

Constitutional Law - Limitations on Price Fixing Legislation

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RECENT DECISIONS

Constitutional Law—Limitations on Price Fixing Legislation.—The defendant was convicted of a violation of the "Fair Sales Act" which prohibited the sale of a commodity at less than the cost price. The defendant admittedly advertised "loss leaders" (name products advertised at less than cost price) to attract customers to his store. His intention was merely to promote the sale of other products at a normal profit ratio. The proponents of the act justified the restriction on the grounds that many retailers used the device of "loss leaders" fraudulently. Known products were advertised at an exceptionally low price. Customers, however, were never able to purchase them at that low price. They were invariably told that the advertised product was sold out, but that there was available a substitute at a slightly higher price. The defendant attacked the statute on the ground that it was a violation of the due process clause of the fourteenth Amendment of the United States Constitution.

On appeal, it was held that the "Fair Sales Act" was an unconstitutional attempt to fix prices upon goods not affected with a public interest. *State v. Packard, Bramberger & Co.* (New Jersey 1939) 2 A. (2d) 599.

A problem, closely akin to the one treated in the foregoing case, arose in *People v. Victor* (Mich. 1939) 283 N.W. 666. A gasoline dealer was prosecuted for a violation of a statute prohibiting vendors of bakery and petroleum products from giving away one commodity to promote the sale of another. The defendant had offered a glass worth less than five cents to each purchaser of five gallons of gasoline. The statute was held to be in violation of the due process clause in that it attempted to fix prices of commodities which did not affect the public welfare, health, morals, or safety.

Numerous statutes prohibiting merchants from distributing redeemable stamps to their customers, a transaction very similar in purpose to the one in the foregoing case, have been sustained. In *Rast v. Van Deman & Lewis*, 240 U.S. 342, 36 Sup. Ct. 370, 60 L.ed. 679 (1915); a Florida statute imposed a practically prohibitive license fee on all merchants using redeemable stamps or similar devices in connection with the sale of their merchandise. The statute was attacked as an illegitimate price fixing statute. The court, however, held it legitimate on the ground that it sought to protect public morals and welfare; that the offer of premiums was "an appeal to cupidity to lure improvidence," though not "gaming it may, however, be considered as having the seduction and evil of such."

The right of an owner to fix the price at which his property is to be sold has almost universally been recognized as one of the inherent attributes of property ownership protected by the fourteenth Amendment. *Case of The State Freight Tax*, 15 Wall. (82 U.S.) 232, 21 L.ed. 146 (1866); *Tyson & Bros. United Ticket Offices v. Banton*, 273 U.S. 418, 47 Sup. Ct. 426, 71 L.ed. 718 (1927). The Supreme Court, in *Munn v. Illinois*, 94 U.S. 113, 24 L.ed. 77 (1876) pointed out that neither the rights of property nor of contract are absolute; that there is reserved in the government, by immemorial tradition, the power to regulate certain businesses such as innkeepers; that, by implication, there is vested in the public an interest in certain types of businesses affecting the public welfare; and that therefore there is impliedly granted to the public the power to regulate these businesses. In the *Munn* case a statute fixing the rates which warehouses within the state of Illinois might charge for the storage of grain was upheld on the ground that the business was affected with a public interest. Under the circumstances these warehouses were "the gateways of commerce" in grain

between the east and the west, and were therefore of such great domestic concern that they were in effect devoted to public use.

Wolff Packing Co. v. Court of Industrial Relations of Kansas, 262 U.S. 522, 43 Sup. Ct. 630, 67 L.ed. 1103 (1923) designated three types of businesses which might be clothed with a public interest: (1) Those conducted upon the authority of a public grant which expressly or impliedly imposed a duty to render services to the public, i.e. the common carrier; (2) Certain occupations wherein the public interest has been traditionally recognized, i.e. the inn keeper; (3) Those businesses which, because of their peculiar relation to the public, have, in effect, devoted their resources to public use.

