Fair Trade and Resale Price Maintenance in Florida

Richard Krieger Fink

Follow this and additional works at: http://repository.law.miami.edu/umlr

Recommended Citation
Richard Krieger Fink, Fair Trade and Resale Price Maintenance in Florida, 5 U. Miami L. Rev. 553 (1951)
Available at: http://repository.law.miami.edu/umlr/vol5/iss4/4
FAIR TRADE AND RESALE PRICE MAINTENANCE IN FLORIDA

RICHARD KRIEGER FINK*

1. INTRODUCTION

On April 5th, 1949, the Florida Supreme Court, in a six to one decision, held the Florida fair trade law invalid under the Florida and United States Constitutions in Liquor Stores, Inc. v. Continental Distilling Corp. Less than two months later, the Florida State Legislature amended the act in an attempt to make it meet the approval of the court and still not be shorn of its desired effect. Before examining the Liquor Stores case and the new act in detail to weigh the possibilities of the act’s survival, perhaps a short summary of the history of fair trade laws in Florida, with a special emphasis on the problem of resale price maintenance, would be appropriate.4

A. In General

Resale price maintenance is “that system of distributing trade-marked articles by which the trade-mark owner fixes the price at which his trade-marked goods are to be sold by wholesalers and retailers irrespective of their individual contractual relations with the trade-mark owner.”5 However, resale price maintenance is not necessarily limited to articles with trademarks, and has, for example, been tried on copyrighted material. The fair trade laws are limited to branded goods, but there have been attempts to expand the device.

Resale price maintenance has been favored generally by two economic classes. The producers or trade-mark owners support it to the extent that they feel that price cutting would detract from the good will of their product. It is easy to see how the confidence of the public would be undermined in, for example, a wrist watch selling for a dollar when retailers start advertising it for less. The consumer would then refuse to pay more than the advertised price; and, thus, other distributors, unable to cut their price lower because of higher fixed overhead costs, would no longer be able to handle the producer’s watch. The other group which has supported resale price maintenance has been the retailers, generally represented by their organized associations, who have seen the general harm caused by price wars and have favored price fixing to deter their price cutting competitors.7 However,

*Member of Florida Bar. LLB, Harvard.

1. Fla. Laws 1939, c. 19201.
2. 40 So.2d 371 (Fla. 1949).
3. Ibid.
5. CALLMAN, LAW OF UNFAIR COMPETITION AND TRADE-MARKS 358 (1945).
7. See notes 36 and 37 infra.
these supporters of price maintenance include less desirable bedfellows, such as those who wish to rig prices higher so as to increase their profits and the inefficient wholesaler and retailer who is carried along by artificially high prices, but could not last in a purely competitive market.

On the other side, there are groups opposing resale price maintenance. These include the consumers who benefit by lower prices, especially when based on lower costs, and the efficient distributor who by cutting distribution costs can attract customers by lower prices. These groups are supported, however, by two less commendable groups, the monopolists who try to ruin competition, and sharks who lure the buyers into their stores by loss leaders and then overcharge them on other items.

Price fixing statutes in general, and resale price maintenance, in particular, have had very rough sailing in Floridian judicial waters in recent years. These statutes seemed to fall into three separate categories: (1) those on price fixing by a board (2) statutes on price agreements for a particular business (3) fair trade acts as commonly understood, applying to all branded goods.

As an example of the first type, a 1935 statute empowering a board of barber examiners to fix minimum prices to be charged by barbers in Florida was held unconstitutional in 1936 in the case of Fulton v. Ives as a denial of equal protection and due process of law and improper restraint upon the freedom to contract. This statute was amended by the Florida Legislature in 1941 and held not unconstitutional, a year later, on the ground that the legislature had found that the services of barbers are “affected with a public interest.” However, this act, too, was declared unconstitutional in 1943 on the grounds that there was not sufficient notice given to the public of the price fixing hearings held by the Barbers’ Sanitary Commission, and that there was unlawful delegation of legislative power to the Commission. In the same year that the Fulton case had declared the barber statute invalid, a so-called “emergency” statute under which a Milk Control Board was authorized to forbid sale of milk at a price less than that fixed by the Board, or on different terms, was upheld as not a denial of due process or equal protection. This case seemed to indicate that regulation and price fixing by the legislature would be permitted if the subject were affected by a public interest. The cleaning, dyeing, pressing, and laundry industries were considered affected by a public interest, in Bon Ton Cleaners and Dyers

---

8. A discussion of the relationship between resale price maintenance and price fixing follows on pages 559-561.
10. 123 Fla. 401, 167 So. 394 (1936).
11. Fla. Laws 1941, c. 20425.
v. Cleaning, Dyeing & Pressing Board, and Miami Laundry v. Florida Dry Cleaning & Laundry Board, which cases involved statutes creating boards for the regulation of these industries. The court was also influenced by the fact that this was an emergency measure.

The subject of liquor, apparently, was not sufficiently in the public interest to be regulated, since a statute, an example of the second type, providing for fair trade contracts and minimum resale prices for intoxicating liquors was held unconstitutional in 1942. This statute had some of the elements of the first type since the fair trade contracts were to be under the supervision of the State Beverage Department. Therefore, this law seemed to remove liquor from the general fair trade law of 1939, which is discussed following. The main objection of the court seemed to be the lack of a legislative finding of necessity and that the statute was for public health, safety, morals or welfare.

