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## TRADE RESTRAINTS - FAIR TRADE STATUTES - VALIDITY OF STATUTE FORBIDDING THE GIVING OF A PREMIUM TO PROMOTE THE SALE OF GASOLINE WITH AN INTENT TO INJURE COMPETITION

Benjamin W. Franklin  
*University of Michigan Law School*

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TRADE RESTRAINTS — FAIR TRADE STATUTES — VALIDITY OF STATUTE FORBIDDING THE GIVING OF A PREMIUM TO PROMOTE THE SALE OF GASOLINE WITH AN INTENT TO INJURE COMPETITION — Defendant operated an independent gasoline station. He gave to each cash customer purchasing five gallons of gasoline at the generally prevailing prices a drinking glass worth less than five cents. For this act he was charged with violating a statute prohibiting the giving away of any commodity for the purpose of promoting the sale of any other commodity.<sup>1</sup> Defendant moved that the information be quashed and a verdict be directed of not guilty on the ground that the statute was unconstitutional. From an order denying the motion and finding him guilty, defendant appeals. *Held*, that the giving of a premium with the sale of gasoline was a legitimate business practice. Its prohibition has no reasonable relationship to the protection of the public health, morals, safety or welfare. A statute purporting to do so results in a deprivation of property and liberty without due process of law in violation of the Michigan Constitution.<sup>2</sup> *People v. Victor*, 287 Mich. 506, 283 N. W. 666 (1939).

The purpose of this and similar statutes is to safeguard the interests of the public against the creation or perpetration of monopolies and to encourage and foster free, open and fair competition by prohibiting unfair, ruinous and predatory trade practices.<sup>3</sup> Reduced to its last analysis, the question in the present case is whether or not this type of prohibition has a reasonable relationship to the ends sought. It was on this point that the court here split, the minority being of the opinion that the legislative determination should be given conclusive effect in

<sup>1</sup> Mich. Pub. Acts (1937), No. 282, § 6: "Any person, doing business in this state and engaged in the production, manufacture, distribution or sale of bakery products or petroleum products, who shall, with the intent to injure or destroy a competitor, give, offer to give or advertise the intent to give away any commodity for the purpose of promoting the sale of any other commodity, shall be deemed guilty of a destructive trade practice, which is hereby prohibited and declared to be unlawful."

<sup>2</sup> Michigan Constitution, art. 2, § 16: "No person shall be . . . deprived of life, liberty or property, without due process of law."

<sup>3</sup> Mich. Pub. Acts (1937), No. 282, is entitled: "An act to prevent unfair discrimination, unfair methods of competition and destructive trade practices. . . ." This statute is identical in substance, although not in form, to many modern fair trade statutes, which incorporate two prohibitions; viz., sales at less than cost, and premiums with a sale, with the intent of injuring a competitor and/or destroying competition. While the "premium" provision seems to be a new question in this case, the "sale at less than cost" provision has been often upheld. *Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co.*, 11 Cal. (2d) 634, 82 P. (2d) 3 (1938); *Balzer v. Caler*, 11 Cal. (2d) 663, 82 P. (2d) 19 (1938); *State v. Langley*, 53 Wyo. 332, 84 P. (2d) 767 (1938); *Rust v. Griggs*, 172 Tenn. 565, 113 S. W. (2d) 733 (1938); *Associated Merchants v. Ormesher*, 107 Mont. 530, 86 P. (2d) 1031 (1939); cases collected 118 A. L. R. 506 (1939).

