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COMMENT

THE FLORIDA FAIR TRADE ACT CASE

MANUEL HARNIK*

Judiciary and Legislature came to grips when the Florida Supreme Court in *Liquor Store Inc. v. Continental Distilling Corp.*¹ declared the State Fair Trade Act of 1939² to be unconstitutional and, immediately afterwards, the State Legislature—with a few insertions—reenacted the law.³

It may be retrospectively recalled that fair trade agreements (contracts relating to maintenance of minimum prices in specialty products), often employed as a remedy against price cutting, found passionate resistance in certain quarters. After many unsuccessful attempts in federal courts⁴ as well as in the courts of several states⁵ the opponents of fair trade succeeded in having price maintenance agreements, made in the absence of statutory right, declared violative of the Anti-Trust laws.⁶ Almost all states⁷ therefore successively enacted essentially uniform fair trade laws, legalizing within their jurisdictions vertical price maintenance agreements in identified goods and making them binding on all dealers who know of the agreements, even those who do not participate in them (non-signers)

The fight around fair trade did not cease. On the contrary, vehement attacks were now made upon the validity of the statutes which legalized price maintenance agreements. As the attackers were mainly non-signers, they concentrated the fight on that provision which made fair trade agreements binding on them.

Through somewhat unusual formulation of the non-signer provisions the impression may be created that it constitutes a striking de-

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¹40 S. (2d) 371 (Fla. 1949).

²Fla. Stat. Ann. § 541.01 et. seq. (1941).

³Florida Laws, c. 25204.

⁴*Dr. Miles Medical Co. v. Jaynes Drug Co.*, 149 Fed. 838 (C. C. D. Mass. 1906); *Dr. Miles Medical Co. v. Platt*, 142 Fed. 606 (C. C. N. D. Ill. E. D. 1906); and many others.

⁵*Grogan v. Chaffee*, 156 Cal. 611, 105 Pac. 745 (1909); *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174 (1900); and others.

⁶*Dr. Miles Medical Co. v. John D. Park & Cons Co.*, 220 U. S. 373, 31 S. Ct. 376, 55 L. ed. 502 (1911); *John D. Parks & Sons Co. v. Hartman*, 153 Fed. 24 (C. C. A. 6th, 1907).

⁷Except Missouri, Texas, Vermont and the District of Columbia.

parture from the traditional law of contracts, in that the owner of a trade-mark may, by unilateral action, dictate to non-contracting dealers such prices as satisfy his economic desires or even his personal whim and caprice. This theoretical criticism, naturally, led to the constitutional objection that the statute delegated legislative power to private persons. These objections which are given prominence in the *Liquor Store* decision were broadly discussed in previous cases in other states.⁸ Logically, it seems irrelevant whether such attacks were made in the name of the Federal or of a State Constitution. The Supreme Court of the United States, within its jurisdiction, finally settled the issue.⁹ With regard to the non-signer provision it pointed emphatically to the fact that the obligation is only laid on those who when purchasing *know* of the existing contract. They are advisedly free not to buy identified goods and if they buy they are still free to sell them at less than a fixed minimum price, provided that they remove the trade-mark or brand from the commodity. The statutory duty laid on the non-signer who deliberately buys trade-marked merchandise which is encumbered with contractual price restrictions and sells it below the fixed minimum price, is not based on the contract. It is an obligation *ex delicto*.¹⁰ It is therefore clear that no legislative power is delegated to the owner of a trade-mark. The owner of the good will as represented by the trade-mark who has made a fair trade contract with some dealers, has no reason to impose any price restrictions on the other dealers since these restrictions automatically run with the acquisition.

The distinction made between the commodity itself, which unquestionably is the property of the buyer although he may have refused to sign a fair trade contract, and the good will which is not sold with the commodity was intended to refute also the objection that the non-signing purchaser is deprived of free enjoyment of his property without due process of law.

⁸*Seagrams-Distillers Corp. v. Old Dearborn Distributing Co.*, 363 Ill. 610, 2 N. E. (2d) 940 (1936), *aff'd* *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139, 81 L. ed. 109 (1936); *Joseph Triner Corp. v. McNeil*, 363 Ill. 559, 2 N. E. (2d) 929 (1936), *aff'd* *McNeil v. Joseph Triner Corp.*, 299 U. S. 183, 57 S. Ct. 139, 81 L. ed. 109 (1936); *Max Factor & Co. v. Kunsman*, 5 Cal. (2d) 446, 55 P. (2d) 177 (1936), *aff'd* *Kunsman v. Max Factor & Co.*, 299 U. S. 198, 57 S. Ct. 147, 81 L. ed. 122 (1936).

⁹*Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139, 81 L. ed. 109 (1936).

