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Alcoholic Beverage Regulation and Substantive Due Process: The Supreme Court of Florida Legislates

Caroline N. Bruckel

CASE COMMENT

ALCOHOLIC BEVERAGE REGULATION AND SUBSTANTIVE DUE PROCESS: THE SUPREME COURT OF FLORIDA LEGISLATES

CAROLINE N. BRUCKEL*

Plaintiff corporation[1] filed its complaint in the Leon County Circuit Court seeking declaratory and injunctive relief, attacking the constitutionality[2] of Florida Statutes section 562.21 (1973)[3] on fourteenth amendment equal protection and substantive due process grounds. The trial court granted defendants'[4] motion to dismiss on the ground that the complaint failed to state a cause of action.[5] On direct appeal to the Supreme Court of Florida, *held,* reversed and remanded: Section 562.21, which subjects retail vendors of beer and wine to "cash only" purchases from distributors, in contrast to vendors of liquor, who are allowed to buy from distributors on ten days' credit, violates fourteenth amendment due process and equal protection requirements. *Castlewood International Corp. v. Wynne,* 294 So. 2d 321 (Fla. 1974) (*Castlewood I*).

On remand from the supreme court, the trial court was confused by the apparent applicability of Florida Statutes section 561.42 (1973),[6] Florida's general "Tied House Evil" law, which prohibits the

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*Senior Articles & Comments Editor, *University of Miami Law Review.*

1. Plaintiff is a Florida corporation doing business as "Big Daddy's Liquors and Lounges," selling wine, beer and liquor for consumption both on and off the premises.

2. [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

The statute is also alleged in the complaint to be violative of the Florida Constitution. The applicable provisions, however, are not specified, and this issue is never addressed by any court.

3. Sale of beer and wine to vendors for cash only.—All sales of malt, brewed or vinous beverages as defined in the beverage law, made by manufacturers, when distributing under a manufacturer's license, wholesalers and distributors to retail licensees must be for cash only, and cash in this instance means that delivery and payment therefor is to be a simultaneous transaction and and any maneuver, device or shift of any kind whereby credit is extended shall constitute a violation of the beverage law.

FLA. STAT. § 562.21 (1973).

4. Primary defendant was Winston Wynne, Director of Division of Beverage of the Department of Business Regulation; the other defendants were the Division of Beverage and the Department of Business Regulation. The Beer Industry of Florida, Inc. was permitted to intervene as a defendant.

5. Castlewood Int'l Corp. v. Wynne, No. 73412 (Leon Co. Cir. Ct., May 3, 1973). The trial judge found plaintiff's allegation of the statute's unconstitutionality to be without merit in light of several recent decisions in various jurisdictions approving similar "Tied House Evil" statutes, which are designed to prohibit any control by alcoholic beverage distributors and wholesalers over retail vendors. *See, e.g.,* Mayhue's Super Liquor Store, Inc. v. Meiklejohn, 426 F.2d 142 (5th Cir. 1970).

6. Tied house evil; financial aid and assitance to vendor by manufacturer or distributor prohibited; . . . exceptions.—

sale on credit by a distributor or wholesaler to a retailer of any alcoholic beverage except liquor. Although section 561.42 had been before the supreme court in *Castlewood I,* it had not been ruled unconstitutional, either wholly or in part. Since the trial court considered it possible that the operation of section 561.42 might still require the denial of credit to beer and wine vendors, notwithstanding the unconstitutionality of section 562.21, it scheduled a hearing on the mandate, requesting the parties to submit memoranda on the extent of credit allowable to retail vendors of any alcoholic beverages.[7] The outcome of the circuit court's deliberation was a final judgment and order on the mandate in which retail vendors of beer and wine remained, as before, subject to the restriction of "cash only" sales.[8]

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(1) *no licensed manufacturer, or distributor, of any of the beverages herein referred to shall have any financial interest, direcly or indirectly, in the establishment or business of any vendor licensed under the beverage law,* nor shall such licensed manufacturer or distributor assist any vendor by any gifts or loans of money or property of any description or any rebates from any such licensed manufacturer or distributor; provided, however, that this shall not apply . . . to the extension of credit, for liquors sold, made strictly in compliance with the provisions of this section.

(2) *Credit for the sale of liquors may be extended to any vendor up to but not including the tenth day after the calendar week within which such sale was made.*

. . . .

(7) *The extension or receiving of credits in violation of this section shall be considered as an arrangement for financial assistance* and shall constitute a violation of the beverage act and any maneuver, shift or device of any kind by which credit is extended contrary to the provisions of this section shall be considered a violation of the beverage act.