In *Great Atlantic & Pacific Tea Co. v. Ervin*, (D. C. Minn. 1938) 23 F. Supp. 70, this phase of the Minnesota statute was held invalid because of the definition of cost; in *Commonwealth v. Zasloff*, 137 Pa. Super. 96, 8 A. (2d) 801 (1939), and *Tortoriello v. Toohey*, 123 N. J. L. 202, 8 A. (2d) 291 (1939), the statutes were held invalid because they were not limited to transactions with an intent to injure or destroy competition.

the absence of a clear showing that it was unreasonable. The majority was of the opinion that "the courts have the power to determine whether, as a matter of fact, the prohibition bears a reasonable relationship to the public health, safety, morals and general welfare"<sup>4</sup> and that "The mere fact the legislature labels the giving of a premium with the sale of gasoline a 'destructive trade practice,' does not make it such nor render the practice subject to prohibition."<sup>5</sup> That there is no element of lottery or chance involved in the giving of a premium with the sale of gasoline would seem clear. Nor is it open to the objection that "They [the schemes] tempt by a promise of a value greater than the article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence."<sup>6</sup> Nothing is concealed from the purchaser, nor offered to him that has the seductive "appeal to cupidity" which would "lure" him into an "improvidence" of buying. The market for the sale of gasoline at retail is a limited one and relatively inelastic. The mere fact that a premium is offered would not cause a motorist to buy more gasoline than he wants or can use. Neither is there any deception whereby the public is inveigled into buying inferior gasoline. If a motorist buys gasoline at a bargain, experience should have taught him to expect bargain quality; if he desires gasoline of a better quality, he will seek established brands, regardless of any "appeal to cupidity" offered by others. If the statute is aimed at preventing destructive price wars, then it falls short of its object. It would be perfectly proper to reduce the price any amount, so long as it is not below cost. And so long as the "sale at less than cost" provision of this statute stands, there is already one effective limit to price cutting. "In order that destructive competition by cutting prices might be eliminated, it would be necessary that some minimum price be fixed, below which a dealer may not sell gasoline."<sup>7</sup> One of the chief objections in the trading stamp cases<sup>8</sup> was the existence of the parasitic middleman, profiting from the sale of stamps to the dealers. Although suggested otherwise in the dissenting opinion, this objection is of doubtful validity in the present case. To the contention that other dealers will be forced to offer premiums or suffer the loss of business it can be answered that whenever one dealer offers a better bargain than another, either by offering better goods at the same price, or inferior goods at a cheaper price, that other will lose business unless the bargain is met. Yet it would not be contended that either practice was an unfair trade practice or

<sup>4</sup> Principal case, 287 Mich. at 515.

<sup>5</sup> Principal case, 287 Mich. at 514.

<sup>6</sup> *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342 at 365, 36 S. Ct. 370 (1916), speaking of the use of trading stamps.

<sup>7</sup> Principal case, 287 Mich. at 516.

<sup>8</sup> The earlier statutes in this field were aimed at the prohibition of the use of trading stamps. Such statutes were upheld by the United States Supreme Court under the Fourteenth Amendment in a series of three cases. *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 36 S. Ct. 370 (1916); *Tanner v. Little*, 240 U. S. 369, 36 S. Ct. 379 (1916); *Pitney v. Washington*, 240 U. S. 387, 36 S. Ct. 385 (1916). However, the great weight of authority in the state courts is that such statutes are invalid under due process. Cases are gathered in the present case, 287 Mich. at 512; 2 L. R. A. (N. S.) 588 (1906); 30 *ibid.*, 957 (1911); 49 *ibid.*, 1123 (1914); L. R. A. 1917A 433.

tended to create or perpetuate a monopoly: "any form of competition tends to take trade away from other dealers with a natural injury to their businesses. . . . Until the legislature sees fit to eliminate all competition between retail gasoline dealers, the mere fact that one dealer manages to take trade away from his rivals in business cannot be held to be a detrimental practice."<sup>9</sup> To justify the interference with private business to the extent of prohibiting what has heretofore been considered a legitimate trade practice, there should be such a public interest in the protection of public health, morals, safety and welfare as would warrant the impinging upon the private interest. The court in the present case was correct in concluding that the present statute would not serve, and was not justified by, the public interest in the prevention of monopolies, and that the giving of premiums with the sale of a commodity is a legitimate trade practice.

*Benjamin W. Franklin*

<sup>9</sup> Principal case, 287 Mich. at 517.