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Statutes -- Florida Fair Trade Act -- Unconstitutionality

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after they have been in existence 21 years. This statute attempts to take away from reverter holders a property right to which they are, by valid contract, lawfully entitled. Therefore, unless this statute comes within some exception to the general prohibition against impairment of obligations of contract, the Florida statute is unconstitutional as applied to the reverter right holders in this case, and those similarly situated.

Those cases which have held that a state, by legislation, may impair obligations of contracts, have so held only when that legislation was a valid exercise of state police powers. The Florida Legislature based its justification for the 1951 statute mainly on the ground that reverter rights, unlimited in duration, make the title to land unmarketable, and this has the effect of retarding the growth of the State. Since reverter rights of this type do make titles unmarketable, and it is generally conceded that state police powers embrace the state's economic welfare, it is conceivable that this statute could have been upheld as constitutional. However, courts have refused to uphold legislation which takes land, or any interest therein, from one person and gives it to another purely for private use. Therefore, the 1951 statute is unconstitutional as applied to reverter clauses that were in existence when the statute was passed.

The decision in this case left some questions unanswered. Did the court, in effect, place a new interpretation on the Murphy Act, or was it held inapplicable? The Florida Supreme Court has previously held that a tax title, under this act, vests fee simple title in the State and that the act is constitutional. Had the majority opinion been more explicit on these questions, future litigation concerning these problems might be greatly minimized.

Howard Barwick.

STATUTES—FLORIDA FAIR TRADE ACT—UNCONSTITUTIONALITY

Plaintiff, a manufacturer, commenced an action against the defendants, attempting to enforce the Florida Fair Trade Act. From a judgment dismissing its complaint, plaintiff appealed. Held, the particular provision of the Fair Trade Act sought to be enforced (i.e., the non-signer clause)
is unconstitutional and void. *Miles Laboratories, Inc. v. Eckerd*, 73 So.2d 680 (Fla. 1954).

This present case is but the culmination of a series of decisions in which the Florida Supreme Court has expressed its disapproval of the underlying philosophy of price fixing statutes. (A good example is *State ex rel, Fulton v. Ives* declaring invalid a statute fixing minimum prices for barber services which was passed during the great depression when, presumably, the strongest case could have been made in favor of the law). That the Fair Trade Act is, in fact, a price fixing statute has been affirmed by the court after an examination of the law’s non-signer provision, which reads, “Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this chapter, *whether the person so advertising, offering for sale or selling is or is not a party to such contract . . .* is unfair competition.” (Italics supplied).

There has been lively litigation and legislation on the Federal level over similar provisions in various Fair Trade Acts throughout the country and, for this reason, United States, as well as Florida, statutes and decisions assumed a position of importance in the present case.

The Florida Supreme Court encountered the Fair Trade law in 1939 and 1942 and on both occasions managed to invalidate it on technical grounds without actually declaring the substance of the act unconstitutional. Such a process of letting the law live on borrowed time could not, however, be continued indefinitely, and in 1949, with the leading case of *Liquor Store, Inc. v. Continental Distilling Corp.*, the non-signer clause contained in the 1939 act was struck down as violative of the constitution, it being held that the act served “a private rather than a public purpose.” Almost immediately the legislature amended the law. Legislative findings of fact were annexed declaring, in conclusion, that the law was enacted as “an exercise of the police power to serve the general welfare.” A new provision was added, reading, “If, after investigation, the attorney general deems that any contract authorized by the provisions of this chapter prevents competition . . . he may bring an action . . . to restrain the performance or enforcement of . . . such contract.”

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1. 123 Fla. 401, 167 So. 394 (1936).
3. *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So.2d 371, 375 (Fla. 1949). (“... this statute is, in fact, a price fixing statute.”)
6. 1001,.2d 371 (Fla. 1949).
Equally important developments had taken place on the Federal level. During the 1930’s Congress passed the Millar-Tydings Act,\textsuperscript{13} which purported to prevent fair trade agreements arising under state law from being invalidated by the Sherman Anti-Trust Act.\textsuperscript{14} Some years later, on May 21, 1951, the United States Supreme Court, in \textsc{Schwegmann Bros. v. Calvert Distillers Corp.},\textsuperscript{15} held that the Millar-Tydings Act applied only to contracts actually signed and did not prevent enforcement of the Sherman Act against non-signers under Fair Trade Acts.