(8) The division may establish rules and require reports to enforce the herein established limitation upon credits and other forms of assistance. Nothing herein shall be taken to affect the provisions for cash sales of wines or beer as are provided in § 562.21 or provisions of § 563.08 but shall govern all other sales of intoxicating liquors.

FLA. STAT. § 561.42 (1973) (emphasis added).

7. As indicated in its memorandum decision, five alternatives were suggested to the court at the hearing on the mandate and in the various parties' memoranda following the hearing:

First, that Section 562.21 being void, there is no limitation on the financial or credit arrangements for the purchase of beer and wine by vendors; and that, therefore, a vendor is free to purchase on whatever terms or conditions may be open to him as a matter of fact. (It is this position opted for by plaintiff and is predicated upon considerations of substantive due process.)

Second, that though 562.21 be void, Section 561.42(1) and (7) remain valid (not having been declared unconstitutional by the Supreme Court Opinion) and these two section s require cash for sale of alcoholic beverages to vendors except, however, a ten day credit be allowed to vendors of liquor as provided by Section 561.42(2) and thus, plaintiff as a vendor of beer and wine must still pay cash for purchases. (This is the possibility opted for by The Division of Beverage.)

Third, that the requirement of cash sale being violative of due process and as beer and wine should not be treated differently from liquor that therefore, vendors of liquor are entitled to equal protection and that the effect of the opinion therefore results in 561.42(1), (2) and (7) being unconstitutional and thus there can be no limitation upon credit and financing arrangements of liquor vendors as well.

Fourth, it is suggested that 562.21 was declared unconstitutional on the basis of equal protection and that beer and wine must not be treated differently from liquor and as the Supreme Court did not find fault with the granting of ten days credit to liquor, that equal protection requires that beer and wine be declared subject to the same credit terms as set forth in Section 561.42(2).

Finally, if there can be no discrimination between beer and wine vis à vis liquor, then the effect of the opinion is to declare Section 561.42(2) unconstitutional and thus all sales to vendors of beer, wine and whiskey must be for cash.

Castlewood Int'l Corp. v. Wynne, No. 73-412, at 2-3 (Leon Co. Cir. Ct., July 29, 1974).

8. Castlewood Int'l Corp. v. Wynne, No. 73-412 (Leon Co. Cir. Ct., July 29, 1974).

Plaintiff responded by filing in the supreme court a "Petition for Constitutional Writ in Aid of Jurisdiction and/or Petition for Entry of a Decree in Accordance with Previous Mandate."[9] Virtually ignoring the defendants' objection that the court would have no jurisdiction under the writ, the supreme court granted plaintiff's petition and *held,* reversed and remanded: Retail vendors of beer and wine are entitled to the same credit period of ten days which is granted to retail vendors of liquor by section 561.42(2) since the statutory term "intoxicating liquor" includes not only distilled liquor, but also beer and wine. *Castlewood International Corp. v. Wynne,* 305 So. 2d 773 (Fla. 1974) *(Castlewood II).*[10]

Section 562.21 is integrally related to section 561.42.[11] Both are part of the general scheme of "Tied House Evil" laws common to most states.[12] Such laws are generally recognized[13] as having been enacted

> to prohibit manufacturers, wholesalers and distributors of alcoholic beverages from controlling retail outlets operated by licensed vendors through granting, withholding or extension of credit, the lending of money, investment in the business of the retailer, the making of rebates or the giving of any other financial assistance. The purpose of the act is to protect not only the public interest but also the interest of retail vendors licensed under the provisions of the act.[14]

In ascribing this laudable purpose to the legislatures, the courts have been almost unanimous in upholding the "Tied House Evil" laws, finding them in compliance with fourteenth amendment substantive due process, procedural due process and equal protection requirements.[15]

In the area of credit restrictions, the courts until *Castlewood I* were apparently in full agreement as to the validity of the statutes.[16] In *Mayhue's Super Liquor Store, Inc. v. Meiklejohn,*[17] issues substan-

9. *See* FLA. APP. R. 4.5(g) (1).

10. The two supreme court decisions together shall be cited as *Castlewood.*

11. *See* Mayhue's Super Liquor Store, Inc. v. Meiklejohn, 426 F.2d 142 (5th Cir. 1970).

12. *Id.*

13. Pickerill v. Schott, 55 So. 2d 716 (Fla. 1951), *cert. denied,* 344 U.S. 815 (1952); *accord,* Weisberg v. Taylor, 409 Ill. 384, 100 N.E.2d 748 (1951); Tom & Jerry, Inc. v. Nebraska Liquor Control Comm'n, 183 Neb. 410, 160 N.W.2d 232 (1968); Neel v. Texas Liquor Control Bd., 259 S.W.2d 312 (Tex. Civ. App. 1953); *see, e.g.,* Annot., 17 A.L.R.3d 396 (1968); *cf.* Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966).

