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Trade Regulation--Monopolies--Status of Requirements Contracts under the Clayton Act

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dependable precedent elsewhere, the Supreme Court of Appeals took the position that dealings with federal money would be subject to the fiscal procedure and regulations required by local statutes. Congress, by adopting the act creating the hot lunch program, undoubtedly expected federal money to receive equal protection with that of the state.

It has been held that federal funds appropriated by Congress for vocational education and vested in the hands of the state treasurer are public funds subject to laws governing handling and the deposit of public funds, *State* ex rel. *Griffith v. Thompson,* 115 Kan. 457, 223 Pac. 258 (1924), unless the placing thereof in a special fund is specifically authorized by the constitution or a statute. *State v. McMillan,* 34 Nev. 264, 117 Pac. 506 (1911). In such case, although the funds may not be subject to appropriation by the legislature, not being part of the state's general fund and the duty of the state treasurer in reference to them being merely clerical and ministerial in nature, *cf. Melgard v. Eagleson,* 31 Idaho 41, 172 Pac. 655 (1918), state laws will still govern the handling and deposit thereof. *State* ex rel. *Griffith v. Thompson, supra* (recognizing that the money did not necessarily belong to the state, but could still be regarded as federal funds). Those authorities seem to agree with our court's determination to protect federal funds. Further, although the Kansas court was not faced in the *Thompson* case with the issue of disbursement of federal funds through a state agency, it seems probable that it would have protected them in distribution as it did in custody. By holding that our statutory regulations apply to federal money spent under the auspices of the state and not solely to money belonging to the state or its governmental units, our court has made a further application of the same basic policy. In view of increasing federal grants-in-aid to the states, the decision would seem both proper and important.

R. F. T.

TRADE REGULATION—MONOPOLIES—STATUS OF REQUIREMENTS CONTRACTS UNDER THE CLAYTON ACT.—Standard Oil had contracts binding some 6,000 gasoline stations to purchase all their requirements of one or more of its products. Gasoline sales under those contracts in 1947 totaled more than $57,000,000 which was, however, only 6.8% of the total gasoline sold to retail outlets in the competitive area. Sales by Standard's competitors had not decreased after the adoption in 1934 of requirements contracts by Standard. The United States sought an injunction on the ground that the contracts violated §3 of the Clayton Act, 37 STAT. 731 (1914), 15 U. S. C. §14 (1946), that "It shall be unlawful for any person engaged in commerce...to lease or make a sale or contract for sale of goods...on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods of a competitor...where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce." *Held,* affirming the lower court, that requirements contracts are unlawful under §3 if thereby "competition has been foreclosed in a substantial share of the line of commerce affected." *Standard Oil Co. of Calif. v. United States,* 337 U. S. 293 (1949).

To establish a violation, it was essential that the facts should be such as probably to result in a substantial lessening of competition for the word "may" in the qualifying clause had been interpreted in *Standard Fashion Co. v. Magrane–Houston Co.,* 258 U. S. 346 (1922), to cover only probable consequences. The lower court concluded that foreclosure from competition of some 6,000 outlets, considering the value of the sales involved, established such probable consequences whether the sales were compared with those of Standard Oil's competitors or not. *United States v. Standard Oil Co. of Calif.,* 76 F. Supp. 850, 889 (S. D. Calif. 1948). Earlier authority involving §3 looked to the proportion of the industry controlled by the challenged business to determine whether the lessening of competition was substantial without proposing that comparative domination was the only test. *Oxford Varnish Corp. v. Ault & Wiborg Corp.,* 83 F.2d 764 (6th Cir. 1936). Standard's sales through retail outlets, including its own stations, comprised less than 14% of the total sales in the competitive area and so less than half the percentage of the competitive field controlled by the seller in *Standard Fashion Co. v. Magrane-Houston Co.,* 258 U. S. 346 (1922), or in *Fashion Originators' Guild v. Federal Trade Comm'n,* 312 U. S. 457 (1941), the only prior cases involving requirements contracts which the Supreme Court had declared illegal under §3 of the Clayton Act. The Court in line with its standard policy of self limitation in kindred cases, *cf.* Stauss, *The Supreme Court and the Architects of Economic Legislation,* 56 J. POL. ECON. 138 (1948), accepted without endorsing the lower court's conclusion that the lessening of competition was substantial in the instant case. The opinion does not purport to draw a line between a remote and a substantial lessening of competition. That is a matter of degree which must necessarily vary from industry to industry in accordance with circumstances. The case is primarily important because it authorizes refusal to receive or consider evidence designed to rebut the inference raised by the foreclosure of outlets.

