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CASES NOTED

CONSTITUTIONAL LAW—FAIR TRADE ACT—A POSSIBLE TURNING POINT IN THE VALIDITY OF STATUTES AUTHORIZING PRICE FIXING AGREEMENTS

Pursuant to the Fair Trade Law of Florida,¹ action was brought by a manufacturer to enjoin the sale by a retailer of a manufacturer's *trademarked* product at less than the resale price established in a contract to which the retailer was not a party. The Act purports to validate contracts which fix the resale price of commodities sold under a trademark, brand, or name of the producer or distributor of such commodity,² and to authorize an action against any person "Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract . . . whether the person . . . is or is not a party to such contract . . ." or whether or not the particular lot of goods offered for sale is covered by such a contract.³ *Held*, the Florida Fair Trade Law is arbitrary and unreasonable and violates the right to own and enjoy property.⁴ *Liquor Stores, Inc. v. Continental Distilling Corp.*, 40 So.2d 371 (Fla. 1949).

Prior to the enactment of fair trade laws, decisions in this country manifested a divided opinion as to the validity of agreements affecting prices of commodities. Those courts upholding price fixing agreements contended they were necessary for the protection of the manufacturer;⁵ those declaring invalid such agreements contended no protection was necessary,⁶ they were injurious to the public interest⁷ and were an undue restraint on trade.⁸ The

1. FLA. STAT. § 541.01 *et seq.* (1941).

2. FLA. STAT. § 541.03 (1941).

3. FLA. STAT. § 541.07 (1941).

4. U. S. CONST. AMEND. XIV; FLA. CONST. DECLARATION OF RIGHTS, §§ 1, 12.

5. *Ford Motor Co. v. Benjamin E. Boone*, 244 Fed. 335 (C. C. A. 9th 1917); *Grogan v. Chaffee*, 156 Cal. 611, 105 Pac. 745 (1917); *Robert H. Ingersoll & Bros. v. Hohne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030 (1917); *Munter v. Eastman Kodak Co.*, 28 Cal. App. 660, 153 Pac. 737 (1915); *Fisher Flowing Mills Co. v. Swanson*, 76 Wash. 649, 137 Pac. 144 (1913); *Gorst v. Charles*, 187 Mass. 144, 72 N. E. 839 (1905).

6. *Boston Store v. American Graphophone Co.*, 246 U. S. 8 (1918); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373 (1911); *B. V. D. Co. v. Isaac*, 257 Fed. 709 (C. C. A. 6th 1919); *Ford Motor Co. v. Union Motor Sales Co.*, 244 Fed. 156 (C. C. A. 6th 1917); *United States v. Kellogg Toasted Corn Flake Co.*, 222 Fed. 725 (E. D. Mich. 1915); *Waltham Watch Co. v. Keene*, 202 Fed. 225 (S. D. N. Y. 1913), *aff'd without opinion*, 209 Fed. 1007 (C. C. A.2d 1913); *John D. Park & Sons Co. v. Hartman*, 153 Fed. 24 (C. C. A. 6th 1907); *W. T. Raleigh Medical Co. v. Walker*, 16 Ala. 234, 77 So. 70 (1917); *W. H. Hill Co. v. Gray & Worcester*, 163 Mich. 12, 127 N. W. 803 (1910).

7. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, *supra*; *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785 (1893).

8. *Boston Store v. American Graphophone Co.*, *supra*; *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, *supra*; *Ford Motor Co. v. Union Motor Sales Co.*, *supra*; *W. H. Hill Co. v. Gray & Worcester*, *supra*; *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790 (1893); *People v. Sheldon*, *supra*; *Craft v. Conoughly*, 79 Ill. 346 (1875).

latter type of case also contended that it was of no consequence that the goods were trademarked, branded, etc.⁹ A manufacturer could not attempt to control the resale price of his commodities beyond their first sale, for thereafter he had lost possession of his property by releasing it into the channels of commerce generally.¹⁰ The recourse left to the manufacturer was to "suggest" the resale price and refuse to sell his product to those who would not comply therewith.¹¹