14. Musleh v. Fulton Distrib. Co., 254 So. 2d 815, 817 (Fla. 1st Dist. 1971).

15. *But cf.* Block v. Thompson, 472 F.2d 587 (5th Cir. 1973) (denial of transfer of location); Parks v. Allen, 409 F.2d 211 (5th Cir. 1969) (denial of license); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Glicker v. Michigan Liquor Control Comm'n, 160 F.2d 96 (6th Cir. 1947) (revocation of license). It is clear at a glance that most of these cases deal with the *licensing* of alcoholic beverage vendors. Statutes vague on their faces or unsystematically and arbitrarily enforced in the granting and denial of such privileges are peculiarly vulnerable to attack on traditional grounds of procedural due process and equal protection. The paucity of such cases, however, suggests the scope of the courts' reluctance to gainsay the legislature in the field of alcoholic beverage legislation.

16. *See* Annot., 17 A.L.R.3d 396 (1968).

17. 426 F.2d 142 (5th Cir. 1970).

tially identical to those in *Castlewood I* were decided adversely to a plaintiff who attacked the Florida "Tied House Evil" laws, including the denial of credit to beer and wine vendors, on fourteenth amendment grounds. The question of statutory validity under the federal constitution was found to be of such little merit by the Fifth Circuit that it was constrained to hold the federal question too insubstantial to be decided on the merits. Not only the Fifth Circuit's own evaluation, but also the implications of the prior dismissal of the same case by the United States Supreme Court for want of jurisdiction[18] compelled this result.[19] In holding section 562.21 unconstitutional, the Supreme Court of Florida thus set itself in opposition not only to the expressed will of the Florida legislature, but also to the pronouncements of every court which had previously ruled upon the issue.

The theoretical basis for the holdings in the *Castlewood* cases is subject to an abundance of inferential difficulties since the court in *Castlewood I* seems to confuse substantive due process and equal protection. For this reason, a consideration of the case law underlying the decision in *Castlewood I* is helpful in drawing conclusions about the possible grounds for the supreme court's holding.

In *Pickerill v. Schott,*[20] which upholds the constitutionality of section 561.42, the Supreme Court of Florida cites the Illinois case of *Weisberg v. Taylor*[21] as "[o]ne of the best reasoned opinions on [the] question"[22] of credit restrictions in sales of alcoholic beverages by distributors to retail vendors. Since *Weisberg* is on point with *Castlewood I* and upholds the constitutionality of "cash only" sales to beer vendors while allowing other retail vendors a credit period, the court's disposition of the equal protection and substantive due process issues is illuminating.

The court in *Weisberg* rejects the equal protection argument, finding a rational basis for the classification since "[h]istorically, the

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18. Mayhue's Super Liquor Stores, Inc. v. Meiklejohn, 394 U.S. 319 (1969).

19. The Fifth Circuit found itself without jurisdiction to consider the merits of the case on the authority of *Ex parte* Poresky, 290 U.S. 30 (1933). Under *Poresky,* when a three-judge district court finds a substantial federal question, jurisdiction to hear the appeal on the merits is vested solely in the United States Supreme Court. In *Mayhue* the Supreme Court dismissed the appeal for want of jurisdiction. Where the federal question if found by the district court to be insubstantial,

> either because it is "obviously without merit" or because its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy,

Id. at 32, the circuit court of appeals is restricted to a finding as to the "substantiality" of the attack.

In *Mayhue,* the court found the attack to be insubstantial within the rule of *Poresky,* recognizing "[T]hat was the reading the Supreme Court must have given it." 426 F.2d at 145. The *Castlewood I* decision is all the more unexpected in the face of the findings in the *Mayhue* cases.

20. 55 So. 2d 716 (Fla. 1951).

21. 409 Ill. 384, 100 N.E.2d 748 (1951).

22. 55 So. 2d at 719.

problem of the 'tied house' was coupled more with the breweries than the distilleries . . . ."[23] The bases set forth for distinguishing between breweries and distilleries include the larger volume of any single brand of beer sold to any particular retailer and the localized nature of beer production, giving breweries greater incentive to attempt to gain control over retailers. The substantive due process argument is likewise rejected by the *Weisberg* court because it finds a reasonable basis for the legislation to be inherently obvious:

> The mere statement of the proposition that the extension of credit by a creditor to a debtor does impose on the debtor an interest, supervision, power and influence on the part of the creditor proves itself.[24]

Notwithstanding the Florida court's previous praise in *Pickerill* for the *Weisberg* decision, *Castlewood I* completely ignores *Weisberg* in discussing the validity of the "cash only" statute, section 562.21. Moreover, some of the cases which *Castlewood I* does cite as authority are of dubious value.