¹⁰Unjustifiable interference with contract rights of others has long been recognized as a tort. *Max Factor & Co. v. Kunsman*, 5 Cal. (2d) 446, 55 P. (2d) 177, 185 (1936). There is, of course, no tort committed, if the non-signer acquired the merchandise before getting notice of an existing fair trade contract. See Harper, *Fair Trade in the Courts* (1946) 69-76.

As the Florida Court does not find the reasoning of the Supreme Court of the United States persuasive, it takes the position that "the court of last resort of each sovereign state is the final arbiter as to whether the act conforms to its own Constitution" ¹¹

The Court quite evidently does not approve of the idea of fair trade; it regards it as an unreasonable price fixing measure. Realizing, however, that the legislature alone "is the judge of the wisdom of the regulation"¹² it feels its duty to delve into the purposes of the act in order to find whether or not it violates the State Constitution.

Such a (price fixing) statute, so argues the Court, can only be valid if it applies to the general public with a view to promoting its welfare. As the statute, however, is interpreted as favoring particular groups at the expense of others, it cannot be recognized as enacted in the interest of general welfare. There is therefore no true exercise of police power involved. "When a statute is brought into question resting upon the police power the courts have the duty to inquire whether it is within constitutional limits. It is particularly a judicial question whether the legislative act is for a private or a public purpose."¹³ The Court, in fact, criticizes the social and economic philosophy on which fair trade legislation is based.

The Court then exposes how far particular groups are favored by legalized price maintenance which, in fact, is but regular price fixing, left to the authority of private citizens and to be exercised without any governmental supervision. The view of the United States Supreme Court that the law does not attempt to fix prices but only permits the making of agreements, is not taken into consideration. On the other hand, the Federal Trade Commission, which is known to be opposed to fair trade legislation, is cited in support of the philosophy of the Court.

It would seem proper to refer here passingly to a very important democratic fundamental. The judge who is asked to enforce a claim on the basis of a given law is authorized to examine the validity of this law. It is clear that the law, under such circumstances, is extremely exposed to attacks by the litigating parties. It is, to a certain extent, put on a par with all the other facts involved in the given lawsuit. The courts are well aware of this situation, which cannot be changed without eliminating important guarantees which democracy affords the citizen. In *City of Jacksonville v. Bowden*¹⁴ the very same Court therefore

¹¹40 S. (2d) 371, 375 (Fla. 1949).

¹²40 S. (2d) 371, 374 (Fla. 1949).

¹³40 S. (2d) 371, 374 (Fla. 1949).

¹⁴67 Fla. 181, 64 So. 769, 772 (1914).

said that "in exercising the exceedingly delicate and responsible power and duty to declare legislative enactments to be contrary to the Constitution. the courts should .refrain from declining to enforce statutes, except in cases of clear and unmistakable violations of the the Constitution. . ." The Supreme Court of Florida expressly wants no duly enacted law to be declared inoperative unless it clearly appears beyond reasonable doubt to violate the Constitution.

In the instant case it is hard to see how the Fair Trade law is a "clear and unmistakable violation of the Constitution" if the courts in many other states¹⁵ and the Supreme Court of the United States¹⁶ after careful examination found such laws valid.

Nevertheless, it may be concluded from the majority decision of the Court that it intended to void the entire act and not the parts complained of only. Particularly, the objection that the act violates the constitutional principle of equality before the law by favoring those who make *vertical* agreements and holding only horizontal agreements to be unlawful,¹⁷ evidently points to the entire purpose of the law rather than to the non-signer clause alone.

Does this holding conform to the principle enunciated by the same Court in *City of Jacksonville v. Bowden*? The answer must be no, particularly since the *Liquor Store* case also presents a clear-cut example of a clash between the philosophy of a State court and the United States Supreme Court as expressed by the latter in the *Old Dearborn* case. It might happen that after the *Liquor Store* decision a similar case, involving interstate commerce, would reach the Supreme Court of the United States. Suppose in that case the commodity in question has been transported to any place in Florida so that the court in accordance with the Miller-Tydings Act¹⁸ would have to solve the preliminary question whether fair trade agreements are lawful in Florida. In answering this question, the United States Supreme Court, in view of the

¹⁵Max Factor & Co. v. Kunsman, 5 Cal. (2d) 446, 55 P. (2d) 177 (1936); Seagram-Distillers Corp. v. Old Dearborn Distributing Co., 363 Ill. 610, 2 N. E. (2d) 940 (1936); Pepsodent Co. v. Krauss Co., 200 La. 959, 9 S. (2d) 303 (1942); Bourjois Sales Corp. v. Dortman, 273 N. Y. 167, 7 N. E. (2d) 30 (1937); Ely Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. (2d) 528 (1939); Weco Products Co. v. Reed Drug Co., 225 Wis. 474, 274 N. W. 426 (1937).