Let us now shift from the boards and the limited type of statute on price agreements to the broad type to which this paper is mainly devoted. The first Florida fair trade law embracing resale price maintenance agreements for all trade-marked goods was enacted in 1937, however, this was held invalid in 1939. The ground for its invalidity was that although the statute, by its title, purported to protect the trade-mark owner and others dealing with the products by use of voluntary contracts with retailers to establish minimum resale prices, there was a "no-signors clause," a provision against violation of such contracts whether the violator "is or is not a party to such contract." This was the only ground for invalidation, and the court did not discuss any other objections to the statute. The title was subsequently amended to remove this objection. It would seem strange,
especially in the light of the intervening cases of McRae v. Robbins, supra, and Scarborough v. Webb, supra, both in 1942, that this act was not challenged in ten years. However, there is no report of any litigation by the Florida Supreme Court on this law until this statute was declared unconstitutional in the Liquor Stores case,26 in 1949. This seems especially strange for this broad law to last until 1949, since a limited price agreement law was upset in 1942 due to lack of public interest. The distinction might have been the existence of a board to fix prices in the laws upset earlier, instead of voluntary price maintenance by agreement. However, validity of this distinction can be disputed. It would seem that an unbiased government board composed of men with no axe to grind could more fairly set prices in a given industry than the members of the industry who are bound to be motivated by self-interest.

II. The Liquor Stores Case

Let us now consider the Liquor Stores case27 in some detail. The plaintiff, Continental Distilling Corporation, a foreign corporation manufacturing liquor, sold certain trade-marked whiskies to two Florida retail whiskey dealers who are not parties to this suit, under contracts28 pursuant to the Florida fair trade law,29 whereby the retailers would not resell the liquors below a price fixed by the plaintiff. The defendant, Liquor Stores, Inc., a retailer, purchased some of plaintiff's trade-marked liquors with notice of the contract; however, the defendant had not signed the contract. The plaintiff brought suit under the Florida fair trade law30 to enjoin defendants from advertising and selling the whiskies with the plaintiff's trade-mark ("Philadelphia Blended Whiskey") below the price set by the plaintiff. A motion to dismiss the bill was denied. On appeal, the Supreme Court of Florida held the act an invalid exercise of legislative police power in that it violated due process and equal protection of law31 and was an unlawful delegation of legislative authority32 under the Florida and United States Constitutions.

When Continental Distilling Corporation brought action against Liquor Stores, Inc., the old nemesis of Florida fair trade in three previous cases (Robbins v. Webb's Cut-Rate Drug Co., 153 Fla. 822, 16 So. 2d 121 [1943]; Scarborough v. Webb's Cut-Rate Drug Co., 150 Fla. 754, 8 So. 2d 913 [1942]; Bristol-Myers Co. v. Webb's Cut-Rate Drug Co., 137 Fla. 508, 188 So. 91 [1939]), the price cutting drug firm of "Webb's Cut-Rate Drug Company," or, more recently, "Webb's City," intervened as party defendant. A word should be said about the canny price-cutter, "Doc" Webb, and

26. Supra note 2.
27. Supra note 2.
28. Supra note 2, at 376-377.
29. Supra note 1.
30. Ibid.
31. Fla. Const., Declaration of Rights, §§ 1, 12.
his colorful retailing tactics in his fabulous "Webb's City", a combined drug-clothing-grocery-hardware-jewelry store, barber shop, etc. In price wars, he has sold 79c butter for 19c, $17 tires for $9.95, $4.50 paint with free paint brushes for $1.79, $2 shirts at 68c, shampoo and finger wave for 49c and large-size breakfasts, in pre-war days, for 3c. He has taken losses on these "come-on" attractions, the most famous of which was to sell 4,500 one-dollar bills at 89c and offer to buy them back at $1.35, in order to attract customers into his store to buy other profit-making articles, such as an odd lot of hard-to-move stock which he bought from a grateful wholesaler at a few cents per item and sold at more than ten times cost and still below list price. Thus, it is understandable why Webb's City's president would be a tireless enemy of Florida fair trade laws, and spend thousands of dollars in court actions and newspaper advertising attacking them.

A. Invalid Exercise of Police Power and Violation of Due Process.

The court said that this was a price fixing statute which eliminated free competition, interfered with freedom to contract and to deal with one's property, and could not be sustained under the police power unless economic conditions clearly necessitated such a measure in the public interest. Under the present economic conditions of relative prosperity, the court continued, there could be no basis on which the legislature could infringe upon constitutional liberties.

The dissent assumed throughout its opinion that the questioned legislation is reasonable and is in the interest of public safety, morals, health, welfare, etc., something which the majority refused to do. In this respect, the dissent was bolstered by the United States Supreme Court, which passed on the validity of the Illinois fair trade law, a statute very similar to the Florida statute, and said that the act was not "so arbitrary, unfair, or wanting in reason as to result in a denial of due process." It would appear that a particularly homogeneous federal system would not be the result when the same type of statute is declared to be valid as not a violation of "due process" (or, for that matter, a violation of "equal protection" or a delegation of legislative powers) under the Federal Constitution, and still be declared to violate the state constitution's "due process", (or equal protection or delegation). The Maryland Court in Goldsmith v. Mead Johnson & Co., upheld the Maryland fair trade act and based its decision on the ground that the law of the land, as used in the Declaration of Rights in the Maryland Constitution, has the same significance as "due process of law" as used in the Fourteenth Amendment to the Constitution of the United States, and the Supreme Court of the United States has held that the Fair Trade Act does not violate the due process of law clause of the Federal Constitution.  