California introduced the first Fair Trade Act in 1931. The Act served as a model, and those passed by 44 other states¹² were substantially the same. Each act authorized vertical price fixing agreements (agreements between manufacturer, wholesaler and retailer) for the purpose of fixing the resale price of the manufacturer's product, and provided that each retailer, *by merely having notice* of the resale price so agreed upon, was bound thereby *whether or not he was a party to the contract*. The act becomes "legally" operative by a single contract between a manufacturer and a lone retailer.¹³ In construing and applying these "fair trade laws," the courts have emphasized that their purpose is not so much to fix prices, but to prevent unfair competition which was detrimental to the good will established by trademarked articles.¹⁴

At first the fair trade laws were applicable only to intrastate trade.¹⁵ In keeping in step with the states, Congress, in 1937, passed what is popularly known as the Miller-Tydings Amendment¹⁶ to the Sherman Anti-trust

9. The manufacturer's trademark does not give him the rights of a patentee, but only secures him and the public from deception as to the origin and source of these goods as against similar ones on the market. The right of alienation, one of the incidents of ownership of personal property, cannot be restricted. *Singer Manufacturing Co. v. June Manufacturing Co.*, 163 U. S. 169 (1896); *Harrison v. Maynard, Maynard & Co.*, 61 Fed. 689 (C. C. A.2d 1894); *John D. Park & Sons v. Hartman*, *supra*; *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219 (1901).

10. *Motion Pictures Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502 (1917); *Bement & Sons v. National Harrow Co.*, 186 U. S. 70 (1902); *see dissent in Ely Lilly & Co. v. Saunders*, 4 S. E.2d 528 (1939).

11. *Frey & Son Inc. v. Cudahy Packing Co.*, 256 U. S. 208 (1921); *United States v. Colgate & Co.*, 250 U. S. 300 (1919); *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 224 Fed. 566 (S. D. N. Y. 1915), *aff'd*, 227 Fed. 46 (C. C. A.2d 1915); *Union Pacific Coal Co. v. United States*, 173 Fed. 737 (C. C. A. 8th 1909).

12. The only states which have not passed fair trade laws are Texas, Missouri and Vermont.

13. *Revlon Nail Enamel Corp. v. Charnley Drug Shop*, 123 N. J. Eq. 301, 137 Atl. 661 (1938); *Houbrigant Sales Corp. v. Woods Drug Store*, 123 N. J. Eq. 40, 196 Atl. 686 (1939); *Shulman, The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels*, 49 YALE L. J. 607 (1940).

14. *Old Dearborn Co. v. Seagram-Distillers Corp.*, 299 U. S. 183 (1936) ("Good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject of legislation."); *Max Factor v. Kunsman*, 5 Cal.2d 446, 55 P.2d 177 (1936), *aff'd* 299 U. S. 198 (1936); *Eastman Kodak Co. v. E. M. F. Electric Supply Co.*, 36 F. Supp. 111 (D. Mass. 1940) (selling below the price established in contracts is injurious to the good will of the owner of the trademark); *Iowa Pharmaceutical Ass'n. v. May's Drug Stores*, 229 Ia. 554, 294 N. W. 756 (1940); *Ely Lilly & Co. v. Saunders*, 216 N. C. 163, 4 S. E.2d 528 (1939).

15. NIMS, UNFAIR COMPETITION AND TRADEMARKS 983 (4th ed. 1947).

16. 50 STAT. 693 (1937), 15 U. S. C. § 1 (1946).

Act,¹⁷ which amendment permits vertical price fixing contracts if permitted by the state in which the contract is made.¹⁸ State courts split as to the validity of such acts¹⁹ until the United States Supreme Court decision rendered in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*²⁰ held such an act to be a constitutional exercise of police power. This case served as a criterion, and until the present case, there had been a uniformity of decisions upholding fair trade acts²¹ regardless of how attacked.

The holding of the present case was based on whether the legislation is within the scope of the state police power. Generally, the police power, under which fair trade laws were passed, extends to all the great public needs.²² Practices harmless in themselves may, from changed circumstances, become a source of evil or may have evil tendencies justifying restrictive legislation.²³ The Fourteenth Amendment does not interfere with a *proper* exercise of the police power, but it must be exercised so as not to invade *unreasonably*

17. 26 STAT. 209 (1890), as amended, 50 STAT. 693 (1937), 15 U. S. C. § 1 (1946).

18. "Nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor . . . when contracts are lawful . . . in any state . . . in which such resale is made. . . ." (Emphasis added.)

