also removes the incongruities existing in the original provision. In *R. E. Schanzer, Inc. v. Bowles*, the Emergency Court of Appeals held that the somewhat ambiguous language of section 203(a)⁵⁸ required that a protest upon grounds first arising after the expiration of the sixty-day period could be brought at any time, leaving open the question of whether a protest upon grounds first arising on the fifty-ninth day after the issuance of the regulation had to be brought within one day, sixty days, or at any time.⁵⁹ Under the amended provision, a protest may be

⁵³ Sections 203 and 204 of the Emergency Price Control Act of 1942, 50 U.S.C.A. (1943 Supp.) App. §§ 923 and 924. A petition for a writ of certiorari may be filed in the Supreme Court of the United States from a judgment of the Emergency Court of Appeals. 50 U.S.C.A. (1943 Supp.) App. § 924(d). For discussion of operation of prior procedure, see H. Hearings, pp. 141-144.

⁵⁴ *Yakus v. United States*, 321 U.S. 414 at 464 (1944); H. Rep. No. 1366, 78th Cong., 2d sess., p. 23. See also H. Hearings, pp. 929, 1331-1332, 1360, 1789, 2028.

⁵⁵ 50 U.S.C.A. (1943 Supp.) App. § 923(a).

⁵⁶ Section 106 of Extension Act.

⁵⁷ H. Rep. No. 1593, 78th Cong., 2d sess., p. 5.

⁵⁸ 50 U.S.C.A. (1943 Supp.) App. § 923(a): “Within a period of sixty days after the issuance of any regulation or order . . . any person subject to any provision of such regulation, order, or price schedule may . . . file a protest. . . . At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days.”

⁵⁹ *R. E. Schanzer, Inc. v. Bowles*, (Emer. Ct. App. 1944) 141 F. (2d) 262.

filed at any time regardless of whether it is based upon the alleged original invalidity of the regulation or upon grounds arising sometime after the issuance of the regulation.

Board of Review. Section 203(c) of the original act,⁶⁰ has been amended to provide that "upon the request of the protestant" any protest filed after September 1, 1944, shall be considered by a board of review consisting of one or more officers or employees of the Office of Price Administration.⁶¹ The board may conduct hearings at any place, and upon the request of the protestant and upon a showing that material facts would be adduced thereby, subpoenas shall issue to procure the evidence of persons, or the production of documents, or both.⁶² The administrator shall cause to be presented to the board such evidence, including economic data, in the form of affidavits or otherwise, as he deems appropriate in support of the regulation under attack. The protestant shall be accorded an opportunity to present rebuttal evidence in writing and oral argument before the board, and the board shall make written recommendations to the administrator. The protestant shall be informed of the recommendations of the board and, in the event that the administrator rejects such recommendations, shall be informed of the reasons for such rejection.

Time Within Which Administrator Must Act Upon Protests. Section 203(a) of the original act provided that the administrator should either grant or deny a protest, notice it for hearing, or provide an opportunity to present further evidence in connection therewith, within a reasonable time after its filing, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order, whichever occurred later.⁶³ In *Safeway Stores, Inc. v. Brown*, the Emergency Court of Appeals held that the failure of the administrator to take affirmative final action within thirty days after the filing of, or within ninety days after the issuance of, a regulation did not amount to such a "denial" of the protest as to afford the protestant the right to file a complaint in the Emergency Court.⁶⁴

The extension act has provided two amendments designed to shorten the time within which the administrator must finally act upon a

⁶⁰ 50 U.S.C.A. (1943 Supp.) § 923(c).

⁶¹ Section 106 of Extension Act. See also, H. Hearings, pp. 608 et seq., 2169-2170.

⁶² The administrator may decide in the first instance whether a showing has been made that material facts would be adduced by the use of the subpoena power in a particular case, but his decision is subject to appropriate court review. H. Rep. No. 1698, 78th Cong., 2d sess., p. 22.

⁶³ 50 U.S.C.A. (1943 Supp.) App. § 923(a).

