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Public Control of Business

Jim Hambright

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plaintiff found the parking lot "closed" and her automobile gone.

The court's decision was for the plaintiff. It was held that a contract of bailment had been entered into under which the bailee assumed an obligation to exercise ordinary care in protecting plaintiff's automobile. It was further held that since the intended limitations on the bailee's responsibility were not brought "clearly and specifically" to the bailor's attention, the obligation on the part of the bailee to use ordinary care did not terminate at 6 p.m.

The principal cases follow the general rule.¹⁶ They emphasize judicial insistence upon actual notice of terms proposed by the bailee and assent either expressed or implied by the bailor before an intended limitation upon the bailee's liability will be recognized as a contractual term of the bailment contract.

D. Carl Richards.

PUBLIC CONTROL OF BUSINESS

MINIMUM PRICE FIXING FOR THE LIQUOR INDUSTRY

Arkansas. A recent decision in this field raises the question as to what extent a state legislature may discriminate against ordinary business under the avowed purpose of regulating a business which exists as a mere privilege.

In May, 1950, the Supreme Court of Arkansas, over a forceful dissent, held that liquor price-fixing by the Legislature was a valid exercise of the police power. In the case of *Gipson v. Morely*¹ a liquor control law² was tested which contained the following provisions: (1) It fixed both wholesale and retail prices; the former were set at wholesaler's cost plus 15 per cent, and the latter was fixed at retailer's cost plus 33 1/3 per cent. (2) A tax on liquor was laid, proceeds to go into a special fund. (3) From this fund an appropriation was made to hire 20 employees in the office of

¹⁶ BROWN, LAW OF PERSONAL PROPERTY (1936) § 84.

¹Ark....., 233 S. W. 2d 79 (1950). Justice McFaddin wrote a dissenting opinion, in which the Chief Justice concurred.

² Ark. Acts 1949, No. 282.

the Commissioner of Revenues to enforce this and other liquor laws.

The principal argument that the measure was unconstitutional was directed at the first provision. Plaintiff, a citizen and taxpayer, in his suit to enjoin the Commissioner of Revenues and the State Treasurer from enforcing or paying out funds to enforce the act, sought to invoke the following provisions of the Constitution of Arkansas:

"The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens."³

"Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed. . . ."⁴

The plaintiff asserted that the act was unconstitutional in that it conferred a special privilege of profit-making upon liquor dealers—a privilege not conferred upon the rest of the population.

The attack was novel. The typical challenge of police power regulations is brought by the one who is regulated, and is based upon a charge that the rule violates a due process or equal protection clause, often of the Federal Constitution. Here, a non-regulated party brought the action, and relied upon a clause in the state constitution⁵ rarely invoked in such cases.

In sustaining the legislation, the majority clearly indicated that even if the act did guarantee a gross profit to those who choose to gain a livelihood through the sale of liquor, such result was within the permissible discretion of the General Assembly. This view was

³ Art. II, § 18.

⁴ Art. II, § 19.

⁵ Typical of such clauses are the following:

- (a) "The Legislature shall not pass any local or special law . . . granting to any corporation, association or individual any special or exclusive right, privilege or immunity." LA. CONST. Art. 4, § 4.
- (b) "The Legislature shall not grant to any corporation or person, any . . . privileges . . . which shall not, upon the same terms and under like conditions, inure equally to all persons." N. M. CONST. Art. 4, § 26.
- (c) "The Legislature shall pass no law granting any association, corporation, or individual any exclusive rights, privileges, or immunities within this state." OKLA. CONST. Art. V, § 51.
- (d) ". . . [N]o man, or set of men is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." TEX. CONST. Art. I, § 3.

opposed by the minority on the ground that insofar as the act prescribed a *minimum* price, the resulting gross profit to the liquor dealer violated the constitutional restriction against grants of privileges.

In support of its decision, the majority relied upon that body of law⁶ which treats the liquor business as a mere privilege and subject to total regulation by the state, as contrasted with ordinary businesses or professions, such as those of the barber or baker, which are of common right and subject only to limited regulation.