With attention confined to the outlets foreclosed by the contracts, the Court's conclusion that a substantial lessening of competition was established as a probability cannot reasonably be contested. In general, a lessening of competition may be anticipated from a restraint placed on the normal influence of competitors. *Cf. Signode Steel Strapping Co. v. Federal Trade Comm'n,* 132 F.2d 48 (4th Cir. 1942); EDWARDS, MAINTAINING COMPETITION 176 (1949). On the other hand, it may be supposed that restriction of a gasoline station to one brand of gasoline will encourage the opening of other stations selling competitive brands so that foreclosure of existing outlets may increase the number of outlets and thereby ultimately restore, or even increase, competition. Recent surveys do indeed indicate that retail sales practices in the gasoline industry have not given rise to the standard pattern of monopoly price structures, Learned, *Pricing* of *Gasoline: A Case Study,* 26 HARV. BUS. REV. 723 (1948); Rodgers and Luedicke, *Dynamic Competition,* 27 *id.* 237 (1949). However, monopoly power may conceivably manifest itself not by being projected forward on consumer prices but by being reflected back in uneconomic returns to the several factors of production. *Cf.* 2 BAIN, THE PACIFIC COAST PETROLEUM INDUSTRY 290 (1945); Machlup, *Misconceptions About the Current Inflation,* 30 REV. OF ECON. & STATISTICS 18 (1948). The Court discreetly declined to examine all the evidence and draw an independent conclusion as to the actual effect on competition. The bulk of the potential evidence and the still unsettled state of economic thought as to the appropriate inferences from such evidence surely made it the part of judicial wisdom for the Court not to decide that competition was actually impaired by the requirements contracts but only to rule that it might not unreasonably be found to be threatened by them.

The correctness of the decision leaves unanswered, however, the question whether the Court should have been called on to make it. As the Court points out in the instant case, there are other methods, technically legal, that will accomplish the same ends for Standard. It is by no means obvious whether it is preferable from the standpoint of the nation's interests that Standard should use requirements contracts, agency contracts or company-owned stations. To further those interests, it is important that the anti-trust laws be enforced with due regard to the actual effect upon commerce as nearly as it can be ascertained. Many transactions technically illegal are in accordance with the spirit of the laws. See Adelman, *Effective Competition and the Antitrust Laws,* 61 HARV. L. REV. 1289 (1948). In practice, few if any law enforcement agencies have either the disposition or the resources to enforce the laws in full in all situations coming within their purview and a problem of selection consequently arises. The enforcement policy of the Anti-Trust Division, as disclosed in this and other recent cases, *cf. United States v. New York Great A. & P. Tea Co.,* 173 F.2d 79 (2d Cir. 1948), suggests a diversion of the law to matters which, though within its terms, are not clearly among the evils which influential proponents of the Clayton Act seem to have had in mind, *cf.* BRANDEIS, THE CURSE OF BIGNESS 115 (1935), perhaps to the neglect of practices it was designed to suppress. Located in the Department of Justice, the Anti-Trust Division has naturally been more sensitive to the impact of legal and political considerations than to evolving economic thought and doctrines. See HAMILTON AND TILL, ANTI-TRUST IN ACTION 32 (1941). At best, prosecuting agencies are not especially adapted to formulating a regulatory policy. *Cf.* LANDIS, THE ADMINISTRATIVE PROCESS 35 (1938).

In theory, the economic problems presented by situations of this type could best be solved by a hearing before some such agency as the Federal Trade Commission where such evidence as was excluded by this decision could be examined and appraised. Unfortunately the Federal Trade Commission has been rebuffed so often by the Court that it cannot be confidently relied on to attempt or to effectuate a positive program. See McAllister, *Government and Some Problems of the Market Place,* 21 IOWA L. REV. 311 (1936). The situation has been remedied to some extent in recent years but the Commission has not been effective in combating monopoly. See Adelman, *supra,* at 1344.

The Anti-Trust Division won another victory in the instant case, but Mr. Justice Douglas in dissenting points out that the merger of giant industries continues, while this decision only points the way to further monopolization of the oil industry. The implication is that the Anti-Trust Division might do greater service to the cause of free competition by using its facilities in an adequate prosecution of the mergers than by picking out technical violations of the anti-trust laws where the effect of the injunction can be legally nullified. More fundamentally the doubt persists from the course of recent prosecution policy whether the Anti-Trust Division as presently constituted has demonstrated its fitness as the agency for developing the program of combating monopoly and preserving competition.

T. W. C.

UNEMPLOYMENT COMPENSATION—LEAVING EMPLOYMENT VOLUNTARILY WITHOUT CAUSE—"INVOLVING FAULT ON THE PART OF THE EMPLOYER."—The claimant terminated her last employment because her physician advised that she might develop tuberculosis by reason of the dust condition in her working place. She made no allegation that her employer was at fault in connection with the circumstances which caused her to cease work. Her claim for unemployment benefits was denied by the Board of Review, whose decision was appealed and affirmed by the circuit court. *Held,* on appeal, that a person voluntarily leaving employment because of fear of illness, or any cause not involving fault on the part of the employer, is not entitled to unemployment benefits. *State v. Hix,* 54 S. E.2d 198 (W. Va. 1949).

Unemployment compensation provisions were first enacted in West Virginia in 1936. W. Va. Acts 2d Ex. Sess. 1936, c. 1; *cf. id.* S. Con. Res. 4. The purpose, as stated by the legislature is "to provide reasonable and effective means for the promotion of social and economic security by reducing as far as practicable the hazards of employment. In the furtherance of this objective, the legislature establishes a compulsory system of unemployment reserves in order to... (2) Guard against the menace to health, morals, and welfare arising from unemployment." W. VA. CODE c. 21A, art. 1, §1 (Michie, 1943). Under accepted practice in the construction of statutes, *cf. Sale v. Board of Education,* 119 W. Va. 193, 192 S. E. 173 (1937); 3 SUTHERLAND, STATUTORY CONSTRUCTION §5902 (3d ed. 1943); *but cf. Slack v. Jacob,* 8 W. Va. 612 (1875), it is in the light