Whether or not a business is in fact affected with a public interest is a matter that must be determined by a judicial inquiry. Property is not clothed with a public interest merely because it is used in the manufacture of commodities for general use. In *Wolff Packing Co. v. Court of Industrial Relations*, *supra*, the court refused to uphold a Kansas statute which declared that the manufacture and preparation of food for human consumption, the manufacture of clothing for human wear, the production of any substance in common use for fuel, public utilities, and common carriers were businesses affected with a public interest. It held that the mere declaration by the legislature that a business is affected with a public interest is not conclusive. The statute in question attempted to authorize a Court of Industrial Relations to fix wages and other terms for the conduct of business, if the court found that labor disputes in the enumerated businesses affected public health. This was declared a violation of the due process clause and therefore an unconstitutional attempt to regulate private enterprise.

A New York statute prohibiting the resale of tickets to places of public entertainment at an enhanced price was held to be a violation of the fourteenth Amendment. The theatrical business and the sale of theater tickets was held not to be of such public interest as would authorize the legislature to regulate the prices at which tickets were to be sold. *Tyson & Bros. United Ticket Offices v. Banton*, 273 U.S. 418, 47 Sup. Ct. 426, 71 L.ed. 718 (1927).

Numerous attempts have been made to utilize price fixing statutes as a means of preserving and protecting the dominant industries of the state. While such laws, under certain circumstances, may be justified under the police powers of the state, the fundamental guarantees of the Constitution cannot be circumvented merely to accomplish what might appear to be a good end. In *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 147 Sup. Ct. 506, 71 L.ed. 893 (1927), the court held unconstitutional a law prohibiting manufacturers and distributors of dairy products from paying more for dairy products in one community than in others, allowing of course for the reasonable cost of transportation. Though the dairy industry was the predominant industry of the state, and though the regulations passed were intended to promote and protect that industry by preventing certain large concerns from wiping out their smaller competitors by creating a monopoly, the court held that the industry was a private one not vested with a public interest and therefore not subject to regulation.

The court came to a somewhat different conclusion in the *Central Lumber Co. v. State of South Dakota*, 226 U.S. 157, 33 Sup. Ct. 66, 57 L.ed. 164 (1912). The statute in question provided that anyone engaged in the production of commodities for general consumption was prohibited from selling his product at a lower price to one retailer than to another in the same community with the intentional object of preventing competition. The milk case may be distinguished from the

lumber case in that the former deals with purchases by manufacturers, while the latter case deals with the sales to retailers. The court interprets statutes attacking monopolies by regulating the sale price of goods as being directed towards the protection of the purchaser. Hence statutes of this nature may be sustained under the police powers of the state, whereas statutes similar in purpose, but operating through the regulation of the purchase price paid by the manufacturer, cannot be sustained because their effect upon the general welfare of the people is regarded as too indirect.

Attempts have been made to interpret *Nebbia v. New York*, 291 U.S. 502, 54 Sup. Ct. 505, 78 L.ed. 940 (1933) as an alteration of the established rule limiting the powers of price fixing. The statute contested in the latter case sought to terminate a price war between local stores and the large distributors of milk. The large distributors had a greater overhead and purchased the milk at a higher price, and therefore necessarily had to maintain the standard price of milk. The smaller stores were able to purchase the milk at an exceptionally low price because they had the opportunity to buy the surplus milk not included in the contracts with the larger distributors. The farmer was willing to sell at a loss because this surplus would otherwise have had to be discarded. To remedy this situation the state board set a minimum price for milk and provided a penalty for those who sold under the established price. The Supreme Court affirmed the conviction of a retailer under the statute. This case, however, does not establish any broad legislative power to fix prices. The act was emergency legislation limited in time, and dealt only with a single industry. And in fact, that industry was, under the circumstances, vitally affected with a public interest.

Following the authority of the *Nebbia Milk Case*, a "Milk Control Act" was declared a constitutional exercise of the police power. The Act authorized a milk board to regulate the prices at which milk was to be sold, and to further regulate and supervise the milk industry. The price was to be based upon a consideration of "the balance between production and consumption of milk, the costs of production and distribution, and the purchasing power of the public, and the amount necessary to yield a reasonable return to the producer and milk dealer." The court pointed out that, "Changing conditions necessarily impose a greater demand upon this reserve power (police power) . . . The economic interests of the state may justify its exercise, notwithstanding that the expedient resorted to invades the domain of property rights or of contract. The Constitution does not secure to any one the liberty to conduct his business in such a fashion as to inflict injury upon the public at large or upon a substantial group of the people." *State v. Auclair* (Vt. 1939) 4 A. (2d) 107.

