

TO:

Mr. Brewer

Dick -

Attached is the memo on the incorporation by reference matter. We have checked for precedents & found none better than the ILO case. The Committee reports on UNRRF, mentioned at the end of the memo, are useful too.

Mr. Speck

MEMORANDUM

January 12, 1945

Re: Validity of legislation incorporating by reference agreements reached at Bretton Woods.

The question has been raised whether the Congress, in legislation ratifying the agreements reached at Bretton Woods, may constitutionally incorporate such agreements in the legislation by reference, without setting forth their texts in full.

While no controlling Federal court decision has been found, analogous Federal court cases and certain state court decisions clearly indicate that the agreements in question may be incorporated by reference.

It is well settled that an act of Congress may incorporate an earlier statute by reference, and such incorporation makes the earlier statute as much a part of the later act as though it had been set out at full length. Engel v. Davenport, (1926) 271 U.S. 33, 38; In re Heath, (1892) 144 U.S. 92; Panama Railroad Company v. Johnson, (1924) 264 U.S. 375, 391; Kendall v. United States, (U.S. 1838) 12 Pet. 524, 625. And it has been held that an act of Congress may incorporate by reference a state law as well as a Federal law. United States v. Weil, (E.D. Ark. 1942) 46 F. Supp. 323; Pestcoe v. Sixth Nat. Bank of Philadelphia, (Pa. 1934) 171 Atl. 302.

State court cases have held that a state legislature may incorporate a federal law by reference,^{1/} Ex parte Humphrey, (Cal. 1923) 222 Pac. 366; Santee Mills v. Query, (S. Ga. 1922) 115 S.E. 202, and also may incorporate Federal regulations by reference. Santee Mills v. Query, supra (income tax regulations); City of Cleveland v. Piskura, (Ohio 1944) 56 N.E. (2d) 683 (price control regulations).

The state court cases most directly in point, however, are Scottish Union & National Ins. Co. v. Phoenix Title & Trust Co., (Ariz. 1925) 235 Pac. 137 and In re Forsstrom, (Ariz. 1934) 38 P. (2d) 878. In the Scottish Union & National Ins. Co. case, an Arizona statute provided that:

"No fire insurance company shall issue any fire insurance policy covering any property or interest therein in this state other than on the form known as the 'New York standard'."

^{1/} In Panama R. Co. v. Johnson, (C.C.A. 2d, 1923) 289 Fed. 964, aff'd. (1924) 264 U.S. 375, it is pointed out that some states have constitutional provisions to the effect that no act shall be passed incorporating an existing law except by inserting it therein. Of course, the Constitution of the United States contains no such provision.

An objection was made that the statute was void for uncertainty since the statute did not set forth what was meant by the "New York standard," and further that the "New York standard" form could not be adopted by mere reference. The court, however, held that the statute was not void, either because of uncertainty or because it adopted the "New York standard" by reference, stating (at pp. 139, 140) that:

"In view of the fact that in 1886 the state of New York by statute adopted a certain form of insurance policy as the 'standard fire insurance policy of New York'; that such form has been adopted by many other states, and often by express reference to the 'New York standard' form; and that every legal text-writer on insurance refers to it as a well known and definite thing--we think the courts can well take judicial notice that there is in existence a form of insurance policy known as the 'New York standard' and just what that form is."

It is equally clear that no confusion or uncertainty would arise by a reference in the proposed legislation to the agreements signed at Bretton Woods, although their texts are not set out in full.

In re Forsstrom, supra, involved condemnation proceedings by the city of Tucson, Arizona, for certain property to be used in the construction of an underpass. A question arose whether the city ordinance authorized the taking of the property involved in the suit. The ordinance provided in effect that the property to be taken was included in "plans and specifications now on file in the office of the State Highway Engineer * * * which plans and specifications are known as 'National Recovery Municipal Project No. 9 for Arizona--Stone Avenue Underpass.'" The court, in holding that the property in suit was subject to condemnation, said (at page 888):

"It is permissible for a legislative body, by reference to something already in existence, to incorporate that thing as part of a law or ordinance. *Scottish Union & National Insurance Co. v. Phoenix T. & T. Co.*, 28 Ariz. 22, 235 P. 137. The plans and specifications referred to are definitely identified as something in existence, and it appears that they show specifically and distinctly on their face just what property will have its right of ingress and egress affected by the proposed underpass and to what extent."

The above authorities justify a conclusion that the Congress may incorporate the agreements reached at Bretton Woods by reference in legislation approving those agreements without embodying their texts in the legislation.

It is to be noted that the Congress in enacting legislation authorizing participation by the United States in the work of the United Nations Relief and Rehabilitation Administration set forth in full in that legislation the agreement reached by the United Nations.^{2/} However, as appears in both the House and Senate Reports on the bill which became that law, the agreement was quoted in full so that it would be before the Congress for its information, and, therefore, not because of a legal requirement. (1944) H.R. Rep. No. 994, 78th Cong., 2d Sess. 2; (1944) Sen. Rep. No. 688, 78th Cong., 2d Sess. 1.^{3/}

^{2/} Act of March 28, 1944, c. 135 (Public Law 267, 78th Cong., 2d Sess.)

^{3/} Legislative precedents have not been examined on the question considered here. See, however, U.S.C. title 22, sec. 271, under which the President was authorized to accept membership for the United States in the International Labor Organization.