35. 176 Md. 682, 7 A.2d 176 (1939).
36. Supra note 34.
It could reasonably be argued that it is desirous for the general welfare for the small businessman, "who has clung to the traditional American principles that he had a right to engage in business on his own account, if he desired to do so," to remain in business; that it is not healthy, economically and morally, for him to be forced out by the price cutting of larger competitors; that we prefer many individual entrepreneurs to a few large monopolies with everyone working for them as clerks; and, if we assume that the only means to protect these small businessmen is by resale price maintenance which would prevent price cutting, then this law seems to be an acceptable constitutional means of exercising the police power to protect public safety, health, welfare, morals, etc. However, we cannot assume that the only means, or, even, the most effective means, to protect small businessmen is by maintaining prices; and, therefore, it could be well argued on the other side that small businessmen, not protected by resale price maintenance, could survive by keeping on their toes and running economical and enterprising businesses, and, thus, the consumer, too, would benefit by not having to pay prices artificially rigged higher than necessary.

B. Equal Protection.

It appears that the majority's objection to this statute within the framework of equal protection follows two lines of approach. First, it believed that the trade-mark owner is receiving preference over the producer of non-marked goods. Second is that it feared that in the case where the producer is pressured into fixing his prices by the retailer, the producer and the consumer are not given equal protection vis a vis the retailer.

As to the first approach, the classification between the trade-mark owner and persons who do not own trade-marks seems to be reasonable. The trade-mark is the means by which the consumer identifies the product, and without it the producer has no good will to be protected. There is little reason for a person without a trade-mark to want to fix minimum prices since his product cannot be identified by the consumer once it leaves his hands, and the harmful effect of price wars cannot be traced to his goods. It is the brand name owner, the presence of whose label in the homes of the consumers is a constant reminder that his is a continuing relationship with that large segment of the American population which "buys by brand," who needs resale price maintenance to protect his good will from the harmful effect of price cutting and price wars. In the case of Old Dearborn Distributing Co. v. Seagram Distillers Corp., Justice Sutherland said,

As this court many times has said, the equal protection clause does not preclude the state from resorting to classification for the purpose of legislation. It only requires that the classification be reason-

39. Supra note 36, at 197.
able. . . . Enough appears already in this opinion to show the difference between trade-marked goods and others.

The court's other approach, however, is more tenable. Not all resale price maintenance is superimposed by the manufacturer to protect the good will of his trade-marked goods. Some retailers, in order to avoid the harmful results of price wars, have favored resale price maintenance despite the fact that the trade-mark owner-producers were indifferent to it, and the consumers, missing their "bargains" which result from price wars, opposed it. Thus, it can be argued that the law benefits one group, the retailers, to the definite detriment of another group, the consumers, and a possible detriment to a third, the producer; and, therefore, denies equal protection of law. Also, the law only protects some of these retailers, since there are many enterprising price cutting stores, such as Webb's City, which oppose maintenance of resale prices. However, members of other special classes, minors in their contractual relations, the insane in their criminal relations, young girls in their sexual relations, are specially protected by law because we consider it to be for the general good of society to do so. I do not mean to class grown grocers with girls or lunatics, but there may be reasons to protect retailers as a class just as there is a reason to protect those less capable of handling their own affairs. Therefore, if we also feel that our economic well-being requires small retailers, as a class, to be protected so that they can survive against the unequal competition of price cutting giants, it would not seem that this type of legislation, in protecting them, would be any more a denial of equal protection of law than would be any law protecting a specially favored class. Of course, it may be overstating the case to speak of price cutting "giants," when people like Doc Webb are certainly not giants and there are many producing giants who maintain prices.

C. Delegation of Legislative Authority.

The court assumed that the act was one of price fixing: a power which even if exercised by the legislative branch or one of its administrative agencies could have no constitutional basis without justification of public necessity; and, therefore, the same result could not be reached by delegating the power to private industries. Therefore, two questions arise: (1) Is resale price maintenance the same as price fixing? If it is not, then the statutes are merely permissive and do not involve delegation of legislative powers.

41. Testifying in favor of resale price maintenance before a House subcommittee (see note 37 supra) were leaders representing such retail associations as retail druggists, book sellers, retail grocers, chain drug stores, automobile dealers, toilet goods' dealers, tire dealers, retail hardware, retail dry goods, etc. And, in 1937, the Druggists' Association presented a draft of a uniform resale price maintenance act which was followed in many states. Wolff, 4 TRADE REG. REV. 5 (1937).
42. The possible detriment to the producer exists in the cases where producers prefer their products to be sold at the lowest possible price by retailers (and still give the retailers some profit) to increase consumer demand; but, the producers are coerced into resale price maintenance contracts by organized retailers who want a higher uniform resale price.
However, if they are price fixing, (2) Are the statutes in such a form as to violate the constitutional prohibition of delegation of legislative power?