¹⁶Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U. S. 183, 57 S. Ct. 139, 81 L. ed. 109 (1936); Kunsman v. Max Factor & Co., 299 U. S. 198, 57 S. Ct 147, 81 L. ed. 122 (1936).

¹⁷26 Stat. 209 (1890), 15 U. S. C. A. § 1 (1941).

¹⁸Chap. 690, Title VIII, 50 Stat. 693 (1937), 15 U. S. C. A. § 1 (1941). This law was enacted in order to make the various fair trade laws of the individual states more effective: Cf. Pepsodent Co. v. Krauss Co., 56 F. Supp. 922 (E. D. La. 1944).

Liquor Store decision, would have to abandon its construction given to the California and Illinois Fair Trade Acts,¹⁹ although in no essential point do they differ from the Florida Act, and—against its conviction—declare the given price maintenance agreement to be an unlawful and punishable violation of the Anti-Trust Law. Should the Supreme Court of the United States regard itself as not bound by the Florida decision—which seems improbable²⁰—the legal situation would become most complicated. It may be that this was one of the reasons why the New York Court of Appeals which previously had declared the New York Fair Trade Act unconstitutional,²¹ in express consideration of the decision of the Supreme Court of the United States,²² overruled itself.²³ The Court stressed that it would have accepted the rulings of the United States Supreme Court if the *Old Dearborn* decision had been available when the *Doubleday* case came before it.

Soon after the *Liquor Store* decision the Florida act was amended without delay.²⁴ In accordance with Section 10 of the new Fair Trade law, the Attorney General may bring an action to restrain the performance or enforcement of any price maintenance agreement if he finds that a given agreement prevents competition with regard to the same general class or that the commodity in question is not in free and open competition with merchandise of the same general class. There is some resemblance to subsection (7) (a) of the Wisconsin Fair Trade Act²⁵ which provides that the State Department of Agriculture may hold a hearing upon a complaint that the minimum resale price is not correct. If it finds the complaint justified it may declare such contract to be in restraint of trade. It seems not unimportant that the Agriculture Department does not interfere *ex officio* but only "upon complaint," the right to such complaints given to any person.

¹⁹*Kunsman v. Max Factor & Co.*, 299 U. S. 198, 57 S. Ct. 147, 81 L. ed. 122 (1936); *Old Dearborn Distributing Co. v. Seagrams-Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139, 81 L. ed. 109 (1936).

²⁰In view of the doctrine established by *Erie Ry. Co. v. Thompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188 (1938).

²¹*Doubleday, Doran & Co. Inc. v. R. H. Macy & Co.*, 269, N. Y. 272, 199 N. E. 409 (1936).

²²*Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139, 81 L. ed. 109 (1936).

²³*Bourjois Sales Corp. v. Dortman*, 273 N. Y. 167, 7 N. E. (2d) 30 (1937).

²⁴Florida Laws, c. 25204. This is the second amendment. The first Florida Trade Law was made in 1937 [Florida Laws (1937) c. 18395]. It was first held unconstitutional because the text of the law was not, as provided in the Florida Constitution (§ 16, Art. III) disclosed in the title. *Bristol-Myers Co. v. Webb's Cut Rate Drug Co.*, 137 Fla. 508, 188 So. 91 (1939). The law was immediately amended.

²⁵Wis. Stat. (1947) c. 133.25.

The Department itself is of the opinion that "it would strengthen the law and its enforcement if there was some provision whereby registration [of the fair trade contract] with the state would be mandatory."²⁶

The general opinion of the Florida Supreme Court in respect of fair trade is rejected by the Legislature which in Section 1 (findings of fact) develops its own theory on this subject. Considering itself entirely free and solely competent to choose between economic policies, it finds, determines and declares that the public interests and general welfare "of the State of Florida will best be served by permitting the maintenance of minimum resale prices" of trade-marked, branded or named commodities and that the object of the Act is to prevent monopoly. It can hardly be assumed that the struggle between judiciary and legislature will be continued. Any return to the policy as expressed in *Miles v. Park* would be met with the argument that this decision goes back to the pre-statutory time and that it expressly hinted at a change of the legal situation by appropriate statute.²⁷

²⁶Letter written to the author of this case comment, signed by Mr. George Warner, Supervisor, Weights and Measures Inspection.

²⁷"Nor can the manufacturer, in the absence of contract or *statutory right*, even though the restriction be known to the purchasers, fix prices for future sales." 220 U. S. 373, 405, 31 S. Ct. 376, 383, 55 L. ed. 502, 517 (1911). (italics supplied).

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