Supreme Court of New Hampshire.

CORNING GLASS WORKS
v.
MAX DICHTER COMPANY, Inc. and Man-Bur Sales, Inc.

Argued May 4, 1960.
Decided May 31, 1960.
Rehearing Denied June 27, 1960.

Headnotes

****570 *506** Petition, for injunction under the provisions of the New Hampshire Fair Trade Law, RSA ch. 357. After the issuance of an *ex parte* temporary injunction, the defendants moved to dismiss on the grounds that the statute was unconstitutional and filed an answer setting up various defenses in the alternative and seeking vacation of the temporary injunction and dismissal of the petition.

The plaintiff contends that it is entitled to a permanent injunction because defendants have sold its fair traded products in violation of RSA ch. 357. The defendants claim that this statute is unconstitutional because in conflict with Pt. I, Art. 15th, Pt. II, Art. 5th and Pt. II, Art. 83 of the Constitution of the State of New Hampshire. It is also defendants' position that plaintiff's fair trade contracts are unenforceable for lack of consideration; that they do not comply with the statute because they are not contracts between a vendor and his vendee; because they provide for unilateral amendment; and because they contain exceptions not provided for in the statute. The defendants further assert that the plaintiff has waived or abandoned any rights which it may have had under its fair trade contracts or is precluded from enforcing them because it has permitted retailers to give cash discounts or trading stamps in connection with the sale, at fair trade prices, of its fair traded products. The plaintiff denies that these defenses operate to deprive it of its right to injunction.

The parties have agreed upon the following facts:

(1) The plaintiff is a corporation duly organizedand existing under the laws of the State of New York with a principal place of business in Corning, New York. The plaintiff is registered to do business in this state.

****571** (2) The defendant, Max Dichter Company, Inc., is a corporation duly organized and existing under the laws of the State of New Hampshire with a principal place of business in Manchester, New Hampshire, where it operates a retail store under the trade name of 'Forest Hills Factory Outlet'.

(3) The defendant, Man-Bur Sales, Inc., is a corporation duly organized and existing under the laws of the State of New Hampshire with a principal place of business in Manchester, New Hampshire. Man-Bur Sales, Inc. is a concessionaire ***507** of Max Dichter Company, Inc., and as such concessionaire operates the hardware department.

(4) The plaintiff is engaged in the business of manufacturing ovenware, dinnerware, bakingware and other items, utensils and objects which bear, or the labels or containers of which bear the plaintiff's trade-marks or brands, 'PYREX' and 'CORNING' and which are in fair and open competition with commodities of the same general class produced by others.

(5) The plaintiff has expended large sums of money in promoting and advertising said products and has established a valuable reputation and good will for said products and for the trademarks, brands, or names under which they are sold.

(6) As of January 1, 1959, the plaintiff had entered into ten so-called fair trade contracts with retailers in the State of New Hampshire, which contracts have remained in force to the present time. Neither of the defendants has signed one of the plaintiff's fair trade contracts.

(7) Pursuant to said contracts the plaintiff has established minimum resale prices for its fair traded goods by issuance of minimum retail price schedules on various occasions prior to and since commencement of this action, which minimum resale prices have been changed by the plaintiff on various occasions prior to and since the commencement of this action. On such occasions the defendants were notified of the existence and nature of plaintiff's fair trade contracts and copies of the price schedules were mailed to them.

(8) The plaintiff's fair traded products are sold in approximately 230 retail outlets throughout the State of New Hampshire, including 'Forest Hills Factory Outlet'. The retailers buy the plaintiff's products from distributors and not from the plaintiff itself.

(9) Both of the defendants follow a pricing policy under which their merchandise is sold to the public at cost plus 21% to 27%. Both of the defendants are operating at a net profit.

(10) Prior to the issuance of the *ex parte* temporary injunction in this case the defendants, in keeping with their general pricing policy, offered for sale and sold the plaintiff's fair traded goods at prices which were less than the fair trade prices established by the plaintiff. These sales were not made under such conditions as would bring them within the exceptions set forth in RSA 357:1, subds. I-III.