The Fifth Circuit case of *Mayhue v. City of Plantation*[25] is relied upon to establish the constitutional requirement that a "statutory discrimination must be based on differences that are reasonably related to the purposes of the Act."[26] However, the impact of such a requirement is surely modified by the decision of the same court in *Mayhue's Super Liquor Store, Inc. v. Meiklejohn,*[27] which fails to impose such a standard in circumstances identical to those of *Castlewood I.*

The citation to *Hornsby v. Allen*[28] in *Castlewood I* as authority for the principle of the "impermissibility of inequity in conditioning government benefits (even privileges)"[29] also presents serious problems. Not only does *Hornsby* turn on a licensing problem, which is different in its essence from the issue of credit denial in *Castlewood I*,[30] but it imposes a rule which is no longer controlling as to the effect of the twenty-first amendment on state alcoholic beverage legislation. The rationale adopted by the *Hornsby* Court is predicated upon its assertion that "the Twenty-First Amendment did not clothe the state's right to control the sale of liquor with any higher degree than it had over the sale of other commodities within the state."[31] However, in the subsequently decided case of *Parks v. Allen*[32] this statement is effec-

23. 409 Ill. at 390, 100 N.E.2d at 751.
24. 409 Ill. at 387, 100 N.E.2d at 750.
25. 375 F.2d 447 (5th Cir. 1967) (ruling invalid municipal ordinance discriminating against some Sunday sales).
26. 294 So. 2d at 324.
27. 426 F.2d 142 (5th Cir. 1970).
28. 326 F.2d 605 (5th Cir. 1964).
29. 294 So. 2d at 324.
30. *See* note 15 *supra.*
31. 326 F.2d at 609, *citing* Brown v. Jatros, 55 F. Supp. 542, 544 (E.D. Mich. 1944).
32. 409 F.2d 210 (5th Cir. 1969).

tively nullified by the statement of the same court that "[t]he Twenty-First Amendment confers upon the states broad regulatory power over the liquor traffic within their territories."[33] Cases decided after *Parks* have adhered to the rule of that case.[34] Moreover, even in cases in which *Hornsby*-type rationale was applied, courts required an exceptionally complete record regarding the operation and effect of an alcoholic beverage control statute before rendering any finding of unconstitutionality under the fourteenth amendment.[35]

The language of the holding in *Castlewood I* indicates that the decision turns primarily on traditional equal protection analysis. The court finds "a patent invidious discrimination to . . . *retail vendors of beer and wine,*"[36] both vertically within the industry and horizontally in relation to other kinds of merchants. However, the court's observations that "restrictions must be rationally related to the purpose in issue"[37] and that "[s]ingling out one vendor of an intoxicating beverage, as opposed to another, does not constitutionally serve or satisfy this purpose"[38] are more difficult to categorize as being based on one clause or another of the Fourteenth amendment. The court's holding indicates that the *classification itself,* and not the denial of credit, is unconstitutional in its failure to relate reasonably to the interest of the legislature in the health, safety or general welfare of the public. This constitutes a confusing merging of the due process and equal protection clauses; in effect the language represents a substantive due process issue couched in equal protection terms.[39]

That substantive due process plays a large part in the holding of *Castlewood I* becomes even more apparent in view of the court's adoption of certain of the assertions in the plaintiff's complaint:

> In our review we cannot ignore the commanding constitu-

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33. *Id.* at 211.

34. *Accord,* Block v. Thompson, 472 F.2d 587 (5th Cir. 1973); Fletcher v. Paige, 220 P.2d 484 (Mont. 1950); *see* Glicker v. Michigan Liquor Control Comm'n, 160 F.2d 96 (6th Cir. 1947); *cf.* California v. LaRue, 409 U.S. 109 (1972); Flemming v. Nestor, 363 U.S. 603 (1960); 27 U. MIAMI L. REV. 509 (1973).

35. Block v. Thompson, 472 F.2d 587 (5th Cir. 1973); Parks v. Allen, 409 F.2d 210 (5th Cir. 1969). Interestingly, the court in *Castlewood I* cites *Block,* yet holds section 562.21 unconstitutional on the basis of an incredibly meager record.

36. 294 So. 2d at 324 (emphasis in original).

37. *Id.*

38. *Id.*

39. Admittedly, since Ferguson v. Scrupa, 372 U.S. 726 (1963), the United States Supreme Court has been reluctant to base its holdings expressly on substantive due process. This has led in some instances to an apparent incorporation into equal protection language of the essential doctrine of substantive due process. *Accord,* Tribe, *Foreward: Toward a Model of Roles in the Due Process of Life and Law,* 87 HARV. L. REV. 1 (1973); *see* Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); *cf., e.g.,* San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1 (1973).