Mr. Justice Sutherland, in the Old Dearborn case, stated that resale price maintenance is not price fixing nor a delegation of power and contains no element of compulsion, but is merely permissive of contracting. "It is clear that this section does not attempt to fix prices, nor does it delegate such power to private persons to contract with respect thereto. It contains no element of compulsion but simply legalizes their acts, leaving them free to enter into the authorized contract or not as they may see fit." This is not completely accurate. The no-signor clause makes the resale price agreed upon between a producer and distributor binding on those who deal in the product, even though the latter have not entered into any contract relating to the price that they will exact.

The argument has been made that this type of no-signor clause can be upheld as an equitable servitude on chattels. However, the mere categorizing or analogizing an instrument which effectively sets prices with equitable servitudes does not prevent the courts from looking at the effect of the instrument and treat price setting by private parties with legislative sanction the same as direct legislative price fixing. This clause is justified by the existence of the very complex merchandising systems in the United States where the producer cannot possibly know all those who are distributing his product let alone get them to sign a resale price maintenance contract. There are all sorts of ways that distributors can get the products without signing the contract, and there are many difficulties in discovering the leaks. Therefore, Justice Hobson's suggestion in the Liquor Stores case that the producer can protect himself by a refusal to sell can be answered by the fact that this is not always an effective or adequate means of protection.

One might say that if a retailer refuses to deal with the producer's goods on the producer's terms, he should refrain from dealing with them at all. The restriction is known to the prospective purchaser, and he is under no obligation to assume it; but, if with such presumptive knowledge he acquires the property, morally and legally he is presumed to have accepted the condition by his voluntary act of purchase. "Rather than interfering with the liberty of contract, the legislature has only protected the bargaining

43. Supra note 36, at 192.
45. See Fairmont Creamery v. Minnesota, 274 U.S. 1 (1927); O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251 (1931), where the statute was upheld only because the insurance business was held to be "affected with a public interest."
47. See Beech-Nut Packing Co. v. Federal Trade Comm'n, 264 Fed. 885 (2d Cir. 1920); Singer Sewing Machine v. Lang, 186 Wis. 530, 203 N.W. 339 (1925).
48. Supra note 2, at 387.
49. Ely Lilly & Co. v. Saunders, supra note 44.
power which the producer himself has attained. Hence, the statutes are not necessarily analogous to price fixing statutes."

This reasoning, of course, can be answered by the argument that one cannot long run a business preserving the liberty of refusing to buy products hamstrung by resale price maintenance contracts. He would soon find all his sources of supply gone and himself out of business.

Despite the rather convincing argument that the no-signor clause indicates some measure of compulsion, some absence of free will, and therefore a degree of delegation of legislative power to fix prices, the state courts have generally upheld fair trade laws which contained these clauses as not price fixing statutes and therefore involving no unlawful delegation of legislative power. In the case of *Max Factor v. Kunsman*, the California court, in holding that there was no price fixing involved, said, "The statute . . . does not merely prohibit price cutting in order to regulate prices, but . . . to protect the validly acquired rights of others." These rights, the court said, were property rights in the good will of the product and "valuable . . . contract rights." These courts seem to assume that the reason there is no unlawful delegation of legislative power is because there is no price fixing involved. Whether a court would concede the presence of price fixing, but would deny that this constituted unlawful delegation of power does not appear to have been considered.

Despite what the courts say about these actions not being price fixing, one has trouble being convinced. The state is not necessarily the only instrument of law making as the Austian school would have us believe. There are many schools of political thought that view this otherwise. Anarchism denies completely the value of the state. Under the theories of Duguit and Laski, with the latter's Political Pluralism, and under the laissez-faire doctrines, the state had relinquished to the individual certain "sovereign" functions of laying down the rules which govern society. So, too, can we say with fair trade law, that we have private law making which fixes prices.

**D. Differentiation Between Vertical and Horizontal Agreements.**

Justice Barns said that the public policy in Florida had always been against contracts fixing prices and restricting trade. Therefore, to hold this statute valid would be tantamount to saying that horizontal agreements and contracts fixing prices or tending to stifle competition are void under the anti-trust acts; but, vertical contracts doing the same thing are not only valid but courts will aid and enforce such contracts. He continued that

---

50. Comment, 45 YALE L.J. 672, 678 (1936).
52. 5 Cal.2d 446, 55 P.2d 177 (1936).
54. *Supra* note 2, at 380.
55. *FLA. STAT. c. 542* (1941).
56. *Supra* note 2, at 380.
this is an arbitrary classification and it is unreasonable to punish those who make horizontal agreements in restraint of trade and not those who make vertical ones. Justice Hobson, in his special concurring opinion, called the differentiation between horizontal and vertical contracts a "very technical and finespun theory."

Apparently, there is a difference between the horizontal agreement, the fixing of prices by so-called competitors along the same level so as to force the consumer to buy at a dictated price as high as the traffic can bear; and, the vertical agreement, where the price is fixed only down one particular chain from producer to wholesaler to retailer without any reference to competing chains. The vertical agreement affects only one particular marked product and does not fix the prices of competing products with different brands, although it does fix the price of the same brand in competing retail stores. When we realize that many of these agreements are imposed, not by the producer, but by association of retailers, all of whom are supposed to be in competition with each other, we realize that there is a very close relationship between horizontal price fixing, illegal under the Sherman Act and Florida Law, and vertical price fixing of the resale price maintenance type. Although most other courts have held otherwise, perhaps fair trade laws are not wholly consistent with the theory and spirit of the anti-trust laws, insofar as those laws condemn horizontal price fixing agreements. However, it seems quite proper for the legislature to differentiate. It is up to it if it wishes only to stop horizontal and to permit vertical price fixing. If the legislature wishes to make some restraints of trade lawful, the Constitution does not forbid this. The only objection that might be raised is that legislatures are influenced by the arguments of a highly organized lobby of retailers, while the unorganized consumers who elect these legislators seem to be left unheard.