⁶⁴ *Safeway Stores, Inc. v. Brown*, (Emer. Ct. App. 1943) 138 F. (2d) 278. See also, H. Hearings, pp. 1579 et seq., 1604.

protest. Section 203(a) has been amended to abolish the ninety-day alternative time limit, so that now some action must be taken by the administrator within thirty days after a protest has been filed.⁶⁵ Secondly, a new section 203(d) has been added to the original act, providing as follows:⁶⁶

"Any protest filed under this section shall be granted or denied by the administrator, or granted in part and the remainder of it denied, within a reasonable time after it is filed. Any protestant who is aggrieved by undue delay on the part of the administrator in disposing of his protest may petition the Emergency Court of Appeals, created pursuant to section 204, for relief; and such court shall have jurisdiction by appropriate order to require the Administrator to dispose of such protest within such time as may be fixed by the court. If the administrator does not act finally within the time fixed by the court, the protest shall be deemed to be denied at the expiration of that period."⁶⁷

Review

Quorum of Emergency Court of Appeals. Under the original act, three judges constituted a quorum of the Emergency Court of Appeals.⁶⁸ The extension act provides that two judges shall constitute a quorum of the court and of each division thereof.⁶⁹

Stays of Enforcement Proceedings to Test Validity of Regulations. To relieve further the situation presented by the *Yakus* case, where a person indicted for the violation of a regulation was precluded from

⁶⁵ Section 106 of Extension Act.

⁶⁶ Section 106 of Extension Act.

⁶⁷ In *Safeway Stores, Inc. v. Brown*, (Emer. Ct. App. 1943) 138 F. (2d) 278 at 280, the Emergency Court indicated that it had jurisdiction, even in the absence of express statutory direction, to require the administrator to dispose of a protest upon which he had unreasonably delayed his decision:

"If the administrator should unreasonably delay final action it would seem clear that this court, upon a proper showing, may under the authority of Section 262 of the Judicial Code, 28 U.S.C.A. § 377, in aid of its jurisdiction issue an order in the nature of a writ of mandamus directing the Price Administrator to take action upon a pending protest."

In the cases of *M. H. Nagle, Inc., No. 78*, and *Aberle, Inc., et al., No. 97*, application for mandamus were filed with the Emergency Court. In each case the court found that the delay had been unreasonable (protests had been filed on May 26, and May 6, 1943, and had not been acted upon on October 13, and December 2, 1943). It was unnecessary for the court to enter formal mandamus orders, however, since in each case the administrator acted upon the protest before a formal order was actually entered. H. Hearings, p. 2104.

⁶⁸ Section 204 (c), 50 U.S.C.A. (1943 Supp.) App. § 924 (c); H. Hearings, p.

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⁶⁹ Section 107(a) of Extension Act.

showing its invalidity,⁷⁰ the extension act adds a new section 204(e), providing for stays of enforcement proceedings under certain circumstances while the validity of a regulation is tested.⁷¹ The section provides that within thirty days after arraignment, or such time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding involving alleged violation of any regulation or order, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint challenging the validity of any provision which the defendant is alleged to have violated. The court in which the proceeding is pending *shall* grant such leave with respect to any application (1) which it finds is made in good faith and (2) where it finds that there is reasonable and substantial excuse for the defendant's failure to attack the provision in a regularly filed protest. Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals has jurisdiction to enjoin or set aside in whole or in part the provision complained of or to dismiss the complaint.⁷² The Emergency Court may authorize the introduction of evidence, either to the administrator or directly to the court, in accordance with the rules governing evidence in a regularly filed complaint in the Emergency Court, and further procedure in the court is then the same as in the case of a regularly filed complaint.

In any criminal or civil enforcement proceeding, the court *shall* stay the proceeding (1) during the period within which a complaint may be filed in the Emergency Court pursuant to leave granted; (2) during the pendency of any protest regularly filed by the defendant in good faith prior to the institution of the enforcement proceeding; and (3) during the pendency of any judicial proceeding instituted by the defendant, either upon leave granted or following the denial of a regularly filed protest, and until the expiration of the time allowed for the taking of further proceedings with respect thereto.