The decisions cited, however, deal with personal rights, and the apparent trend of the Supreme Court is to incorporate substantive due process standards into the equal protection limitation on state legislation only where fundamental personal rights are at issue.

> tional *standards*[40] asserted by the plaintiff, in support of its position, as the proper criteria surrounding the validity or invalidity of the statute in question.[41]

The first "standard" cited by the court is the classic "rational basis" test for a non-suspect classification under the equal protection clause;[42] the second is an openly delineated attack on substantive due process grounds,[43] unencumbered by any of the ambiguity of phraseology inherent in the court's actual holding. Since the court quotes at length the plaintiff's "standards" as the "proper criteria" for evaluating the validity of the statute, it is a reasonable inference that substantive due process, as well as equal protection, furnishes a basis for the holding in *Castlewood I*.

It is noteworthy, moreover, that the court incorporates into its substantive due process consideration a passage from Representative Bill Andrews' report[44] to the Florida House of Representatives. Since the report was apparently issued in connection with a House Bill on alcoholic beverage regulation which died in committee,[45] it is of doubtful effect as reliable, or even persuasive, evidence to support a substantive due process attack. The report criticizes credit restrictions on sales of alcoholic beverages as resulting "in enormous benefit to the wholesale beer distributor" by providing ready cash for payment of taxes as well as for working capital. The validity of this argument is questionable according to some economic theories, considering the overall availability of credit to distributors as well to retail vendors. The restrictions seem simply to shift the burden of obtaining credit from distributor to retail vendor and, arguably, to shift the benefit of supplying credit from distributors to banks.[46] At any rate, there is

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40. It is apparent here that the court's opinion is grounded on more than the *sole* standard of the equal protection clause.

41. 294 So. 2d at 323 (emphasis added).

42. The allegation quoted in the decision from plaintiff's "prayer," reads:

> (a) There is no rational basis for the difference in treatment regarding the proscription of credit sales to the class of retail vendors of beer and wine, as contrasted to (1) retail vendors of hard liquor; (2) retail vendors in other industries; or (3) other commercial entities in the liquor industry (*e.g.* brewery manufacturers dealing with distributors). This baseless discrimination between classes deprives Plaintiff as a member of the class of retail vendors of beer and wine of its right to equal protection of the laws.

Id. at 322-23.

43 (b) There is no rational basis in terms of the evils designed to be prevented by the statute—temperance and anti-monopoly—for the prescription of cash only purchases imposed by F.S. § 562.21, F.S.A. This lack of reasonable relationship between the "evils" and the legislative regulation establishes a denial of *substantive due process* of the laws.

Id. at 323 (emphasis added).

44. Fla. House Comm. on Business Regulation, Report on the History of Florida Alcoholic Beverage Legislation, Reg. Sess., 1973, *quoted at* 294 So. 2d 323.

45. H. Bill 141, Reg. Sess., 1973.

46. That the existence or abolition of such credit restrictions probably makes no difference to the consumer is the opinion of Henry G. Manne, Professor of Law and Director, Center for the Study of Law and Economics, University of Miami School of Law. *See generally* J. Ferguson,

little question that the legislature might reasonably believe that "cash only" sales could contribute to the public welfare. Since even the strictest standard of substantive due process does not require proof of the absolute efficacy of the statute in relieving the ills addressed, vague or unreliable allegations of its ineffectuality should not contribute to a finding of invalidity.

The court's confusion of substantive due process and equal protection is primarily of academic interest in an analysis of the *Castlewood I* decision by itself. However, since the implications of that decision have a crucial effect on the plaintiff's rights under the still-constitutional section 561.42, the theoretical foundation for the first supreme court decision is obviously critical.

The ambiguity of reasoning in *Castlewood I* contributed significantly to the trial court's confusion after the mandate in its attempt to determine the proper credit provision applicable to retail vendors of beer and wine.[47] Since the express holding in *Castlewood I* is limited to ruling section 562.21 invalid, the trial court was forced to reach its conclusion on the mandate by considering the apparent intent of the supreme court as revealed in the court's reasoning in *Castlewood I*.

Since plaintiff's prayer was for a declaration of the unconstitutionality of section 562.21 and for *injunctive* relief to prevent the future enforcement of "cash only" sales, it may be surmised that the supreme court's intention in allowing plaintiff to prevail was to extend to vendors of beer and wine the same credit period already allowed other retail vendors in section 561.42. After the decision in *Castlewood II* it is immediately apparent that this was, in fact, what the court intended to be the result of *Castlewood I*, especially since the court took the case the second time under a constitutional writ in aid of jurisdiction[48] expressly in order to correct the trial court's misapprehension.

Analysis of Interstate Difference in Retail Liquor Prices: Collusion and State Regulation (Univ. of Rochester Graduate School of Management, Working Paper Series No. 7419, June, 1974.)