Therefore, in September, 1951, when the Florida Supreme Court was for the first time confronted with the Fair Trade Act as amended, it could, and did, hold the non-signer clause inoperative under federal law, on authority of the \textsc{Schwegmann} case, without finding it necessary "to decide the question of the effect which this court should give" to the legislature's amendments.\textsuperscript{16}

Congress, in 1952, passed the McGuire Act\textsuperscript{17} which cured the defects of the Miller-Tydings Act and overthrew the legal effect of the \textsc{Schwegmann} case. Consequently, when the present case arose, the court was, for the first time, forced to consider directly not only the effect of the fair trade amendments, but of the McGuire Act, on the constitutionality of the law. However, in the decision it was pointed out that the McGuire Act, while pre-eminent in its proper sphere, cannot operate to influence the Florida Supreme Court’s interpretation of its own state’s constitution. “The decisions of this Court interpreting the Constitution of Florida are supreme and will not be overthrown by act of Congress.” Neither the legislative findings of facts nor the delegation of power to the attorney general were held to have remedied “the real vice of the non-signer clause,” which was conceived to be lack of the “yardstick for protection of the consuming public,” the “yardstick” being defined as “our traditional concepts of free competition.” Thus, it was once again declared that, “The non-signer clause must fall as an invalid use of the police power.”

What, then, is the present state of the law in Florida regarding this most important topic? Certainly, the non-signer clause, which is the \textit{sine qua non} of the Fair Trade Act, has been rendered entirely inoperative.\textsuperscript{18} A manufacturer, to effectively set minimum limits on the retail prices of his products, must now sign a fair trade contract with every retailer in the state who handles those products, an almost impossible undertaking. Signing such agreements with some or most of the retailers would do no good, since even a few of them able to undercut the others could

\textsuperscript{14} 26 STAT. 209 (1890), 15 U. S. C. § 1-7 (1952).
\textsuperscript{15} 341 U. S. 384 (1951).
\textsuperscript{16} Seagram Distillers Corp. v. Ben Greene, Inc., 54 So. 2d 235, 236 (1951).
\textsuperscript{18} Miles Laboratories, Inc. v. Eckerd, 73 So.2d 680 (Fla. 1954); Liquor Store, Inc. v. Continental Distilling Corp., 40 So.2d 371 (Fla. 1949).
eventually destroy the whole minimum price structure. And, since the Fair Trade Act applies solely to commodities “in free and open competition with commodities of the same general class,” the retailer only on condition that he sign a minimum price contract would be equally ineffective. He could simply refuse and buy the same product from a rival producer. Neither could all producers combine together to force minimum price contracts on the retailers, for this would constitute a “horizontal” agreement in restraint of trade and would subject them to the penalties of the anti-trust laws.

And, as a matter of fact, the Florida Supreme Court has indicated, without ever having had occasion to decide the question, that it might consider even voluntary fair trade agreements invalid, as representing a denial of the principle that “all shall stand equal before the law.”

Assuredly therefore, with such a solid array of judicial precedent and opinion mitigating against it, the Florida Fair Trade Act is, for all practical purposes, no longer of any effect in this state.

David Edward Emanuel.

TAXATION—REFUNDS—LIMITATIONS OF ACTIONS

Plaintiff brought an original mandamus proceeding to recover use taxes paid under a Florida statute which subsequently was judicially determined to be unconstitutional. Plaintiff bases his right to recovery on another statute which authorizes the comptroller to make such a refund ”... if the claim be filed within one year after the right to such refund shall have accrued ...” This action was begun less than one year after the original statute was declared unconstitutional, and more than two years after the last payment of the tax. Held, that the right to refund accrued at time of payment of taxes, not at the time the statute was determined to be invalid; and the refund claim, not having been filed within one year from such accrual, was barred. State ex rel. Victor Chemical Works v. Gay, Comptroller, 74 So.2d 560 (Fla. 1954).

One of the most controversial subjects in the field of taxation is that of tax refunds. About the only point upon which most courts agree is that there can be no recovery for illegal taxes voluntarily paid, in the

19. FLA. STAT. § 541.03(1) (1953).
20. Jayne v. Loder, 149 Fed. 21 (3rd Cir. 1906).
1. FLA. LAWS 1949, c. 26319.
2. Thompson v. Intercounty Tel. & Tel. Co., 62 So.2d 16 (Fla. 1952).
3. FLA. STAT. § 215.26 (1943).