Michigan Law Review

Volume 34 | Issue 8

1936

CONSTITUTIONAL LAW-TRADE REGULATION-FAIR TRADE ACT

CONSTITUTIONAL LAW — TRADE REGULATION — FAIR TRADE ACTS — Plaintiff, owner of the exclusive right to sell certain popular trade-marked cosmetics in California, entered into a large number of contracts with wholesalers and retailers of that state, fixing the price at which those branded articles were to resell. Thereafter, pursuant to the provisions of the state Fair Trade Act,[1] he brought suit to enjoin defendant, a retail druggist who had refused to make any such agreements and who, from sources unknown, had acquired such trade-marked articles, from reselling at less than the price stipulated in the contracts with others. A demurrer to the complaint was sustained, but on appeal it was *held* (Justices Shenk and Thompson dissenting) that the state Fair Trade Act was constitutional and the defendant was bound by the stipulated price. *Max Factor & Co. v. Kunsman,* (Cal. 1936) 55 P. (2d) 177.[2]

The New York Court of Appeals in a recent decision [3] reached a contrary result, approaching a similar provision of the New York Act [4] as a price-fixing statute, unconstitutional because the business sought to be regulated was not affected with a public interest. The interesting point in the instant case lies in the fact that the court, in coming to its conclusion, takes an entirely different approach. The act is treated not primarily as a price-fixing

[1] "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract . . . whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." Cal. Code (Deering, 1933 Supp.) Act 8782, § 1½, p. 2396.

[2] The case has been appealed to the United States Supreme Court. See 3 U. S. LAW WEEK 26 (June 2, 1936).

[3] Doubleday, Doran & Co. v. R. H. Macy & Co., 269 N. Y. 272, 199 N. E. 409 (1936).

[4] N. Y. Laws (1935), c. 976, p. 1902.

statute, but as a legislative extension of the *Lumley v. Gye* theory [5] that an unlawful interference with contract rights is actionable; [6] and the defendant is enjoined from knowingly acting and using his property in an "unfair" manner, to the damage of the complainants' contract rights and their property interest in their trade marks and good will.[7] Such an interpretation is novel, but it may be questioned whether in the long run it will reach any different results [8] than the approach adopted by most commentators; [9] for either view, taken literally, runs into constitutional difficulties more serious than the price-fixing feature. There is a well-recognized principle that private individuals can be given no power to affect the right of a property owner to deal with his property as he sees fit.[10] Yet under the approach of the California court, some situations will arise where this will in effect result from enforcement of the act. Thus, it seems perfectly sound to bind a dissenting retailer who obtains products from within the state with knowledge of the contracts which the producer has made; but it is another thing to hold that after the retailer has acquired the products, the producer, by making resale price agreements with others or changing the prices theretofore established, can bind non-agreeing parties. For the legislature to interfere with vested rights is one thing; for the legislature to allow private persons to do it is another. The same difficulty follows a literal application of the section, taking it as a price-fixing

[5] 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853). For a discussion of this approach see also 45 YALE L. J. 672(1936).

[6] The theory of the court is that while defendant's contract right to sell as he pleases is interfered with, it is done to protect the trade mark interests of the producer, and in the public interest in preventing destructive price cutting practices. The legislation is held, therefore, to be reasonable, non-discriminatory, and relevant to the policies a state is free to adopt.

[7] In discussing and distinguishing the New York case, the court intimates that several conditions to the securing of relief exist. Thus, it is suggested the producer must deal entirely by resale price contracts, and such contracts must be entered into in good faith. Further, he must refuse to deal with those who will not make such agreements, the thought being that he cannot complain of a sale below a price agreed on with others if he sells to one or several without securing resale stipulations.