47. *See* note 7 *supra*.

48. A tangential issue in *Castlewood II* is the jurisdiction of the court under the writ. Contrary to the insistence of counsel for defendant-intervenor, the authority of the Supreme Court of Florida to issue writs is not confined to the issuance of writs in aid of jurisdiction already acquired by appeal, but extends to those cases which are within its appellate jurisdiction, although no appeal has been taken. Couse v. Canal Authority, 209 So. 2d 865 (Fla. 1968), *overruling* State *ex rel.* Watson v. Lee, 150 Fla. 496, 8 So. 2d 19 (1942), insofar as *Watson* holds that authority in the supreme court to issue writs may not be invoked until jurisdiction is acquired over the cause by means of independent appellate proceedings.

But jurisdiction remains in the supreme court after a mandate only until the expiration of the term in which that court's judgment was entered. The court, during that interval, may recall its mandate and re-assume jurisdiction during that term despite denial of rehearing in the interim. Chapman v. St. Stephen's Protestant Episcopal Church, 105 Fla. 683, 136 So. 238 (1931) *motion to recall mandate granted,* 105 Fla. 694, 138 So. 630, *rehearing granted,* 105 Fla. 717, 139 So. 188, *Modified,* 105 Fla. 717, 145 So. 757 (1932).

The term of the supreme court is provided in FLA. STAT. § 25.051 (1973): "The supreme court shall hold 2 terms in each year, . . . commencing respectively on the first day of January and July . . . ." Since the supreme court's original order in *Castlewood* was issued on April 17,

Nevertheless, after *Castlewood I* the intent of the supreme court was obfuscated to some degree by its apparent reliance on equal protection as the *sole* ground for its holding. Despite the court's reference to substantive due process in the body of its opinion, all parties except the plaintiff at the hearing on the mandate presented their arguments as if the result were dependent exclusively on the equal protection clause. Granting the trial court's understandable misapprehension in omitting substantive due process from its consideration, the decision reached by the circuit judge is nonetheless puzzling in its failure to take into account even the equal protection clause. The action of the trial court in centering its second opinion on the remaining constitutionality of section 561.42[49] had the anomalous effect of rendering the plaintiff's substantive rights unchanged despite the supreme court's decision in *Castlewood I*.

A result entirely different from the denial of credit to beer and wine vendors and its retention with respect to liquor vendors would have been forthcoming in the trial court if any of the constitutional grounds for the *Castlewood I* decision had been taken into account. Assuming the trial judge had perceived equal protection as the *exclusive* legitimate basis for the supreme court's opinion, his decision logically should have been to disallow credit to *any* retail vendor of any type of alcoholic beverage. This result would have been necessary because, under the supreme court's decision that the statutory classification is invalid, beer and wine vendors must be subject to equal treatment with liquor vendors as to credit restrictions. Whether the equal treatment should be "cash only" for all or ten days credit for all depends on which alternative would do the least violence to section 561.42. Since the overall purpose of the "Tied House Evil" law is to prohibit financial assistance of any kind from distributor to retailer, the general rule of section 561.42 is to prohibit, among other forms of financial assistance, *any* extension of credit.[50] That the withholding of credit was considered by the legislature to be a critical element in its

and the order of the circuit court from which petition was taken came down July 29, it is clear that no longer was jurisdiction vested in the supreme court independent of the usual constitutional jurisdiction by way of appeal.

Even under the broad rule in *Couse,* it is doubtful whether jurisdiction was vested by virtue of the writ, since there were no collateral issues, the consideration or preservation of which was dependent on the supreme court's jurisdiction over the point at issue.

Nevertheless, the supreme court's interpretation of its jurisdictional power pursuant to FLA. CONST. art. V, § 3(b), and FLA. APP. R. 4.5(g) (1) (constitutional writs in aid of jurisdiction) is apparently being expanded. *See* Dickenson v. Stone, 251 So. 2d 268, 273 (Fla. 1971) (cites *Couse*); Mize v. County of Seminole, 229 So. 2d 841 (Fla. 1969); Merrill v. Dade County Canvassing Bd., 300 So. 2d 28 (Fla. 3d Dist. 1974). *Mize* seems to illustrate the usual case where the writ is used to avoid frustrating existing exclusive jurisdiction over another issue; use of the writ unaccompanied by any other jurisdiction, as in *Castlewood II* is unusual.

The only viable theory to support the court's assertion of jurisdiction by virtue of the writ in *Castlewood* is that the court accepted the writ in lieu of an appeal. This possibility, however, was not argued by plaintiff, nor alluded to by the court.