***508** (11) The parties know of no retailer in the state who is currently selling the plaintiff's trademarked goods at a gross price which is lower than the fair trade price set by the plaintiff. However, numerous retailers give cash discounts or trading stamps in connection with the sale of plaintiff's fair traded goods. Such discounts and trading stamps are currently given with the knowledge and permission of the plaintiff. Such permission was granted on or prior to January 23, 1959 and stated in the plaintiff's fair trade minimum retail price list, effective March 1, 1959 (which list is available to all retailers as follows):

'Cash Discount--Trading Stamp Policy.

'It shall not be a violation of Corning's Fair Trade Contracts for a

retailer: (1) to allow his customers interest-free credit; (2) to allow to his customers a bona fide discount for cash payment; or (3) to allow **572 to his customers gifts, certificates, stamps or coupons, provided that (a) the posted or advertised price of any commodity or commodities shall not be less than the minimum price or prices stipulated by the seller hereunder and, (b) the amount or value of such allowance does not exceed 3% of the amount of the price established by the seller.'

Further facts appear in the opinion. Transferred without ruling by Grant, J.

Devine, Millimet & McDonough, Shane Devine, Manchester, for plaintiff.

Booth, Wadleigh, Langdell, Starr & Peters, Ralph E. Langdell, Manchester, and Walter D. Ford, Wilmington, Del., for E. I. duPont de Nemours & Co. as amicus *curiae*.

McLane, Carleton, Graf, Greene & Brown, Arthur A. Greene, Jr., Manchester, for defendants.

BLANDIN, Justice.

[1] I. The first issue before us is whether our Fair Trade Law (RSA ch. 357) violates the due process clause of our Constitution, Pt. I, Art. 15th.

The act provides in substance that no contract which relates to the sale or resale of a commodity bearing a trademark or the producer's name and which is in 'fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state' because the contract contains provisions 'that the buyer will not resell such *509 commodity at less than the minimum price stipulated by the vendor; that the producer or vendee * * * require upon the sale of such commodity to another' that the purchaser agree he will not resell it 'at less than the minimum price stipulated by such producer or vendee'. RSA 357:1.

Section 2 of the same law provides that anyone who 'wilfully and knowingly' sells or advertises such commodity at less than the stipulated price is engaged in unfair competition whether he is or is not a party to the contract, and 'any person' injured thereby may bring an action. It is further provided that 'any person' may maintain proceedings for an injunction to restrain violations of this law without alleging or proving actual damages. RSA 357:4.

[2] Pt. I, Art. 15th of the Constitution, so far as pertinent, reads as follows: 'And no subject shall be * * * deprived of his property * * * but by the judgment of his peers, or the law of the land.' The phrase 'law of the land' is synonymous with due process of law. Opinion of the Justices, 66 N.H. 629, 633, 33 A. 1076.

[3][4] In 1903, our Constitution was revised so that Pt. II, Art. 83 gave to the legislature the right to protect 'free and fair competition in the trades and industries' against monopolies 'or any other unfair

means'. The avowed purpose of RSA ch. 357, originally enacted in 1937, is to protect 'trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade-mark, brand or name.' Laws 1937, c. 184. While the announced purpose is not conclusive, it is nevertheless entitled to weight. McIntire v. Borofsky, 95 N.H. 174, 178, 59 A.2d 471; Velishka v. City of Nashua, 99 N.H. 161, 165, 106 A.2d 571, 44 A.L.R.2d 1406.

[5][6] The defendants, in their claim that the act is unconstitutional, are faced at the outset with the proposition that we should not declare it so except upon 'unescapable grounds'. Musgrove v. Parker, 84 N.H. 550, 551, 153 A. 320. Our court cannot compete with the Legislature in matters of opinion 'upon points of right, reason and expediency.'State v. Moore, 91 N.H. 16, 21, 13 A.2d 143, 147. Nor is the 'wisdom, effectiveness, and *economic desirability*' (emphasis supplied) of a measure ****573** for us to decide. McIntire v. Borofsky, supra, 95 N.H. 178, 59 A.2d 471, 472.

[7] The police power, under which the plaintiff seeks to sustain the law, is broad. It includes such varied interests as public health, safety, morals, comfort, the protection of prosperity, and the general welfare. Dederick v. Smith, 88 N.H. 63, 67, 184 A. 595. If any ***510** fair reason can be given for including this legislation within the scope of these powers, the law must be upheld. Sundeen v. Rogers, 83 N.H. 253, 257, 141 A. 142, 57 A.L.R. 950. In other words, unless we can clearly see that this law purporting to have been enacted to protect 'free and fair competition * * * against all monopolies * * * or any other unfair means' bears 'no relation to those objects', we cannot declare it unconstitutional. Sundeen v. Rogers, supra, 83 N.H. 257, 141 A. 144.