E. Fair Trade Laws Acceptable Only During Depression.

Chief Justice Adams admitted that precedents from other jurisdictions would lead to an approval of the act. However, these states enacted or approved this type of legislation before they had opportunity to observe the effects of such legislation, which was conceived when there were surpluses of commodities, and a need for such a law upon the economy, when the scale of supply and demand had shifted the other way. In other words, when during depression, there is a surplus of goods over demand and price cutting would be more prevalent, a price floor is necessary; however, when demand exceeds supply, the court saw justification for price ceilings, such as those set by the O. P. A., but not for minimum price maintenance. Justice Barns also felt that fair trade laws were permissible during times of depression;

57. Supra note 2, at 387. Previous to this, on page 386, Hobson, J., makes astounding bedfellows when he says that the legislature "portrays monopolistic, if indeed they are not communistic, tendencies. . . ."
58. See note 41 supra.
59. FLA. STAT. c. 542 (1941).
60. Supra note 2, at 374.
but, he said that when there are shortages of goods there is no "free and open competition," and it is not in the public interest to enforce the Florida fair trade law on behalf of a product in which there is no competition.

It is probably true that fair trade laws are more desirable at certain periods in the economic cycle than in others. However, there is a belief that, even during inflationary periods, this type of legislation is not undesirable. The new Florida fair trade law states:

The public interest and general welfare of the State require the . . . maintenance of minimum resale prices . . . as a permanent public policy of the state, at all times, including periods of deflation or inflation. . . .

Also it seems rather unfortunate for concepts as supposedly basic as constitutional ones to shift back and forth with the vagaries of our more fickle laws of supply and demand. To declare a fair trade law constitutional in 1933, unconstitutional in 1949, and, then, perhaps, constitutional again in 1975, would seem to be giving scant respect to the Constitution which Gladstone described as "... the most wonderful work ever struck off at a given time by the brain and purpose of man."

As for Justice Barns' contention that during times of shortages, there is no free and open competition and therefore the act should not be enforced: this seems to be small reason for declaring the act unconstitutional. Assuming this to be the case, it would seem to be a much less drastic, and certainly equally effective, means, merely to have the courts only enforce the act where it finds the prerequisite of free and open competition existing, and to refuse to enforce resale price maintenance contracts and to refuse to penalize their violation in the absence of free and open competition.

F.  Good and Bad Price Cutting

We come now to the possibility that there might be good and bad price cutting, and that only the latter should be prohibited by fair trade laws. Justice Hobson indicated that a law prohibiting only "loss leader" price cutting might be less offensive. Under the National Industrial Recovery Act, price cutting "below cost" and the use of "loss leaders" were regulated.

"Loss leader" price cutting is of the type where the retailer cuts the price of an article in demand and is willing to take a loss on it so as to attract...
purchasers into his store in hopes that they will buy other articles which he sells at a profit. Price cutting below cost is similar but may be undertaken for many devious reasons, among which are the attempt to crush local competition, to control markets and distribution, etc. These types of price cutting definitely hurt the producer's established good will and undermine the public's confidence in the quality of his identified trade-marked product. The opposing view on this question is that price cutting of popular brands does not discredit the product in the eyes of the consumer, that the effect of price cutting does not hurt any real value, but just deflates the bubble of a fictitious advertised value. However, there seems to be little argument against the contention that the prohibition of "good" price cutting, based upon superior business efficiency and the elimination of luxury services, would act only to penalize the "cash and carry" consumer; higher prices than otherwise would prevail; and, it would mean a subsidy of inefficient, high cost distribution units otherwise eliminated by competition, and the stultification of lower cost distribution systems eliminating the incentive to attempt to improve their methods and pass the savings on to the consumer. The great question is whether these consequences outweigh those injuries caused by "loss leaders" and price wars; and, whether legislation can effectively differentiate between "good" and "bad" price cutting.

G. Ownership of the Trade-Mark.

In the discussion of the injury done to the producer by price cutting, he has been referred to as the "owner" of the trade-mark. However, Justice Barns, in his concurring opinion in the Liquor Stores case, indicated that once the product is sold with its trade-mark, trade-name, brand, etc., attached and part of it, the producer no longer retains what he has sold and the purchaser becomes owner of the commodity with the trade-mark: and, the purchaser is entitled to what he has bought. The question whether or not a trade-mark is property is not too important. It is an interest in substance, and the real question is how far this interest should allow the owner of the mark to control what happens to his product after it leaves his hands.

H. The Existence of an Oligopoly.

The court found that the plaintiff corporation was one of about forty subsidiary companies whose parent corporation controlled from eighty to ninety per cent of the liquor trade in the United States. Therefore, as a second ground for the decision, Chief Justice Adams said that the whiskies were not in free and open competition and therefore do not come within the terms of the statute; "... relief should be denied even though the act is not unconstitutional."

