CONSTITUTIONAL LAW-DUE PROCESS - FAIR TRADE ACTS

Milton Rabinowitz
University of Michigan Law School

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CONSTITUTIONAL LAW — DUE PROCESS — FAIR TRADE ACTS

The question herein discussed has called forth much noteworthy comment. See, for example, 25 CAL. L. REV. 368 (1937); 49 HARV. L. REV. 811 (1936); 50 HARV. L. REV. 667 (1937); 31 ILL. L. REV. 793 (1937); 34 MICH. L. REV. 691 (1936); 13 N. Y. UNIV. L. Q. REV. 267 (1936); 45 YALE L. J. 672 (1936); and annotations in 104 A. L. R. 1452 (1936), 106 A. L. R. 1486 (1937). Also, see generally on the economic aspects of the problem, SELIGMAN and LOVE, PRICE CUTTING AND PRICE MAINTENANCE (1932).

1 N. Y. Laws (1935), c. 976, §§ 1, 2.
servient to the public policy of the state, and renders price cutting by any merchant with knowledge of such an agreement, even though not a party thereto, actionable as unfair competition at the suit of anyone injured thereby. In *Doubleday, Doran & Co. v. Macy & Co.*, the New York court had condemned the enactment as violating the due process clause of the Fourteenth Amendment. Subsequently, the United States Supreme Court, in *Old Dearborn Distributing Co. v. Seagram-Distiller Corp.*, decided the contrary as to the validity of a similar Illinois statute. Thereafter, defendant was sued by a manufacturer who asserted a violation of the Fair Trade Act by the former. Defendant’s demurrer on the ground that the statute was unconstitutional was sustained by the trial court on the authority of the *Doubleday* case. However, on appeal it was held, that the *Seagram* case necessitated overruling the previous New York decision, and that the lower court’s ruling must therefore be reversed. *Bourjois Sales Corp. v. Dorfman*, 273 N. Y. 167, 7 N. E. (2d) 30 (1937).

The validity of “fair trade” legislation in so far as it legalizes price maintenance agreements has apparently never been doubted. However, prior to the decision of the United States Supreme Court in the *Seagram* case, the state courts had been evenly divided on the question of the constitutionality of the provision binding competing merchants who were strangers to the contract. The New York and New Jersey courts invalidated identical statutes as attempts at legislative price-fixing, violating the due process clause of the Fourteenth Amendment since most of the commodities covered by the act were not “affected with the public interest” and improperly delegating legislative power to private individuals in contravention of state constitutional provisions. On the other hand, the California and Illinois courts chose to view the statutes as intended primarily for the protection of the property—good-will—of manufacturers of trade-marked articles from the ruinous effects of retail price wars, and only incidentally designed to fix prices; accordingly, the enactments were sustained as a valid exercise of the state’s police power. The Supreme Court

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3 269 N. Y. 272, 199 N. E. 409 (1936).
4 299 U. S. 183, 57 S. Ct. 139 (1936).
5 N. Y. Laws (1935), c. 976, § 1.
6 Unquestionably, the testing of the constitutionality of this section was discouraged by the fact that price maintenance agreements were valid even at common law in most of the states which enacted “fair trade” legislation. See 13 N. Y. Univ. L. Q. Rev. 267 at 268, notes 4 and 5 (1936).
10 Max Factor & Co. v. Kunsman, 5 Cal. (2d) 446, 55 P. (2d) 177 (1936), followed in *Pyroil Sales Co., Inc. v. The Pep Boys*, 5 Cal. (2d) 784, 55 P. (2d) 194 (1936).
in the *Seagram* case adopted the latter approach in reaching a similar result;\(^{12}\) and the New York court expressed itself as "duty bound" to follow suit by overruling the *Doubleday* case. In view of its strong condemnation of the statute in the latter decision, the New York court's about-face was not confidently to be anticipated. The *Seagram* case was controlling only with respect to the federal constitutional question, and it would not have been surprising if the court had now chosen to invalidate the statute as an infringement of the due process guarantee in the state constitution or as an improper surrender of legislative authority. Certainly the court would have been justified in standing by its previous decision to the extent of the peculiar circumstances there presented. In the *Doubleday* case the complaining manufacturer had voluntarily sold his product to the defendant without insisting on a restrictive price agreement. Moreover, the only price maintenance contract in existence involving plaintiff's product had been entered into by plaintiff and a controlled subsidiary. On the other hand, in the *Seagram* and principal cases, the manufacturer had pursued an extensive price maintenance policy, and the offending merchant had procured his wares from sources unknown. The "fairness" of protecting the manufacturer's good-will, the presence of which factor clearly influenced the result in the *Seagram* case,\(^{13}\) is not very evident under the former circumstances. However, there have been numerous instances in the law of the constitutional surrender of equitable refinements to administrative exigency;\(^{14}\) and no doubt comprehensive uniformity in the operation of the statute was deemed essential to the successful regulation of the multifarious and complex business transactions within its scope.

*Milton Rabinowitz*

\(^{12}\) "The primary aim of the law is to protect the property—namely, the good will of the producer, which he still owns. The price restriction is adopted as an appropriate means to that perfectly legitimate end, and not as an end in itself." Sutherland, J., in Old Dearborn Distributing Co. v. Seagram Distillers' Corp., 299 U. S. 183 at 193, 57 S. Ct. 139 (1936).

The court also held that the act (1) did not involve the unlawful delegation of power to private persons condemned in Eubank v. Richman, 226 U. S. 137, 33 S. Ct. 76 (1912); Seattle Trust Co. v. Roberge, 278 U. S. 116, 49 S. Ct. 50 (1928); and Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855 (1936); and (2) did not deny equal protection of the laws.