In order to apply the tests laid down by these authorities to the case before us, it it necessary to discuss briefly certain relevant factors. Fair trade laws have been and are the subject of sharp differences of opinion among laymen, economists and courts. As was stated in Sunbeam Corporation v. Masters of Miami, 5 Cir., 1955, 225 F.2d 191, where the court applying Florida law held the act unconstitutional, 'We well realize that Fair Trade is a highly controversial subject among economists and businessmen as well as in the courts.' Id., 225 F.2d 197. Among opponents of the law we find such uncommon allies as The Wall Street Journal, certain labor unions, farmers' groups, chain store concerns, and economists. Some eighteen of the thirty- three states which have passed upon the act within the last decade have declared it unconstitutional.

Turning to the reverse side of the picture, we find favoring the measure small businessmen, retailers of various sorts, large producers and manufacturers such as represented here, the National Association of Retail Druggists, and some economists. Approximately fifteen courts of last resort have upheld the act, as has the United States Supreme Court in Old Dearborn Distributing Co. v. Seagram Corp., 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109. This case has not been overruled either expressly or, do we believe, by implication. Sunbeam Corporation v. Masters of Miami, supra, 225 F.2d at page 194; see also 21 U.Chi.L.Rev. 175, 207.

States which have upheld the law include Massachusetts (General Electric Co. v. Kimball Jewelers, Inc., 333 Mass. 665, 132 N.E.2d 652), New York (Bourjois Sales Corp. v. Dorfman, 273 N.Y. 167, 7 N.E.2d 30, 110 A.L.R. 1411), and New Jersey (Lionel Corp. v. Grayson & Robinson Stores, 15 N.J. 191, 104 A.2d 304).

Among the states holding the act unconstitutional are Arkansas (Union Carbide & Carbon Corp. v. White River Distributors, Inc., 224 Ark. 558, 275 S.W.2d 445), Florida (Liquor Store, Inc. v. Continental Distilling Corp., 40 So.2d 371), and Washington (Remington Arms Co. v. Skaggs, 1959, 345 P.2d 1085). In the latter case the court split five to four with a sharp dissent by the minority.

***511** Typical articles by economists, whose number is legion, attacking fair trade may be found in 65 Yale L.J. 23, and 21 U.Chi.L.Rev. 175. On the other hand, a summary of the case for fair trade and answers to the objections to it appear in 64 Yale L.J. 967. Counsel appear to be in agreement that the United States Department of Commerce favors the act, while the Department of Justice opposes it. We think it would serve no useful purpose to enumerate further or attempt to analyze the myriad articles or decisions opposing or supporting free trade. If we grant, *arguendo*, that the balance of economic utility now seems to tip against such a law, we cannot say that it bears no relation to the objects of the police power. Nor can we hold that it is such an invasion of individual rights, while the public interest to be benefited is ****574** so slight, that we must declare the act of the Legislature 'indisputably unreasonable.' Shirley v. New Hampshire Water Pollution Commission, 100 N.H. 294, 300, 124 A.2d 189.

In short, we believe that a government of laws is best served when, in such situations as the present, a court exercises sufficient judicial restraint so that it does not substitute its economic or sociologicial predilections for the judgment of the Legislature. The defendants' contention that RSA ch. 357 violates Pt. I, Art. 15 of our Constitution cannot prevail.

[8] II. The claim that the act constitutes an unlawful delegation of legislative powers so that it violates Pt. II, Art. 5, of the Constitution does not require extended consideration. The law is complete as to purpose and general policies. It requires no persons or agencies to make it effective. It removes the bar against contracts fixing a resale price and does so, in part at least, in recognition of the continuing property right of the producer in the good will of his business symbolized by his trademark. See 27 Fordham L.Rev. 68, 73. The producer can only take advantage of the law if his product is in free and open competition. Reasonable standards and policies having been prescribed, there is no invalid delegation of powers. Conway v. New Hampshire Water Resources Board, 89 N.H. 346, 199 A. 83. This is not a case of 'delegation running riot' as in Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 853, 79 L.Ed. 1570 or of a grant of unfettered discretion such as was given to the Milk Board and condemned in Ferretti v. Jackson, 88 N.H. 296, 188 A. 474. Courts in other jurisdictions have reached this conclusion as to the validity of the Fair Trade laws when attacked as being an unlawful delegation of powers. Old Dearborn Distributing Co. v. Seagram Corp., 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109; General Electric Co. v. Kimball Jewelers, Inc., 333 Mass. 665, 132 N.E.2d 652.