If plaintiff, as the court says, fails to make a case under the act, it

67. Haring, Retail Price Cutting 195 (1935).
68. Supra note 2, at 387.
69. Supra note 2, at 376.
70. Ibid.
seems unnecessary for the court to use this case to declare the act unconstitutional when it can dispose of the case on other grounds.\textsuperscript{71}

I. Conclusions.

In discussing the treatment of this law by the Florida Supreme Court, two questions have been paramount. First, was the 1939 law a desirable law, which ought to have been passed by the legislature? Second, was it a constitutional law, which ought to have been upheld by the court? Of course, an answer of "no" for the second question would seem to mean "no" for the first, but the reverse is not necessarily so. It would seem, from the above discussed criticism of the court's opinion, that the second question could be answered "yes," that perhaps the court was not warranted in overturning this law on constitutional grounds. However, the first question, the desirability of this law, is more difficult to answer, and, perhaps, can better be dealt with in discussing Florida's new fair trade law.

III. The New Law

Florida's new fair trade act,\textsuperscript{72} which became law without the Governor's signature on June 1st, 1949, is very similar to the old one\textsuperscript{73} declared unconstitutional in the Liquor Stores case\textsuperscript{74} with but three significant changes. These additions are: (1) a legislative "findings of fact" which was a policy declaration expressing the legislature's disfavor with the economic grounds for the Supreme Court's invalidation of the act; (2) a substantive change to lessen the possibility of monopolistic oligopolies and their satellites from qualifying as fair traders under the act; and, (3) a procedural change to assure that the new law will not encourage a suppression of competition.

A. The Policy Declaration.

In Section One of the new act, the legislature in seven paragraphs,\textsuperscript{75} stated, in essence, that small retailers cannot survive the price cutting of the larger stores; and, without resale price maintenance, the good will of the trade-mark owner would be hurt and retail commerce would be monopolized by a small group. The legislature found that "public interest and general welfare" would be best served by resale price maintenance; that predatory price cutting has been "the most potent weapon to which the great and destructive trusts have resorted..." This, the legislature concluded, adversely affects the general public whether the time be deflationary or inflationary. This legislative declaration is an attempt to answer the Supreme Court's economic policy reasons for invalidating the act; to show that the legislative intention was that such an act be effective during an upward as

\textsuperscript{71} Economy Cleaners v. Cleaning, Dyeing & Pressing Boards, 128 Fla. 408, 174 So. 829 (1937). This type of oligopoly has been held to be a violation of the Sherman Act, United States v. Frankfort Distillers, 324 U.S. 293 (1945), and the Federal Trade Commission Act, Triangle Conduit & Cable Co. v. Federal Trade Comm'n, 168 F.2d 175 (7th Cir. 1948).
\textsuperscript{72} Fla. Laws 1949, c. 25204.
\textsuperscript{73} Fla. Laws 1939, c. 19201.
\textsuperscript{74} Supra note 2.
\textsuperscript{75} Supra note 24, § 1.
well as a downward spiral in the price structure; and, a declaration that the legislature was acting within its police power. To declare its intention and economic policy seems to be quite a proper function of the legislature.

However, for the legislature to declare that the new fair trade law shall not be held unconstitutional on the ground that the legislature has exceeded its own powers would seem plainly ineffectual. Although declarations of policy can be made by both, it would seem to be the province of the judicial, and not the legislative, branch to determine whether the statutes passed by the legislature exceed the legislative powers. The original conception of judicial review was that the courts should compare the applicable clause of the constitution with a challenged statute and from a consideration of the words alone, decide whether the two were in conflict.\(^7\)

There has been a gradual movement away from this view. Chief Justice Marshall in *McCulloch v. Maryland*\(^7\) made clear that the court should also consider the condition of the nation and its needs. There developed the doctrine that “the ultimate question is not what is the meaning of the constitution, but whether the legislation is sustainable or not;”\(^7\) and so, “an act of the legislature is not . . . declared void, unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.”\(^7\)

This theory of “judicial self-abnegation,” that the court should not allow its economic or other theories to intrude so long as the legislation is in some way constitutionally sustainable, as expressed by Justice Chapman in his dissent in the *Liquor Stores* case,\(^6\) has been the basis for the courts’ allowing the legislature to change the doctrines of constitutional law in some fields,\(^8\) including economic regulation under the due process clause.

The United States Supreme Court, in upholding the National Labor Relations Act\(^8\) in *NLRB v. Jones & Laughlin*,\(^8\) was very much influenced by the legislative “findings and declaration of policy.” The same court, in *Nebbia v. New York*,\(^4\) upheld a milk price fixing statute largely on the basis of the “legislative finding; statement of policy,”\(^5\) overruling a case\(^6\) litigated before the passage of the statute. In upholding a Washington minimum wage law\(^8\) which contained a general statement that the welfare of the state demanded this protection, the court in *West Coast Hotel v.

---

76. *The Federalist*, No. 78 at 357 *et seq.* (Hallowell’s ed. 1857).
77. 4 Wheat. 316 (U.S. 1819).
80. *Supra* note 2.
83. 301 U.S. 1 (1937).
84. 291 U.S. 502 (1934).
85. N. Y. Laws 1933, c. 69, § 300.
Parrish,\textsuperscript{88} overruled two previous cases.\textsuperscript{89} Therefore, it would not be wholly inconsistent with the present trend in constitutional law for the court to bow to the economic judgment of the legislature as expressed in its “findings of fact.” However, all these cases went on other grounds as well as following the legislative findings, and it is doubtful that these alone would be sufficient to work a change of heart upon the court.