What may be the beginning of a new philosophy giving impetus to a more extensive governmental paternalism over business may be found in the dissent of the *New State Ice Co. v. Liebmann*, 285 U.S. 262, 52 Sup. Ct. 371, 76 L.ed. 747 (1932). That case held that a law requiring a certificate of necessity as a condition precedent to the right of entering the ice business in the State of Oklahoma was unconstitutional, because it was an attempt to regulate private enterprise. Justice Brandeis, in voicing his dissent, said, "In my opinion, the true principle is that the State's power extends to every regulation of any business reasonably required and appropriate for public protection." While not any of the recent decisions have gone so far as to sustain a regulation merely because it was "reasonably required, and appropriate for public protection," the growth in number of the many new codes seems to indicate a tendency towards an increased governmental regulation. In *State v. McCasters* (Minn. 1939) 283 N.W.

767, the court sustained a barber's code on the ground that it was a trade affected with a public interest. Yet in the same opinion the court said, "The main objective, somewhat disguised, is the welfare of the trade rendering the services. The general public interest if any, is indirect and incidental." Similar codes were sustained in *Herrin v. Arnold*, 183 Okla. 392, 82 P. (2d) 977 (1938); *Board of Barber Examiners v. Parker*, 190 La. 214, 182 So. 485 (1938). Such codes were declared unconstitutional in: *City of Mobile v. Rouse*, 27 Ala. App. 344, 173 So. 254 (1937); *Ex parte Kansas*, 22 Cal. App. (2d) 161, 70 P. (2d) 962 (1937); *State v. Ives*, 123 Fla. 401, 167 So. 394 (1936).

DANIEL C. SHEA.

Contracts—Consideration—Accord and Satisfaction of a Liquidated Debt.—

An indorsee brought action on a note. The defendant maker pleaded discharge by virtue of a three-party agreement under which the plaintiff had acquired the note from the former holder. This agreement had been fully executed. Under it the former holder received from the plaintiff an automobile worth \$250. The plaintiff received from the defendant livestock and produce worth \$250, and the defendant paid the license fee on the automobile. At the time of the agreement the defendant was hopelessly insolvent. The trial court directed a verdict for the plaintiff on the ground that "a mere promise of the debtor to pay a sum less than the debt in full satisfaction of it is without consideration and binds neither party." *Rye v. Phillips* (Minn. 1938) 282 N.W. 459.

The Minnesota Supreme Court characterized the doctrine invoked by the plaintiff as a relic "of antique law which should have been discarded long ago" and as evidence of the capacity of lawyers "to make the requirement of consideration an overworked shibboleth rather than a logical and just standard of actionability." There is no reason, said the court, why a person should be prevented from making an executed gift of incorporeal as well as corporeal property. But the decision was ultimately based on the fact that "the new tripartite contract pleaded had plenty of consideration."

The common law doctrine, that a past due, liquidated debt can not be discharged by payment of a lesser sum, is one that has provoked much opposition. At least ten states have changed it by statute: Alabama, California, South Dakota, Georgia, Maine, North Carolina, North Dakota, Oregon, Tennessee, Virginia. WILLISTON, *CONTRACTS* (2d ed. 1936) § 120, n. 9.

Iowa has long accepted part payment from an insolvent debtor in full satisfaction. *Engbreitson v. Seiverling*, 122 Iowa 522, 98 N.W. 319 (1904). In a Kansas case a defendant was indebted to plaintiff bank for the sum of \$1370 covered by two notes, one for \$870 and the other for \$500. Defendant, being unable to feed the stock mortgaged to secure the first note, entered into an agreement whereby payee bank agreed to accept the proceeds of the sale of the mortgaged livestock in full settlement providing that defendant did not go into bankruptcy. The sale netted \$515, for which payee returned the note for \$870, but brought suit on the other. It was held that the debtor's agreement not to enter bankruptcy was sufficient consideration to support creditor's promise to accept the proceeds of the sale in full payment of both notes. The court stated that any possible loss or inconvenience to the one or benefit to the other was enough to sustain the agreement extinguishing the debt by a smaller sum. *Hall v. Swindell*, 147 Kan. 382, 76 P. (2d) 769 (1938).