49. See the second alternative which is stated in note 7 *supra*.

50. FLA. STAT. §§ 561.42(1), (7) (1973). *See* note 6 *supra*.

regulation of alcoholic beverage distribution was perceived by the Supreme Court of Florida itself in *Pickerill v. Schott*:[51]

> The manufacturers, wholesalers or distributors could exercise control by the granting or withholding of credit to retailers just as effectively as they could by the actual lending of money to the retailers or the investment of money in the retailers' business. The calling of loans, the extension or the granting of credit may be just as powerful in exercising control as the actual ownership of a controlling interest in a retail business, or the lending of money to establish or operate such business.

In attempting to reach a resolution of the plaintiff's rights under the equal protection argument, it is thus important to remember that the ten-day credit provision allowed in section 561.42(2) is an *exception* to the complete prohibition against credit extension contained in sections 561.42(1) and (7). Since an equal protection attack poses a requirement only of equality, the only sensible act would be to eliminate the exception of ten days' credit, thereby giving full effect to the general rule of no credit. Not only would this result do the least violence to the general legislative intent expressed in the "Tied House Evil" law, but it would do less damage to section 561.42, invalidating only one subsection rather than affecting both subsections (1) and (7). Moreover, the legislature, if it wished, would then be free to provide a reasonable credit period for all retail vendors of alcoholic beverage, unhampered by any specific credit allowance granted by a court.

Had the trial court perceived its deliberations to be governed not only by equal protection, but also by substantive due process, the result could not have been "cash only" sales for beer and wine. Under the equal protection clause, beer and wine vendors must be given the same credit limitation accorded liquor vendors after *Castlewood I*. The rights of liquor vendors were unaffected by the *Castlewood I* decision; they remained subject to a ten-day credit limitation under section 561.42(2). The substantive operation of the due process clause, under the plaintiff's reasoning as quoted by the supreme court, would eliminate "cash only" sales for beer and wine vendors since not only the classification itself, but the *denial of credit* would be unconstitutionally unreasonable. Therefore, had the trial court used both substantive due process and equal protection rationale, the only possible decision would have been an allowance of ten days' credit for all retail vendors.

This result is obviously what the supreme court intended after

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51. 55 So. 2d 716, 719 (Fla. 1951). The phraseology of the holding in *Castlewood I* avoids any overt attack on the reasonable relationship of the *denial of credit* to the public welfare, attacking instead the *creation of the classification* of beer and wine vendors as lacking any reasonable relationship to the purpose in mind. Thus, ostensible harmony with *Pickerill* is preserved.

Castlewood I; the trial court's failure to enter such an order furnished the basis for the court's second consideration in *Castlewood II*. Since the decision in this second case is meant to resolve "the trial judge's perplexity, on remand, in deciding the resolution of the method of payment by a vendor of beer and wine, i.e. cash on delivery, wide open credit or ten-day credit arrangements,"[52] it may reasonably be presumed that the constitutional reasoning under the fourteenth amendment set forth in *Castlewood I* also applies to the decision in *Castlewood II*. Thus, if the substantive due process and equal protection clauses of the fourteenth amendment furnish the basis for the first decision, they must also underlie the second opinion. The supreme court says nothing in *Castlewood II* to negate this inference.

Nevertheless, in an attempt, perhaps, to furnish an alternative rationale for the extension of the ten-day credit provision in section 561.42(2) to retail vendors of beer and wine, the court in *Castlewood II* represents its decision as turning upon the definition of "intoxicating liquor" as used in the Liquors and Beverage law. "Intoxicating liquor" is currently defined in Florida Statutes section 561.01(5) (1973) in the following manner: " 'Intoxicating beverage' and 'intoxicating liquor' mean only those alcoholic beverages containing more than three and two tenths per cent of alcohol by weight." After tracing the historical development of the term "intoxicating liquor," the *Castlewood II* court indicates that beer and wine are included in the term "intoxicating liquor."[53] Since section 561.42(2) allows ten days' credit "for the sale of *liquors*,"[54] the supreme court concludes that, absent the constitutionally impermissible denial of such credit to beer and wine vendors under section 562.21, beer and wine automatically fall within the exception of subsection (2) and are thus entitled to a ten-day credit allowance.

While this logic may seem reasonable at first glance, it fails to stand up to more thorough analysis. Section 561.01(5) does not define "liquors" as used in section 561.42(2), but defines *two* terms, "intoxicating liquor" and "intoxicating beverage"; "liquor" containing more than 3.2% alcohol is simply one of three categories of beverage included in either of those terms. Rather, the definition of the term "liquor" is provided in the part of the Liquors and Beverage law devoted exclusively to the regulation of *liquor* vendors: "The words 'liquor' or 'distilled spirits' mean all spirituous beverages created by distillation and by mixture of distilled beverages by what is commonly

52. 305 So. 2d at 774.