In addition, we should view each finding of fact in the light of its own merits and see whether it warrants a great deal of judicial attention. The findings in the Florida fair trade law undoubtedly drafted with the aid of the retailers’ lobby, the findings in the Taft-Hartley Act compiled by the N.A.M., the findings in the proposed Mundt-Nixon Bill, all do not necessarily represent the true state of affairs, and, perhaps, not even the opinion of the majority of the legislators, who probably did not read them, of the true state of affairs.

Also, this economic judgment and intent of the Florida Legislature seemed quite apparent before the adoption of the new act; the court ignored it in the Liquor Stores case,\textsuperscript{90} and there might be little reason for the court to accede to such judgment simply because the legislature has spelled it out. Furthermore, even the cases going the farthest with the liberal due process theory in giving the legislatures free rein have limited themselves by saying that “. . . [the] regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.”\textsuperscript{91} The Florida Supreme Court has said that the fair trade law is all these things, and much more; and, therefore, it is questionable whether these legislative “findings of fact” are sufficiently conclusive to override the habitual hostility of the Florida Supreme Court to fair trade laws and resale price maintenance.

B. The Substantive Change.

In Section 3(4), the new act adds the following:

Commodities which bear, or the labels or containers of which bear, trade marks, brands, or names or producers or distributors who shall be controlled (sic) by or through any common ownership, for the purposes of this chapter, shall be treated as a single commodity having a single producer or distributor.\textsuperscript{82}

This probably means that where a number of different brands are under the control of common ownership they shall be treated as all produced by

\textsuperscript{88} 300 U.S. 379 (1937).
\textsuperscript{89} Adkins v. Children’s Hospital, 261 U.S. 525 (1923); Morehead v. New York ex rel Tipaldo, 298 U.S. 587 (1936). The court said that it only distinguished the latter case, but its explanation “is a story that should bring blushes to those who joined in the official narration.” Powell, Some Aspects of American Constitutional Law, 53 Harv. L. Rev. 529, 549 (1940).
\textsuperscript{90} Supra note 2.
\textsuperscript{91} Nebbia v. New York, 291 U.S. 502, 539 (1934).
\textsuperscript{92} Supra note 24, § 3(4).
a single producer. Thus, the various brands of goods controlled by an oligopoly would be treated as one brand and not in competition with each other. Where the outside competition was very small, as in the Liquor Stores case where the plaintiff was a subsidiary of a family controlling at least 80% of the liquor trade, or non-existent, there would be deemed to be an absence of free and open competition, and the producers of these products born of common ownership could not qualify as fair traders under the fair trade law.

This does not seem to add too much to the old act. It had already been declared that free and open competition was a prerequisite under the act; and, without the aid of Section 3(4), the Supreme Court had already determined that the plaintiff in the Liquor Stores case could not qualify under this prerequisite. However, this standard of free and open competition, although probably constitutionally acceptable, is really much too vague to be of much use. Without a definite standard to govern him, the producer runs the risk of prosecution under the state anti-trust laws; and, the standard serves really no good purpose since a producer with a monopoly can set his own price anyway without needing the aid of a fair trade law or a resale price maintenance contract. It is true that Section 3(4) can be used as a basis for the contention that the law is not as arbitrary as the court found it to be; and, with its stated objective of measuring and retarding the growth of monopolistic and oligopolistic evils, the provision is commendable.

C. The Procedural Change.

Section 10 of the new act provides for actions by the Attorney General to restrain the enforcement of contracts in which the commodities to which said contracts pertain are not in free and open competition with commodities of the same general class, or if the contracts prevent competition. The provision is undoubtedly aimed at the contention of the court that contracts obstructing competition would be protected by the fair trade law. Undoubtedly, the legislature should have added “contracts in restraint of trade;” and, rather than making the action of the Attorney General permissive, it should have been couched in more mandatory language. This provision is probably not an unlawful delegation of legislative powers since executive or administrative officers may exercise quasi legislative functions not assigned by the constitution exclusively to a branch of the government. However, there is some strong precedent which may be construed to hold to the contrary.

93. Supra note 2.
94. Supra note 24, § 3.
95. Supra note 2, at 376.
96. Supra note 24, § 1.
98. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935). In Fulton v. Ives, 123 Fla. 401, 167 So. 394 (1936), it was held that a Barber Board was given excessive authority for price fixing when authorized by statute to change prices throughout the state, at its own discretion. It should be remembered, however, that the Attorney
This provision seems to have gone beyond most other states’ statutes. Wisconsin is a notable exception where complaints can be made to the Wisconsin Department of Agriculture and Markets if established prices are claimed to be unfair.\footnote{Wis. Stat. 1947, c. 133, § 25(7).}