Stays shall be granted in civil proceedings only after judgment and upon application made within five days after judgment. In the case of an injunction proceeding brought by the administrator, the court grant-

⁷⁰ *Yakus v. United States*, 321 U.S. 414 (1944).

⁷¹ Section 107(b) of Extension Act. "While the constitutionality of the exclusive jurisdiction provisions of the statute has been upheld by the Supreme Court (*Yakus v. United States*), the committee is of the opinion that these provisions should be relaxed to the fullest extent consistent with the effective administration and enforcement of the act." H. Rep. No. 1593, 78th Cong., 2d sess., p. 6.

⁷² The thirty-day period merely specifies the time within which the complaint must be filed in order that the Emergency Court will have jurisdiction, but does not limit in any way the jurisdiction of the court to act upon a complaint filed within such thirty-day period. H. Rep. No. 1698, 78th Cong., 2d sess., p. 23.

ing a stay shall issue a temporary injunction for the period of the stay. In the event that any provision of any regulation or order is determined to be invalid by a final judgment of the Emergency Court of Appeals, any pending enforcement proceeding shall be dismissed and any judgment vacated to the extent that such proceeding or judgment is based upon the violation of such provision. No retroactive effect is to be given to any judgment of the Emergency Court setting aside a provision of a regulation or order.

Enforcement

Venue. The original act provided that criminal enforcement proceedings could be brought in any district in which any part of any act or transaction constituting the violation occurred, and that injunction or treble damage proceedings could, in addition, be brought in the district in which the defendant resided or transacted business.⁷³ The extension act has narrowed the venue of treble damage actions by requiring that such actions be brought only in the district or county in which the defendant resides or has a place of business, an office, or an agent.⁷⁴

Treble Damages. The original act provided that a person who purchased a commodity for use or consumption other than in the course of trade or business at a price above the maximum price or who paid rent higher than the maximum rent was entitled to bring an action for reasonable attorney's fees and costs plus the higher of (1) treble damages or (2) fifty dollars.⁷⁵ Although the Supreme Court of the United States had held in *Hecht Co. v. Bowles* that courts were not required to issue an injunction merely because violations of a regulation were shown and that such courts could, in their discretion, determine what order should be entered, considering wilfulness and other circumstances,⁷⁶ nevertheless, the Supreme Court, by its refusal to review the case of *Bowles v. American Stores, Inc.*, left in effect a ruling that once a violation is shown in a treble damage action, the plaintiff must be given treble damages or fifty dollars, whichever is higher, and the court can exercise no discretion in the matter, regardless of wilfulness and other mitigating circumstances.⁷⁷

The extension act provides that an overcharged consumer is entitled to reasonable attorney's fees and costs plus (1) not less than the amount of the overcharge nor more than three times the amount of the overcharge as the court "in its discretion may determine," or (2) not

⁷³ Section 205(c), 50 U.S.C.A. (1943 Supp.) App. § 925(c).

⁷⁴ Section 108(a) of Extension Act.

⁷⁵ Section 205(e), 50 U.S.C.A. (1943 Supp.) App. § 925(e).

⁷⁶ *Hecht Co. v. Bowles*, 321 U.S. 321, 64 S. Ct. 587 (1944).

⁷⁷ *Bowles v. American Stores, Inc.*, (Ct. App. D.C. 1943) 139 F. (2d) 377, rev'g. (Mun. Ct. D.C. 1943) 32 A. (2d) 388, cert. den., (U.S. 1944) 64 S. Ct. 947. See also, H. Hearings, pp. 1634-1638.

less than twenty-five dollars nor more than fifty dollars, as the court "in its discretion may determine," whichever is the greater. The extension act has also added a proviso to the effect that the amount to which the overcharged consumer is entitled "*shall* be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation."⁷⁸ Furthermore, the extension act prohibits the granting of separate minimum judgments for each overcharge.⁷⁹

