Marquette Law Review

Volume 18
Issue 3 *April 1934*

Article 8

Constitutional Law: Police Power: Price Fixing

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sold by a retailer in the course of trade. The creditor should not be required to record his security instrument to get protection against any creditors of the borrower.

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CONSTITUTIONAL LAW—POLICE POWER—PRICE FIXING.—A law passed by the New York state legislature (Chapter 158 of the Laws of 1933) declared that the milk industry was of paramount importance to the people of the state; that conditions existed in the industry which warranted control in the interests of the public welfare; and founded a conrol board with the power to regulate the entire milk industry and in particular to fix minimum and maximum prices for the sale of fluid milk. The law was based on an extensive survey made by a joint legislative committee which reported that the evils in the industry, owing to certain peculiar factors, could not be expected to right themselves through the ordinary play of the forces of supply and demand. The statute also provided for a criminal sanction. Defendant was convicted of selling milk at a price lower than that fixed by the control board. His conviction was affirmed by the New York Court of Appeals. [262 N.Y. 259, 186 N.E. 694 (1933); Recent Decision, 18 Marq. Law Rev. 56 (1933).] Defendant appeals to the Federal Supreme Court on the ground that the statute contravenes the 14th Amendment, particularly the due process clause. *Held,* judgment of conviction affirmed. The statute is constitutional *Nebbia* v. *New York,* 54 Sup. Ct. 505, 78 L.Ed. 563 (1934).

A state legislature has no power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is "affected with a public interest." *Munn* v. *Illinois,* 94 U.S. 113, 24 L.Ed. 77 (1876); *William* v. *Standard Oil Co.,* 278 U.S. 235, 49 Sup. Ct. 115, 73 L.Ed. 287, 60 A.L.R. 596 (1928). As first ennunciated in the *Munn* case, where a state statute fixing maximum charges for the storage of grain in warehouses was sustained, this simply meant that a business, although private in its nature, may become of such public consequence and so affect the community at large, as to be subject to reasonable regulation in the interest of the public. However, Mr. Justice Field, dissenting in that case, construed the phrase "affected with a public interest" more narrowly, to mean a business dedicated by the owner to public uses, or a business the use of which was granted by the government, or in connection with which special privileges were conferred. It was this construction that was adopted by the court in decisions subsequent to *Munn* v. *Illinois,* supra; so that statutes very similar to the one in the instant case have been held invalid as taking property without due process of law: *Lochner* v. *New York,* (hours of labor in bakeries) 198 U.S. 45, 25 Sup. Ct. 539, 49 L.Ed. 937 (1905); *Adkins* v. *Children's Hospital,* (minimum wages for women) 261 U.S. 525, 43 Sup. Ct. 394, 67 L.Ed. 785 (1923); *Wolff Packing Co.* v. *Court of Ind. Rel.,* (wages for the meat packing industry) 262 U.S. 522, 43 Sup Ct. 630, 67 L.Ed. 1103 (1923); *Tyson & Bro.* v. *Banton,* (maximum price for resold theater tickets) 273 U.S. 418, 47 Sup. Ct. 426, 71 L.Ed. 718 (1926); *Fairmount Creamery Co.* v. *Minnesota,* (price at which creameries could buy cream) 274 U.S. 1, 47 Sup. Ct. 506, 71 L.Ed. 893 (1926); *Ribnick* v. *McBride,* (charges to be made by employment agencies) 277 U.S. 350, 48 Sup. Ct. 545, 72 L. Ed. 913 (1927); *Williams* v. *Standard Oil Co.,* (price at which gasoline could be sold (278 U.S. 235, 49 Sup. Ct. 115, 73 L.Ed. 287 (1928). In each of these cases the legislature, no doubt, thought that conditions warranted control in the interests of public welfare, and that the regulation passed was reasonably adapted to achieving such control.

It seems that the extraordinary economic emergency, that existed when the law was passed, is not used by the court as a justification of its decision; the cases of *Wilson* v. *New,* (fixing of wages and hours of railroad employees during a national emergency sustained) 243 U.S. 332, 37 Sup. Ct. 298, 61 L.Ed. 755 (1917); *Block* v. *Hirsh,* (fixing of rents during emergency in housing facilities sustained) 256 U.S. 135, 41 Sup. Ct. 458, 65 L.Ed. 865 (1921); and *Marcus Brown Holding Co.* v. *Feldman,* (same as *Block* case) 256 U.S. 170, 41 Sup. Ct. 465, 65 L.Ed. 877 (1921) are not even cited in the opinion.

The court goes back to the majority opinion in *Munn* v. *Illinois,* supra; in that case defendants enjoyed a virtual monopoly, but neither the enjoyment of a monopoly nor of a franchise is held to be "the touchstone of public interest" which justifies the regulation in the instant case. 78 L.Ed. 563, 575; cf. *Brass* v. *North Dakota,* 153 U.S. 391, 14 Sup. Ct. 857, 38 L.Ed. 757 (1894) where price regulation for grain elevators was sustained even though it was established that the business was highly competitive. In rediscovering *Munn* v. *Illinois,* supra, the court renounces the *laissez-faire* philosophy of the cases which had given so narrow a construction to the phrase, "affected with a public interest." As the law now stands, a business is affected with a public interest, so as to be subject to the exercise of the police power, when the legislature reasonably determines that regulation is for the best interests of the people as a whole. And such regulation will not be considered as denying due process unless it is "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt * * * " A definite tendency is indicated to hold all legislation, which is passed in the interests of public welfare, valid unless the party assailing such legislation can show it to be unreasonable and arbitrary. See Notes, 82 U. of Pa. Law Rev. 619 (1934). Such a construction in effect adopts the economic philosophy and the approach to the due process clause of Mr. Justice Brandeis, as evidenced in his dissenting opinions in *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 52 Sup. Ct. 371, 76 L.Ed. 747 (1932); and *Liggett Co.* v. *Lee,* 288 U.S. 517, 53 Sup. Ct. 481, 77 L.Ed. 929 (1933).

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PATENT RIGHTS—INJUNCTION IN PATENT CASES.—The city appeals from a decree holding the appellee's patents covering processes and mechanisms appropriate for their practice, in purification of sewage valid and infringed by the operation of the city's large sewage disposal plant. The decree granted an accounting and also an injunction restraining the city from operating its plant. The patents had not as yet expired. *Held,* the decree is affirmed except as to the injunction and as to it the decree is reversed. *The City of Milwaukee* v. *Activated Sludge, Inc.,* Fed. (C.C. A. 7th, 1934).

The right (franchise) which the patent grants to the inventor and his assigns is the right to exclude everyone from making, using or vending the invention patented. *Bloomer* v. *McQuewan, et al,* 14 How. 539, 549, 14 L.Ed. 532 (1852); U. S. Const. Art. 1, § 8, cl. 8; Pomeroy's Eq. Rem. 2nd Ed. § 565 (1919). The inventor does not get from the law a right to a use he did not have before but he gets the right to an exclusive use. *United States* v. *United Shoe Machine Co.,* 247 U.S. 32, 58, 62 L.Ed. 968 (1917). When the right has been legally established, the obvious means of protecting it is by an injunction. If no other remedy could be given than an action at law for damages, the inventor would be ruined by the necessity of perpetual litigation. Story's Eq. Jur. § 931 (1877); *Allington & Curtis Mfg. Co., et al* v. *Booth,* 78 Fed. 878 (C.C.A., 2d, 1897); §