[8] The effect of such an interpretation upon goods coming from outside the state raises a problem. It seems clear that a state cannot directly restrict or control the resale price of goods in interstate commerce, not even to protect its own interests. Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497 (1935). Whether, then, this use of the concept of unfair competition can be made to accomplish the same result seems questionable. If it can be, of course, here is one important difference between an approach on the theory that the statute prohibits price cutting, and the approach of the principal case.

[9] It seems to be the view of most that the statute fixes prices, but the New York court's adoption of the "affected with a public interest" test is not followed, it being usually thought that Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505 (1934), did away with this artificial standard. See 49 HARV. L. REV. 811 (1936); 36 COL. L. REV. 293 (1936); 45 YALE L. J. 672 (1936).

[10] Eubank v. Richmond, 226 U. S. 137, 33 S. Ct. 76 (1912); Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U. S. 116, 49 S. Ct. 50 (1928).

provision.[11] The net result would seem to be that under either approach the section must, to be upheld, be interpreted as applying only to those who willfully and knowingly advertise, offer for sale or sell, below the stipulated figure, goods which previously had been *acquired with knowledge of the price stipulations*.[12] Such a construction has been criticized as an unwarranted application of the canon that a statute is to be construed to avoid constitutional difficulies; [13] but it would seem at the same time to be thoroughly in keeping with the purposes and objectives of the legislation.[14] In the instant case, however, there is little to indicate definitely that the court believed any distinctions were necessary, or that it intended to construe the statute as requiring notice at the time of the purchase on the part of those sought to be bound.[15]

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[11] Literally the statute restricts knowingly selling below the price agreed on, but does not make knowledge at the time of the acquiring of the goods a prerequisite to liability, nor literally does it make the price at the time of acquiring control. This would leave the retailers at the mercy of the contracting parties.

[12] Such an interpretation would, it is believed, result in the creation of an equitable servitude as to price upon the products. See 13 N. Y. UNIV. L. Q. REV. 267 (1936); 45 YALE L. J. 672 (1936). An article in 34 MICH. L. REV. 691 (1936) was written upon this construction. Whether different results would follow then from the application of either the unfair competition theory or the price fixing theory is matter for speculation. It seems arguable that the latter approach would give the producer greater advantages since he would not be required to sell through price maintenance agreements exclusively. Cf. 34 MICH. L. REV. 691 (1936). For an opposite view, see 13 N. Y. UNIV. L. Q. REV. 267 (1936). Cf. also, footnote 7, supra.

[13] 49 HARV. L. REV. 811 at 819, footnote 44 (1936).

[14] Since the purpose is price maintenance and the objective is to devise a means of reaching all retailers and wholesalers, the use of notices attached to the article itself and of the contracts would seem the clearest means of accomplishing these. Of course, it is arguable that the use of notices could accomplish the same results alone and therefore the legislature must have had something else in mind when it adopted the use of resale price contracts. However, requiring contracts does serve the purpose of giving retailers and wholesalers a voice in the prices to be set, and gives them also grounds for suit for violation of those prices.

[15] The dissenting justices used the constitutional argument suggested above, but it does not appear to have been answered by the majority, as though they considered it inapplicable. On the other hand, the decision of the majority notes that the defendant took the products "with full knowledge of the system of contracts." (Cal. 1936) 55 P. (2d) 177 at 187. Further, the court refuses to hold the statute invalid merely because certain hypothetical situations were presented "under which enforcement of the act would be inequitable or difficult, or, perhaps, even unconstitutional." (Cal. 1936) 55 P. (2d) 177 at 187. This shows the court, at least, is going to separate the constitutional transactions from the unconstitutional, and not hold the whole section invalid which would seem the outcome of any refusal to interpret. On the other hand, this discussion might have been directed mainly at those objections which suggest, for example, that a producer might, in following out this section, make several contracts stipulating various prices so that retailers could not tell by which price they were bound. No matter what view is taken the possibility of this objection seems present; but the court's answer is believed sound. Such suppositions, moreover, ignore the principal purpose of the Fair Trade Act, viz., to secure uniform prices.