19. *Max Factor & Co. v. Kunsman*, 5 Cal.2d 446, 55 P.2d 177 (1936) (upholding the validity of the California Fair Trade Act). *Contra*: *Doubleday, Doran & Co. v. R. H. Macy & Co.*, 269 N. Y. 272, 199 N. E. 409 (1936), *overruled*, *Bourgeois Sales Corp. v. Dorfman*, 273 N. Y. 167, 7 N. E.2d 30 (1937).

20. 299 U. S. 183 (1936).

21. Fair Trade Acts are constitutional and not violative of the 14th Amendment. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, *supra*; *Calvert Distillers Corp. v. Stockman*, 26 F. Supp. 73 (E. D. N. Y. 1939); *Bourgeois Sales Corp. v. Dorfman*, *supra*; *Max Factor & Co. v. Kunsman*, *supra*.

Constitutionality of such acts is no longer open to question. *Calvert Distillers Corp. v. Stockman*, *supra*; *Bourgeois Sales Corp. v. Dorfman*, *supra*.

The act is complete and effective upon its enactment, and nothing further is needed to put it into operation. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, *supra*; *Ely Lilly & Co. v. Saunders*, *supra*; *Weco Products Co. v. Reed Drug Co.*, 225 Wis. 474, 274 N. W. 426 (1937).

Such an act is a proper exercise of police power when used for promotion of the general welfare. *Joseph Trimer Corp. v. McNeil*, 363 Ill. 559, 2 N. E.2d 929 (1936).

The manufacturer may single out one retailer who is cutting prices and bring action against him alone even though many others in the community are also cutting prices. *Calvert Distilling Co. v. Brandon*, 24 F. Supp. 857 (W. D. S. C. 1938). Action under these acts sounds in *tort* not contract. *Borden Co. v. Schrader*, 185 P.2d 581 (1947).

It is not a price fixing act, or a delegation of authority—but merely *permits* the designated persons to contract in respect thereto. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, *supra*; *Ely Lilly & Co. v. Saunders*, *supra*; *Waco Products Co. v. Reed Drug Co.*, *supra*; *Max Factor & Co. v. Kunsman*, *supra*.

The general principle that the legislature cannot deprive the owner of the right to fix the price at which he will resell does not apply to goods "identified" by a trademark, etc. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, *supra*.

22. *Noble State Bank v. Haskell*, 219 U. S. 104 (1911); *Canfield v. United States*, 167 U. S. 518 (1897).

23. *Rast v. Van Deman & Co.*, 240 U. S. 342 (1915); *Ward v. Ely-Walker Dry Goods Co.*, 248 Mo. 348, 154 S. W. 478 (1913). The state may declare an act or conduct invalid or unlawful which had previously been regarded as valid. *Booth v. People*, 186 Ill. 43, 57 N. E. 798 (1900), *aff'd*, 184 U. S. 425 (1902); *L. Maxcy, Inc. v. Mayo*, 103 Fla. 552, 139 So. 121 (1932).

the rights guaranteed by the Federal Constitution.²⁴ Constitutional guaranties are not immune from limitation in the interest of the public good.²⁵ But the "public good" for which legislation may be enacted is the good of *all* without recognizing favored classes.²⁶ The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.²⁷

In recognizing these fundamental principles, the court in the instant case pointed out that conditions which prompted the passage of fair trade laws are no longer existent; that the country is no longer in the midst of a depression accompanied by price wars, but that a state of relative prosperity is now prevailing. It was further pointed out that though most courts were no doubt greatly influenced by the United States Supreme Court, Florida's *first* duty was to its own constitution.

It is evidenced by the passage of fair trade laws by 45 states that the Fair Trade Act enacted by California in 1931 must have appeared to be a panacea for the price cutting and "loss-leader" problems. However, the fair trade laws and the Miller-Tydings Amendment to the Sherman Anti-trust Act are permitting by indirection precisely the evil sought to be removed by the anti-trust laws, to wit, the establishment of a uniform resale price for all goods containing trademarks, tradenames, brands, etc. to which retailers must adhere just as though the retailers themselves had formed a combination for that purpose. Statutes such as these give evidence of the ability of organized minorities to procure legislation for their own advantage and enrichment at the expense of the unorganized purchasing masses.