This was the only procedural change in the new law. Whether this will be sufficient to satisfy the court is doubtful, particularly since there is no guaranty that the vague standards of “free and open competition”\footnote{Because Eastman Kodachrome film was held not to be in free and open competition, a cease and desist order against its price fixing was upheld, Eastman Kodak Co. v. Federal Trade Comm’n, 158 F.2d 592 (2d Cir. 1946).} will assure that the public interests will always be protected. Chief Justice Adams’ prerequisites for a constitutional “price fixing” fair trade law, the assurances of “reasonableness,” “due notice,” or “review” of a fair trader’s price fixing practices,\footnote{Supra note 2, at 375.} are not covered. However, these prerequisites were formulated by Chief Justice Adams without any argument to support the conclusion that fair trade acts must contain these as necessary elements; although, it is true that the Florida Supreme Court has said that,\footnote{Robbins v. Webb’s Cut-Rate Drug Co., 153 Fla. 822, 16 So.2d 121 (1943).} “The law must require notice and give opportunity to be heard; it is not enough that the public get it by chance. Otherwise the requirements of due process fail. . . .” Still, if the required element of “free and open competition” is present, it can be argued that there is no need for abstract standards of reasonableness and administrative or court review. Justice Hobson’s objection that we should have a definite measuring stick and not leave the power to determine the prices “to the unleashed discretion of the trade-name owner”\footnote{Supra note 2, at 387.} has not been satisfied since the Attorney General only prosecutes those obstructing competition and has no power over the actual price fixing itself.

\section*{IV. Conclusions}

From the preceding discussion, it is apparent that the new Florida fair trade laws is essentially like the old statute which was declared unconstitutional. However, since the grounds for the invalidation of the earlier act were, as outlined above, subject to criticism, there is a possibility, although perhaps not probability, of the court’s reversing itself. With the possibilities of the court’s (a) declaring the new law unconstitutional on the same basis as the invalidation of the old statute, (b) declaring the new law constitutional on the basis that it has cured the alleged evils of the old statute, or (c) declaring the new law constitutional by reversing its decision on the old statute, it seems idle practice to attempt to predict the life expectancy of the new law.

Perhaps, it is more useful to discuss what the court and legislature
should do: whether resale price maintenance is or is not desirable. The previous discussion of "good" and "bad" price fixing is relevant here. Underlying this discussion, there should be a realization that a large portion of our retail trade is not affected by these laws. As Justice Chapman said in his dissent, the law does not give arbitrary power to fix minimum resale prices "on all the necessities of life," but is restricted to branded and trade-marked products in free and open competition with similar products. This would mean the exclusion of products controlled by monopolies or oligopolies, as was the case with those goods sold by the Continental Distilling Corporation. It would also probably mean the exclusion of liquidated sales, sales of damaged goods or "seconds" (trade-mark owners usually require that their marks be removed from "seconds"), forced sales by courts, mail orders or any other type of direct distribution from the producer to the consumer, private brands which are used by large distributing chains, cases where the manufacturer keeps the title and the goods are distributed by agents, and, of course, any other case of unbranded or unmarked goods. It has been estimated that fair trade acts affect not more than ten per cent of the entire retail trade in the United States. And yet, it has also been estimated that fair trading practice costs the consuming public at least five hundred million dollars annually.

Additional provisions to the Florida fair trade law seem necessary really to make it a "fair" fair trade law. One could be the establishment of an appropriate administrative agency which would administer, and, in proper cases, enforce the new law. All proposed fair trade contracts could be first submitted to this body, and it would determine whether they comply with the statute. Additional powers of this agency could include: (1) publishing periodically notice of submitted fair trade prices and contracts; (2) holding hearings in regard to the contracts, prices, and other matters under the act; (3) allowing and disallowing each prospective fair trader's submitted prices. It might be provided that from the agency's decision on the prices and contracts, appeal could be taken to the courts under the usual procedures of administrative law.

There are certainly other substantive provisions which probably should be added to any "fair" fair trade law. The producer should be required to set his prices equally and without any favor among his retailers; and, uniform enforcement of the contracts should be guaranteed. To assure the latter, it would seem necessary to give the courts power to add as party de-
fendant any favored retailer who was breaching the resale price maintenance contract and whom the producer neglected to sue; although the producer was suing another retailer for a similar breach of the same contract. Other necessary substantive changes might include a full definition of "free and open competition" and "fair price." In addition, the treatment prescribed in Section 3(4) of the new act 109 should be avoided in the cases where adequate proof is given that the prices on the articles produced under common ownership were independently arrived at.

As indicated before, the conclusion as to the fate of resale price maintenance must ultimately rest on an attempt to weigh the conflicting interests of the consumer who wants low prices as a result of opencompetition, the retailer who does not want to risk the dangers of price wars, and the manufacturer who wants to preserve the good will of his product.

As indicated above, the arguments, pro and con, both legal and economic are rather complex and should not be oversimplified. The ideal result would seem to be a compromise, an attempt to prohibit, by a fair trade law, the type of below cost and loss leader price cutting which tends to discredit trade-marks and stifle competition; but, not that which is a natural result of efficiency, the savings as a result of which should be passed on to the consumers. This type of statute may be impossible to draft, and without effective differentiation, the cure may be worse than the disease; but, it is a norm toward which any fair trade policy should attempt to approach.

EDITOR'S NOTE: The above article is particularly pertinent in view of the recent decision of the United States Supreme Court, on May 21, 1951, which invalidated the "no-signors" provisions in state fair trade laws. Mr. Fink's article, which was written previous to the handing down of this decision, contains in it similar views to those expressed by the Supreme Court, and interesting and valuable background material for anyone desiring to analyze this recent decision.

109. Supra note 72.