Thus, the court distinguished its previous holding in *Noble v. Davis*,⁷ the only occasion where it had passed upon the validity of a price-fixing statute. In that case an enactment which authorized minimum price schedules for barbers was held unconstitutional. There the decision was put upon the ground that the business of the barber is one of common right, and that prices charged for shaves and haircuts have no such effect upon the public peace, health, safety and welfare as to justify a minimum price statute. The court held *Noble v. Davis* inapplicable to the principal case because the statute in question regulated a business not of common right. The court said:

"... [F]rom the earliest days of liquor regulation our laws, now admittedly valid, have granted a special privilege to liquor dealers much more far-reaching, more monopolistic, than any thing contained in Act 282. This is the license to engage in the liquor business to the exclusion of unlicensed sellers. This is a 'special privilege' of which bootleggers have traditionally complained, and one which gives to liquor dealers a substantial assurance of net profit that is not given to other law-abiding citizens. Yet the courts of Arkansas, like those of all American states, have sustained these monopolistic grants of special privilege on the ground that it is within the competency of the legislature to determine under the police power what regulatory rules are needful in controlling a type of business fraught with perils to public peace, health and safety as is the liquor business."⁸

⁶ See 30 AM. JUR., *Intoxicating Liquor*, §§ 22, 277, pp. 266, 399; 16 C. J. S., *Constitutional Law*, § 469, p. 931; 48 C. J. S., *Intoxicating Liquor*, § 33, p. 165; 169 A. L. R. 1190 (1947); 172 A. L. R. 608 (1948).

⁷ 204 Ark. 156, 161 S. W. 2d 189 (1942).

⁸ 233 S. W. 2d at 83.

However well established this principle may be, it goes only to explain why the state by its licensing procedure may grant or withhold the privilege of selling liquor, and regulate it even to the point of extinction. It does not explain why in the process of regulating the liquor traffic the Legislature should be allowed to go further and set up a gross profit, which, according to the contention made in this case, amounts to a privilege in violation of the constitution. That is to say, while this principle may suffice to justify burdens or restrictions running to the disadvantage of the liquor dealer, it does not explain why he should receive a guaranteed gross profit, running, perhaps, to the disadvantage of the barber, who has failed to get a floor put under his prices. The relation a guaranteed gross profit bears to the problem of policing is distant indeed.

The majority opinion states that "unlawful sales to minors and drunkards, the offering of free samples, the effort to increase sales by cutting prices . . . are among the evils against which our legislation seeks to guard."⁹ In order to halt these evils may the legislature insure liquor dealers a gross profit in the face of constitutional restrictions against a grant of special privilege? If so, the statutory measure must be reasonably related to a proper legislative purpose in protection of public health, safety, morals or general welfare.¹⁰ Yet appearing first in order in the recital of legislative policy in Section 1 of the act in question is the declared purpose "of avoiding price wars *which would materially affect the revenues of the state.*" (Emphasis added.) One does not question the need for revenue in Arkansas, but within the limits of this avowed purpose the majority opinion's discussion of the theory which permits a stronger regulation of the liquor business than other businesses is rendered irrelevant. And insofar as the act has for its purpose a remedy for attendant evils of the liquor trade, then the availability of alternative remedies—not in conflict with the constitution — would seem to require the court to examine

⁹ *Ibid.*

¹⁰ *Nebbia v. New York*, 291 U. S. 502 (1934), 89 A. L. R. 1495 (1934).

closely a measure which grants such special privilege to a select group of citizens.

The majority opinion refers to *Nebbia v. New York*¹¹ as removing any federal constitutional issues from the case at bar. Under the rule of that case, when necessary to the protection of public health, minimum prices may be established for retail sales of milk. On the strength of this precedent it may be contended that there could be no constitutional bar to minimum price-fixing in a business involving less wholesome products possessed of a potentially greater effect upon the public welfare.

In the *Nebbia* case, however, the complaint was that the statute violated the equal protection and due process clauses of the Fourteenth Amendment to the Federal Constitution. Nowhere in the opinions handed down in that case is reference made to a contention like that propounded in the principal case—that the legislation was unconstitutional under the state constitution since it conferred a privilege on a certain class which was denied to others. Moreover, the *Nebbia* case held that the phrase “affected with a public interest” is no longer decisive in determining the power of a state to regulate and set prices in a private business. And this tends further to erase the distinction made in *Gipson v. Morely* between businesses which exist through the permission of the state, and those of “common right.”

The power of the Legislature, if extensive, is not absolute over any business, even one which may “be regulated to extinction.” Thus, if the Legislature granted a \$1,000 annual bonus to every person engaged in the liquor trade within the state, the court probably would have no difficulty in holding such an act unconstitutional as a grant of special privilege, even if it were contended that such grants were necessary to insure financial stability of liquor dealers. Such bonus could scarcely be justified as necessary to protect public welfare. In many respects the statute tested in the *Gipson* case is similar to such an outright grant. The legislation was contested by a citizen and taxpayer, not by a liquor dealer who was the beneficiary of the special grant; and it was contended

¹¹ *Ibid.*