The present holding is contra to an almost overwhelming number of decisions upholding the validity of such fair trade legislation.²⁸ Though meeting with some adverse criticism,²⁹ the present case has been proclaimed to be a possible judicial reawakening to the classical principles of American constitutional law³⁰—the protection of the natural and inalienable rights of

24. *Louisville & Nashville Ry. Co. v. Melton*, 218 U. S. 36 (1910); *Keller v. United States*, 213 U. S. 138 (1909); *Giozza v. Tierman*, 148 U. S. 657 (1893); *Barbier v. Connally*, 113 U. S. 27 (1884) (leading case); *Borden v. State Board of Education*, 168 La. 1005, 123 So. 655 (1929); *State v. Gurry*, 121 Md. 534, 88 Atl. 546 (1913); *People v. King*, 110 N. Y. 418, 18 N. E. 245 (1888).

25. Constitutional provisions will not set aside the inherent police power of the state unless plainly required. *State v. Murphy*, 237 Ala. 332, 186 So. 487 (1939); *Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board*, 134 Fla. 1, 183 So. 759 (1938).

26. *State v. Cox*, 91 N. H. 137, 16 A.2d 508 (1940), *aff'd*, *Cox v. State*, 312 U. S. 569 (1941).

27. See *Burns Baking Co. v. Bryan*, 264 U. S. 504, 513 (1923); *Otis v. Parker*, 187 U. S. 606, 608 (1903); *Lawton v. Steele*, 152 U. S. 133, 137 (1894).

28. Fair Trade Acts substantially identical to the one involved in the present case have been upheld by the highest courts in the following states: California, Illinois, Louisiana, Maryland, Massachusetts, New Jersey, New York, North Carolina, Oregon, South Carolina, South Dakota, Washington and Wisconsin. See note 21 *supra*.

29. *Florida State Pharmaceutical Ass'n Journal*, April 1949, p. 3.

30. *Quarterly Synopsis of Florida Cases*, 3 MIAMI L. Q. 593 (1949).

the individual, not the least of which is the freedom of the market place.³¹ This may be indicative of the end of an unpopular era during which such statutes have been upheld.³²

Less than two months after the decision in the present case, the Florida Legislature enacted another Fair Trade Act.³³ This Act incorporates verbatim most of the Fair Trade Law of 1939.³⁴ However, it embodies a legislative finding of fact that permissive "... resale price maintenance of trade-marked, branded and named commodities ..." is imperative "... at all times, including periods of deflation or inflation, ..." to the general welfare of Florida and its citizens. This finding is exactly opposite to the holdings in the present case. It is submitted that, in view of the instant case, the legislative findings will be entirely inoperative.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS— RACIAL DISCRIMINATION IN HOUSING PROJECTS

Plaintiffs, Negroes, sought to enjoin the Metropolitan Life Insurance Company and its subsidiary, Stuyvesant Town Corporation, from denying to any persons because of race or color, accommodations and facilities in their housing project contending that such discrimination violated the equal protection clause of the Federal¹ and State² Constitutions. The Stuyvesant Town project was built pursuant to a contract between the City of New York, the Metropolitan Life Insurance Company, and its subsidiary, under the authority of the state Redevelopment Companies Law.³ This statute, after reciting the need for low cost housing, provides for the exercise of various governmental powers as an incentive to private redevelopment companies in effecting the clearance and rehabilitation of the slum and blighted areas of the city. *Held*, since Stuyvesant Town is a private corporation, its action in denying accommodations to Negroes is not state action, but individual action, to which the equal protection clause of the Fourteenth Amendment does not apply; the decree denying the injunction affirmed. *Dorsey v. Stuyvesant Town Corporation*, 87 N. E.2d 541 (N. Y. 1949).

31. See Holman, *Our American Heritage*, 22 FLA. L. J. 153 (1949).

32. Four times in the past six months price fixing statutes have been successfully attacked in the state courts. *Time*, October 3, 1949, p. 68.

33. Fla. Laws 1949, c. 25204.

34. See note 1 *supra*.

1. U. S. CONST. AMEND. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.")

2. N. Y. CONST. Art. I, § 11 ("No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.")

3. N. Y. McK. UNCONSOL. LAWS §§ 3401-3426 (1942), as amend. c. 234 (1943) and c. 840 (1947).