The original act provided that the administrator could bring a treble damage action in cases where the purchaser was a purchaser in the course of trade or business and not a purchaser for use or consumption.⁸⁰ The extension act broadens the administrator's right to bring treble damage actions by authorizing him to bring such actions where the purchaser is a purchaser for use or consumption but fails to institute an action within thirty days from the occurrence of the violation. If the administrator brings such action, the buyer is thereafter barred from bringing an action for the same violation.⁸¹

The amendments, insofar as they relate to actions by buyers or actions which may be brought by the administrator after the buyer has failed to institute an action, are applicable only with respect to violations occurring after the date of enactment of the extension act. In cases where the administrator is the only person entitled to bring the action, the amendments are applicable with respect to proceedings pending on the date of enactment or instituted thereafter.⁸²

License Suspension. In *L. P. Stewart & Bro., Inc. v. Bowles*, the

⁷⁸ Section 108(b) of Extension Act. (Italics supplied.) See also H. Rep. No. 1698, 78th Cong., 2d sess., p. 23.

⁷⁹ Section 205(e), as amended, reads in part as follows:

"A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered."

Prior to the amendment, if there was a series of overcharges, the purchaser was entitled to recover at least fifty dollars for each such overcharge. For example, if a roomer who paid his rent by the day was overcharged fifty cents a day for ten days, he was entitled to recover five hundred dollars from his landlord even though the aggregate amount of overcharges was only five dollars. H. Rep. No. 1593, 78th Cong., 2d sess., p. 8. See also Sprecher, "Price Control in the Courts," 44 *COL. L. REV.* 34 at 62, n. 160 (1944). Under the amended provision, in the example cited the recovery would be fifty dollars if the violation was willful, twenty-five dollars if it was not.

⁸⁰ Section 205(e), 50 U.S.C.A. (1943 Supp.) App. § 925(e).

⁸¹ Section 108(b) of Extension Act.

⁸² Section 108(c) of Extension Act.

Supreme Court of the United States held that the price administrator had the power under the Second War Powers Act⁸³ to prevent a person who has violated a rationing order from dealing in rationed commodities.⁸⁴ However, the administrator had attempted to use this power to punish violations of price regulations and orders issued under the Emergency Price Control Act.⁸⁵ The extension act provides that a person who has violated a price regulation or order cannot be prevented from dealing in rationed commodities by a rationing suspension order,⁸⁶ although, of course, he may be prevented from dealing in the commodity in connection with which a price violation occurred, by a license suspension order under section 205 (f)(2) of the Price Control Act.⁸⁷

Review of Rationing Suspension Orders. The extension act adds a new section 205(g) to the original act, providing that district courts shall have exclusive jurisdiction to enjoin or set aside in whole or in part orders for suspension of allocations, and orders denying a stay of suspension, issued by the administrator under the Second War Powers Act. An action to enjoin or set aside such orders shall be brought within five days after the service thereof, and no suspension order shall take effect within five days after it is served, or, if an application for a stay is made to the administrator within such five-day period, until the expiration of five days after service of an order denying the stay. No interlocutory relief shall be granted against the administrator unless the applicant therefor consents to the entry of an order enjoining him from violation of the regulation or order involved in the suspension proceedings.⁸⁸

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⁸³ 56 Stat. L. 176, approved March 27, 1942, 50 U.S.C.A. (1943 Supp.) App. § 631 et seq.

⁸⁴ *L. P. Steuart & Bro. v. Bowles*, (U.S. 1944) 64 S. Ct. 1097.

⁸⁵ H. Hearings, pp. 482 et seq., 717-719; H. Rep. No. 1366, 78th Cong., 2d sess., pp. 24-25.

⁸⁶ Section 108(d) of Extension Act, amending § 205(f)(2), 50 U.S.C.A. (1943 Supp.) App. § 925(f)(2).

⁸⁷ 50 U.S.C.A. (1943 Supp.) App. § 925(f)(2).

⁸⁸ Section 108(e) of Extension Act.

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