[9] ***512** III. Pt. II, Art. 83, of our Constitution as amended in 1903, while providing that 'free and fair competition in the trades and industries * * * should be protected against all monopolies and conspiracies which tend to * * * destroy it * * *' also states that the Legislature has power to enact laws to prevent the destruction offree and fair competition 'through combination, conspiracy, monopoly, or any other unfair means * * *'.

In 1941, four years after the enactment of the Fair Trade Law, our legislature passed an Unfair Sales Act. Laws of 1941, c. 92, now RSA ch. 358. This statute prohibited any retailer from selling merchandise below cost with the 'effect, of injuring competitors or destroying competition.' It was held constitutional in McIntyre v. Borofsky, supra, 95 N.H. 174, 59 A.2d 471, and not in violation of the anti-monopoly clause of our Constitution. Similarly, we hold that the present Act does not violate Pt. II, Art. 83.

[10] IV. A further contention of the defendants is that the plaintiff's contracts do not comply with our act because the term 'vendor' in Section 1 does not include a manufacturer or producer. To adopt this view we believe would destroy a major purpose of the law. It is the producer or manufacturer who is primarily interested in protecting his trademark, and it is common knowledge that many of these do not sell directly to retailers but through middlemen. The Legislature has provided that 'any person' may enforce the contract (§ 4), and reading the act as a whole we have no doubt that the intent was to pass an effective law and not one which would perhaps more often than not be impotent to achieve the desired result of protecting the trademark as symbolizing the good will of the manufacturer or producer. Other courts have reached the same conclusion. General Electric Co. v. Kimball Jewelers, Inc., 333 Mass. 665, 132 N.E.2d 652. It follows that the defendants' claim that the contracts do not comply with our act must fail.

****575 [11][12]** V. The defendants take the position that the agreements lack consideration. It is axiomatic that the consideration may consist either in a right, interest, profit or benefit accruing to the promisor or a detriment to the promisee. Frye v. Hubbell, 74 N.H. 358, 372-373, 68 A. 325, 17 L.R.A.,N.S., 1197. The plaintiff here, although under no obligation to do so, established a fair trade program into which the dealers including the defendants entered voluntarily by acquiring the goods with notice of minimum resale prices. It may reasonably be presumed that they would not have bought the goods had they not expected to derive a benefit from them. Their knowledge of the establishment ***513** of the minimum resale prices 'carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability * * *.' Old Dearborn Distributing Co. v. Seagram Corp., 299 U.S. 183, 193-194, 57 S.Ct. 139, 144, 81 L.Ed. 109.

[13] The fact that the plaintiff under these contracts can unilaterally change the prices is no cause for holding them invalid. Nowhere does our act forbid such a practice, and the contracts being entered into freely and for consideration remain enforceable. Eliopoulos v. Makros, 322 Mass. 485, 488, 77 N.E.2d 777.

[14] VI. The defendants' final claim is that the plaintiff has abandoned or waived any rights it may have under the act by permitting some dealers to give cash discounts or stamps as a bonus with purchases of trademarked and other merchandise.

While authorities are split on this subject (22 A.L.R.2d Annotation 1212), as they appear to be on nearly all phases of the act, we do not believe our Legislature intended that the giving of stamps, gifts, cash discounts, or the extension of credit should cause those who do so to forfeit their rights under the act. In practical effect, the giving of stamps comes to no more than a normal cash discount, which has never been regarded as an unfair practice any more than the extension of credit, but merely as a common custom of trade. The practices permitted by the plaintiff here may be equated to the offering of free delivery or free parking. We cannot conceive that the Legislature considered these practices as cut-throat competition at which the act was aimed.

In conclusion, we hold that the plaintiff has done nothing to forfeit its right under the law. Gever v. American Stores Co., 387 Pa. 206, 127 A.2d 694.

Remanded.

All concurred.

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