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Public Control of Business

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never concern the jury. . . ." Texas has recognized this rule in such decisions as *Exporters' and Traders' Compress & Warehouse Company v. Schulze*¹⁷ and *Mustang Aviation, Inc., v. Ridgway*.¹⁸ However, the explanation must be one that can reasonably be regarded as explaining away fault. There was no explanation in the principal case.

James A. Knox.

PUBLIC CONTROL OF BUSINESS

VALIDITY OF FAIR TRADE ACT

Oklahoma. The Robinson-Patman Act¹ includes a provision which prohibits sales at "unreasonably low prices" for the purpose of destroying competition. This provision is similar to the "sales below cost" statutes enacted in several states, but leaves undetermined what constitutes "unreasonably low" prices. Whether this standard is sufficiently definite has not been passed upon by a federal appellate court.

The state legislatures, for the most part, did not attempt to enact Fair Trade Laws until the United States Supreme Court decision in *Nebbia v. New York*² provided a broad concept of police

¹⁷ 265 S. W. 133 (Tex. Comm. App. 1924).

¹⁸ 21 S. W. 2d 677 (Tex. Civ. App. 1950).

¹ 49 STAT. 1526, § 1(b) (1936), 15 U. S. C. 1946 ed. § 13(b).

² 291 U. S. 502, 525, 537 (1934). In this case the New York Legislature had established a Milk Control Board which was empowered to fix the maximum and minimum retail prices charged for milk sold within the state. The defendant was convicted of violation of the Board's order, and the constitutionality of the law establishing the Board was the issue on appeal. The guiding principles obtained from Justice Roberts' opinion are:

. . . And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, . . . because the reasonableness of each regulation depends upon the relevant facts.

* * *

So far as the due process requirement is concerned, and in the absence of other constitutional restriction, a state is free to adopt and enforce whatever economic

power not limited to the former concept, "affected with the public interest." Two years after the *Nebbia* case, the Illinois Fair Trade Act,³ permitting contracts for the control of resale prices of certain commodities, was sustained in *Old Dearborn Distributors v. Seagrams Distillers Corporation*.⁴ With the green light furnished by these decisions, Fair Trade Laws have been passed in many states.

As a supplement to the Fair Trade Acts, several state legislatures have passed statutes prohibiting sales below cost for the purpose of destroying competition. The most frequent attack brought against these statutes is that they contravene an owner's right to sell his property at whatever price he and the buyer may agree. However, under the broad rule of the *Nebbia* decision, the acts generally have been upheld when the state legislatures have made wrongful intent a necessary element in the offense. A Minnesota decision⁵ states that sales below cost may be prohibited regardless of intent, but this holding is in the minority.⁶ To date, Arkansas, New Mexico and Oklahoma have adopted Unfair Trade Acts, while Texas and Louisiana have not done so.

In Oklahoma the first Unfair Sales Act⁷ adopted by the Legislature was declared unconstitutional by the Oklahoma Supreme Court because its terms subjected merchants to criminal penalties for making sales below cost when such sales resulted in injury to a competitor without regard to the merchant's intent in making the sale.⁸ In an effort to keep this type of statute on the books the Oklahoma Legislature repealed the original Act and adopted the

policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation. . . . And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise.

³ ILL. REV. STAT. (1951) C. 121½, § 188 *et seq.*

⁴ 299 U. S. 183 (1936).

⁵ *McElhone v. Geror*, 207 Minn. 580, 292 N. W. 414 (1940).

⁶ Cases are collected in Notes, 162 A. L. R. 532 (1946) and 118 A. L. R. 506 (1939).

⁷ Laws 1941, p. 53; 15 OKLA. STAT. ANN. (Perm. Ed.) §§ 592-597.

⁸ 201 Okla. 585, 208 P. 2d 376 (1949), noted 4 Southw. L. J. 327 (1950).

present one.⁹ This Act provides that sales below cost by a merchant with the intent to injure a competitor are unfair competition and contrary to public policy.¹⁰ One section of the Act sets forth the method to be used in computing "cost."¹¹ Provision is made for injunctive relief and assessment of fines¹² for violation of the Act. It is of interest to note that a sale or an offer of sale below cost shall be prima facie evidence of intent to injure competitors and lessen competition.¹³ In the overall picture, this clause leaves the price-cutting merchant in difficulty unless he can produce a valid reason for his low price. An exemption clause¹⁴ permits sales below cost in exceptional instances where they are necessary to avoid a greater loss on the goods.

The Act was held constitutional in a 5-3 decision in *Adwon v. Oklahoma Retail Grocers Association*.¹⁵ The court stated that its previous objection to the statute had been met when wrongful intent was made a prerequisite to punishment of an offender. The dissenting opinion was primarily devoted to the argument that the grocery business involved in the case was not the type of business to which state regulation of this kind could properly be applied.

Common law principles governing agreements not to compete have become well established over the years. Generally, the validity hinges upon the reasonableness of the restraint imposed. The first requirement for validity is that the agreement must be ancillary and if it is limited as to time but not as to space, it is invalid; if it is reasonably limited as to space, it is generally held valid regardless of the period of time it is to run.¹⁶ The reasonableness of the limitation as to space is dependent upon the nature of the busi-

⁹ Laws 1949, p. 103; 15 OKLA. STAT. ANN. (Perm. Ed.) §§ 598.1-598.11.

¹⁰ 15 OKLA. STAT. ANN. (Perm. Ed.) § 598.3.

¹¹ § 598.2.

¹² § 598.4, ¶ 5.

¹³ § 598.5.

¹⁴ § 598.6.

¹⁵Okla....., 228 P. 2d 376 (1951).

¹⁶ See authorities collected in 17 C. J. S., *Contracts*, §§ 242-244.

ness involved and the possible competition. These rules stem from efforts of the court to require parties to abide by their contracts and efforts to maintain a beneficial public policy by permitting all persons to pursue the gainful occupation to which they are suited or which they most desire. The rules themselves strike a balance or middle ground which is founded upon the reasonableness of the agreement itself. Legislation has been enacted in most states supplementing or enlarging upon the common law rules against restraint of trade.

CONTRACTS IN RESTRAINT OF TRADE

Texas. An agreement not to make an article except for the inventor was held to be a contract in restraint of trade by the Supreme Court of Texas in *Wissman v. Boucher*.¹⁷ In this case the plaintiff had come up with an idea for a collapsible fishing pole suitable for use as a walking stick. The defendants who operated a machine shop had made up sample poles for the plaintiff and had agreed that they would not manufacture these poles except for him. The idea itself, while novel, was not patentable. No trade secrets were involved, since any competent machinist could duplicate the device after a brief study of it. The agreement was completely unlimited as to time and space, within the class generally held to be unreasonable and unenforceable, and was considered by the court as simply an attempt by the plaintiff to buy off competition.

A recent Texas decision has construed Section 1 of the Texas Anti-Trust Act,¹⁸ which declares that a conspiracy in restraint of trade exists "where any two or more persons, firms, corporations or associations of persons, who are engaged in buying or selling any article of merchandise, produce, or any commodity enter into an agreement or undertaking to refuse to buy from or sell to any

¹⁷ _____Tex., 240 S. W. 2d 278 (1951).

¹⁸ TEX. REV. CIV. STAT. (Vernon, 1948) art. 7428, § 1.