53. The court traced the history of the laws regulating the sale of alcoholic beverages from their enactment in 1933. The high point of the court's historical development seems to be the statutory definition of "intoxicating liquor" which was enacted in 1943: "The term 'intoxicating beverage' and the term 'intoxicating liquor' shall include only those liquors, wines and beers containing more than three and two-tenths per cent of alcohol by weight." FLA. STAT. § 561.01 (1943).

54. Emphasis added.

termed 'blending.' "[55] Since beer and wine are not distilled, but brewed and fermented, they are not "liquors."[56]

Moreover, the "Tied House Evil" law is designed to address types of *vendors,* not types of beverages; and typically throughout the Liquors and Beverage law, types of vendors are treated differently.

Finally, it should be noted that the definitional grounds involving the term "intoxicating liquor" could not have been a basis for the *Castlewood I* decision since the approach adopted by the court in *Castlewood II* was not detailed in the pleadings of any of the parties until a brief was filed by a new amicus curiae[57] just prior to the supreme court's decision in *Castlewood II.*

Rejecting the definitional rationale for the decision in *Castlewood II* as ill founded, it might still be considered possible that a reasonable hypothesis to sustain the two *Castlewood* decisions could be found in the fourteenth amendment standards set forth in *Castlewood I.*

However, the equal protection argument is particularly weak in its insistence that there be a rational relationship between the legislation and the *"purpose in issue."*[58] In *Flemming v. Nestor*[59] the United States Supreme Court observes that by a particular mode of reasoning, the legislation at issue might be found not to violate Due Process limitations, and thus

> it is, of course, constitutionally irrelevent whether this reasoning in fact underlay the legislative decision, as it is irrelevant that the section does not extend to all to whom the postulated rationale might in logic apply.

Moreover, considering the United States Supreme Court's apparent appraisal of the constitutional attack in *Mayhue* as lacking in merit or as already fully decided in other Supreme Court cases,[60] the Supreme Court of Florida seems to have given too much weight to arguments based on insubstantial questions of federal constitutionality, since the issues presented in *Castlewood I* are identical to those in *Mayhue.*

The court's decisions are all the more susceptible to attack since the apparent, though obscured, basis for the holdings in both *Castlewood* decisions is to a great degree, substantive due process. It is clear that the substantive due process standard may not legitimately be applied in any case involving state legislative regulation of alcoholic beverage sales,[61] although it has occasionally been suggested.[62]

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55. FLA. STAT. § 565.01 (1973).

56. Beer is defined in FLA. STAT. § 563.01 (1973) and wine in FLA. STAT. § 564.01 (1973).

57. Representing Southern Wine & Spirits, Inc., American Distributors, Inc., Carbo, Inc., and West Florida Liquor Distributors, Inc.

58. 294 So. 2d at 324 (emphasis added).

59. 363 U.S. 603, 612 (1960) (5th amendment case).

60. *See* note 19 *supra.*

61. Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 39 (1966).

62. Parks v. Allen, 409 F.2d 210 (5th Cir. 1969). The point is made in reliance upon Louis K. Liggett Co. v. Galdridge, 278 U.S. 105 (1928), which has since been overruled in North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

The unwarranted extension of this standard into the area of alcoholic beverage regulation by the court in *Castlewood* is unfortunate because it poses an implicit threat to future legislative action in this field. Since the overwhelming presumption of constitutional validity given to all state alcoholic beverage legislation by the twenty-first amendment proves insufficient to deter the supreme court from a foray into that special area of state regulation, the mantle of substantive due process, however disguised, may provide sufficient means to enter into any *other* field of economic legislation. At present, the lower courts in Florida seem reluctant to intrude further into the legislative scheme, even in subsequent proceedings between the same parties.[63] Legislative attempts to deal with the *Castlewood* mandate have so far been fruitless.[64]

Hopefully the *Castlewood* cases are an anomaly. A continued or extended imposition of substantive due process standards by the Supreme Court of Florida creates a significant obstacle to the fruition of legislative intent. Moreover, such a policy might provide a fertile source of encouragement for future litigation by parties asserting insubstantial constitutional objections to any legislation.

63. *See* Castlewood Int'l Corp. v. Ashley, No. 73-412 (Leon Co. Cir. Ct., Mar. 20, 1975) (denial of motion for contempt in suit by Castlewood against successor Director of Division of Beverage and others; alleged contempt in de facto price increase for beer sold to plaintiff on credit). The court refuses to insist that distributors sell beer at the same price to cash and credit customers.

64. In the Florida legislature, section 562.21 was reintroduced on May 17, 1974, as House Bill 4139, fully armed with Supreme Court cases and legislative history to avoid a repeat of *Castlewood*. The bill, however, died on the House calendar.