Monopoly: Fixing of Reasonable Prices; Reasonable Restraint of Trade

H. W. I.
It might be well to state in this connection the objection of the dissenting justices to the constitutionality of the interpretation of the court. "If the principal contractor, who has complied with the law and requires his sub-contractor to protect his employees by insurance, is not an employer, within the meaning of the statute, I see no constitutional basis upon which liability may be imposed upon him. It is said that by accepting the terms of the act he becomes an insurer; the act makes no provision for third or other party bringing themselves within its terms. One not an employer "cannot accept the provisions of the act." The relationship is certainly not that of insured and insurer, for that relationship implies the voluntary agreement to assume by contract a definite obligation."

CHARLES L. GOLDBERG

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In *United States v. Trenton Potteries Co. et al.*, a prosecution under the Sherman Anti-Trust law, the Supreme Court reaffirmed its earlier position that a combination between producers of articles sold in interstate commerce to fix prices is in violation of the Sherman Anti-trust Act, regardless of whether or not the prices fixed are unreasonable.

In their exposition of the present state of the law an interesting analysis of the law on this point was drawn by Justice Stone. The pertinent, refused instruction primarily considered in this regard was as follows:

The essence of the law is injury to the public. It is not every restraint of competition and not every restraint of trade that works an injury to the public; it is only an undue and unreasonable restraint of trade that has such an effect and is deemed to be unlawful.

The charge was found to be true as an abstract proposition although inapplicable to the present case to the point of effect of reasonableness of prices fixed. The charges given, viewed as a whole, were held to have fairly submitted to the jury the question whether a price fixing agreement was entered into by respondents. The gist of the Court's discussion on this point is embodied in the following at page 406-7:

It does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable.

Our view of what is reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least in the light of its effect on competition, for whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition.

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably

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exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as to whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.

Thus viewed, the Sherman Law is not only a prohibition against the infliction of a particular type of public injury. It is a limitation of rights which may be pushed to evil consequences and therefore restrained.

In the Standard Oil Case where, in considering the Freight Assn. Case, the court said (221 U.S.) p. 65:

"That, as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made. That is to say, the cases but decided that the nature and character of the contracts, creating as they did a conclusive presumption which brought them within the statute, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made."

H.W.I.

Parent and Child: Tort: Right of Infant to Recover From Parent.

"Honor thy father and thy mother."

If the fourth commandment was never announced by any of the writers of the common law (because no case involving a child's suit against its natural parent was ever brought before the courts of England) it was unmistakably and indelibly carved upon the tablets of Mount Sinai and by the recent case of Wick v. Wick,1 firmly fixed in the jurisprudence of our commonwealth—Wisconsin. This was an action brought against the defendant by his infant child, under the age of fourteen years, to recover damages for personal injuries sustained by plaintiff as a result of an automobile accident due to the negligence of the defendant. A demurrer to the complaint was overruled, and the appeal from the order overruling the demurrer presented the question of whether an infant child may maintain an action in tort against its parent.

In answering this question in the negative, the Wisconsin Supreme Court based its decision on the dictates of the Natural Law and on considerations of public policy. Said the court: