Recent Decisions

Criminal Law — Evidence Obtained Through Unlawful Search and Seizures

The defendant, charged with selling opium in violation of the Harrison Anti-Narcotics Act, 21 U.S.C. §§ 173, 174 (1909), and conspiracy in violation of 18 U.S.C. §371 (1948), was at large on bail. During a conversation in his laundry and dwelling with an old acquaintance, Chin Poy, petitioner made self-incriminating statements. Unknown to the defendant, Chin Poy was equipped with a microphone over which the conversation was heard by a Federal Narcotics agent outside the laundry. Petitioner objected to the admission of the agent's testimony, asserting that the manner in which it was obtained violated both the search and seizure provision of the Fourth Amendment of the United States Constitution and Section 605 of the Federal Communications Act, 47 U.S.C. §605 (1934), and offended against the judicial policy requiring fair play in federal law enforcement. (Cf. *McNabb v. United States,* 318 U. S. 332 [1943]). The evidence was admitted, forming the basis for his conviction, from which an appeal was taken.

The Court of Appeals, 193 F. 2d 306 (2d Cir. 1952), in an opinion by Chief Judge Swan, held the evidence admissible as against a "wiretapping" objection since there was no "interception" within the meaning of the Comunications Act. Distinguishing between cases involving the seizure of tangible and intangible evidence, the majority found no trespass to any area constitutionally protected by the search and seizure provision of the Fourth Amendment. Judge Jerome Frank dissented, arguing that the concealment of the microphone constituted a trespass, and thus an "unreasonable search" making the evidence obtained by the federal agent inadmissible under the exclusionary rule of *Weeks v. United States,* 232 U. S. 383 (1914).

On appeal, the Supreme Court of the United States affirmed the judgment, Mr. Justice Jackson writing for the majority. The court held that the conduct in obtaining the evidence was not an unreasonable search and seizure within the meaning of the Fourth Amendment, was not in violation of the Federal Communications Act, and was not inconsistent with the "civilized standards" policy in federal law enforcement. Mr. Justice Black dissented, differing with the majority on the latter ground. Mr. Justice Douglas, completely reversing his position taken in *Goldman v. United States,* 316 U.S. 129 (1941), dissented on the ground that any invasion of the privacy of a constitutionally protected area, such

as an office or dwelling place, aided by a scientific device though not accompanied by a physical intrusion is an unreasonable search and seizure. Under this view, spying through a keyhole or listening against a wall with the naked ear, without proof of a prior trespass, would be reasonable. Mr. Justice Frankfurter, also in dissent, said that the police should not be allowed to employ under-handed tactics in gathering evidence and indicated that *Olmstead v. United States,* 277 U.S. 438 (1928), which held "wiretapping" to be a "reasonable search" should be overruled, quoting from Mr. Justice Holmes' dissent therein, that it is "a less evil that some criminals should escape than that the Government should play an ignoble part." Mr. Justice Burton, with the concurrence of Mr. Justice Frankfurter, dissented saying that the presence of the radio transmitter amounted to a surreptitious entry of the agent stationed outside and thus an unreasonable search and seizure. *On Lee v. United States,* 343 U.S. 747 (1952).

The Fourth Amendment problems arising during the first century of our nation primarily involved the search for and seizure of tangible things. The prohibition was held to cover letters in the mail, *Ex Parte Jackson,* 96 U. S. 727 (1877); books, papers, and documents taken from an office, *Silverthorne v. United States,* 251 U. S. 385 (1920); and papers and articles in the home, *Weeks v. United States, supra.* It was early announced that the interpretation to be accorded the Fourth Amendment was to be liberal "to effectuate the great purposes of the guarantee." *Boyd v. United States,* 116 U. S. 616 (1886). When, similar to the informer in the principal case, a government agent gained entry by posing a friendly call, his surreptitious taking of books and papers was held to be an unlawful search and seizure. *Gouled v. United States,* 255 U. S. 298 (1920). Although the latter case has been said to be the outer limit of the protection, the *Olmstead* case, *supra,* it appears that the privacy of a dwelling, office, or other inclosure is well protected from searches and seizures for tangible evidence.

With scientific and technological advances in crime detection devices, it has become possible to intercept communications and overhear far distant conversations. An early and leading case involving the problem of modern devices and the Fourth Amendment was the *Olmstead* case, *supra,* where Mr. Chief Justice Taft for the Supreme Court said that gaining evidence by intercepting telephone messages from or to defendant's premises was not an unlawful search, reasoning that the Fourth Amendment protected only "tangible material effects." Thus any physical invasion of privacy to overhear confidentially spoken words or gather other intangible evidence would apparently be held reasonable. However, later Court of Appeals decisions found a Fourth Amendment violation

where policemen made a physical entry without the express or implied consent of the defendant and without a proper search warrant or authority to arrest, and obtained evidence intangible in nature, such as incriminating admissions. *Nueslein v. District of Columbia,* 73 App. D. C. 85, 115 F. 2d 690 (1940); *Fraternal Order of Eagles v. United States,* 57 F. 2d 93 (3rd Cir. 1932). In the *Goldman* case, *supra,* the Supreme Court, following the *Olmstead* case, *supra,* held no illegal search and seizure to exist where federal police officers listened to conversations within an office by means of a detectaphone placed on the outside of a wall, but added a limitation by dictum that an entry to install a dictaphone "might be said to" render evidence obtained thereby inadmissible. The effect of the latter cases in limiting the *Olmstead* case, *supra,* seems to be that a traditional trespass to a constitutionally protected area makes intangible evidence gained thereby inadmissible.

Although it has been indicated that a "place of business" is not to receive the constitutional protection of a private home, *Davis v. United States,* 328 U. S. 582, 588 (1946), both the lower court and Supreme Court in the principal case assumed the laundry and dwelling of the defendant to have the sanctity accorded homes and offices in the previous cases. *Weeks v. United States, supra; Amos v. United States,* 255 U. S. 313 (1920); *Silverthorne v. United States, supra.* Thus if a trespass either by the informer or the eavesdropping agent could be found, the evidence according to the purport of the above cases would seem to have been unreasonably obtained. That the court in the principal case was influenced by the *Olmstead* case dichotomy between tangibles and intangibles is indicated by their refusal in this area of "intangible" searches to hold the informer who brought the microphone onto the premises a trespasser, although a similar entry was held unlawful in the seizure of books and papers. *Gouled v. United States, supra.* Further, the presence of the microphone without consent was held not to be a trespass, the court requiring at least an unpermitted physical entry by the officer, as in the *Nueslein* case, *supra.* But in the area of tangible evidence, it is plausible that the surreptitious presence of a mechanical arm reaching through a window to snatch a paper from a desk top would be held unlawful.

The distinction between tangible and intangible evidence seems unrealistic in the modern age. No longer is the policeman limited to overhearing spoken words with the naked ear; science has enabled him to go far beyond that. The intent of the Fourth Amendment to secure the people's private matters against unreasonable inspections and discoveries should not be defeated by a narrow construction of its language to permit law enforcement officers to do all but enter homes and seize papers. The spirit of the amend-

ment should control, an interpretation which is also in line with the judicial policy announced by the *McNabb* case, *supra*. It is hoped that such a construction of the amendment will soon be adopted by the court and that the use of scientific devices to discover events and overhear conversations occurring within a dwelling will be held unreasonable without an order of search.

Robert E. McGinnis

LANDLORD AND TENANT — PROPERTY LEASED FOR AMUSEMENT PURPOSES — LIABILITY OF LESSOR

The plaintiff, who was attending a professional football game, was injured by the collapse of temporary bleachers in a park owned by the defendant but leased to the Cleveland Rams. The defendant employed police, ticket takers, and ushers who were being used by the lessee when the injury occurred. The Supreme Court *held* that the trial court had not erred in holding as a matter of law that the plaintiff could recover from the defendant. *In re Brown v. Cleveland Baseball Co.*, 158 Ohio St. 1, 106 N.E. 2d 632 (1952).

At common law the landlord owed no duty to repair the leased premises unless he contracted to do so. The tenant took the property for better or worse and the landlord was not liable to the lessee for not repairing. The landlord was not bound to repair if the defect was existing at the time of the lease. *Divines v. Dickinson*, 189 Iowa 194, 174 N.W. 8 (1919). He was not bound to repair if the defect occurred after the lease was entered into. *Russell v. Little*, 22 Idaho 429, 126 Pac. 529 (1912). This is the general rule concerning the liability as to repairs of the lessor to the lessee. TIFFANY, REAL PROPERTY §103 (1939).

It seems logical to extend this doctrine of non-liability of the landlord to business patrons of the tenant who suffer injuries. The law should regard this invitee as standing in the shoes of the tenant and the same rules applying to the tenant should apply to the business patron. *Dalton v. Gilson*, 192 Mass. 1, 77 N.E. 1035 (1906); *Bloecher v. Duerbeck*, 333 Mo. 359, 62 S.W. 2d 553 (1933).

But, most courts would say that if the property is leased for public or semi-public purposes, the owner is responsible. *Colorado Mortgage and Investment Co. v. Galcomini*, 55 Colo. 540, 136 Pac. 1039 (1913) (Hotel); *Campbell v. Elsie S. Holding Co.*, 251 N.Y. 446, 167 N.E. 582 (1929) (Warehouse). These courts say the the lessor cannot evade liability to a third person for damages result-

ing from a dangerous condition on the property that was leased for such public purposes. They say the lessor has a duty to make the property safe for the purposes intended. Their reasoning is that the lessor should not be receiving rent for such uses where he has not exercised due care in repairing and maintaining the premises. The public, who do not have the opportunity to inspect the property, are deemed to be invited by the owner. Thus, most courts have made an exception to the rule of non-liability of the lessor in the case where the premises are leased for public purposes. *Van Avery v. Platt Valley Land and Investment Co.*, 133 Neb. 314, 275 N.W. 288 (1937) (Public garage); *Martin v. Asbury Park*, 111 N.J.L. 364, 168 Atl. 612 (1933) (Public bathing pavilion) 123 A.L.R. 870 (1939).

There are some courts which deny the applicability of this exception to other than amusement places. They reason that the property is not intended for public use when the property is leased for ordinary business purposes. *Clark v. Chase Hotel Co.*, 230 Mo. App. 739, 74 S.W. 2d 498 (1934); *Hayden v. Second Nat. Bank of Allentown*, 331 Pa. 29, 199 Atl. 218 (1938).

But there is a growing tendency toward expanding the application of this principal of responsibility of the lessor to business invitees. COMMENT, 50 HARV. L.R. 725, 743 (1937); Note, 62 HARV. L.R. 669 (1949). Most of the courts which recognize this exception do go farther and hold that the lessor is liable even where the premises are rented for a business concern such as stores, hotels, garages, professional offices as well as amusement places. These courts say that if the lessor knew the lessee was going to admit large numbers of people on the property, it put these invitees at an unreasonable risk. *Webel v. Yale University*, 125 Conn. 515, 7 A. 2d 515 (1939) (Beauty shop); *McCarthy v. Maxon*, 134 Conn. 170, 55 A. 2d 912 (1947) (Veterinarian's office); *Turner v. Kent*, 134 Kan. 574, 7 P. 2d 513 (1932) (Grocery store).

Therefore, generally throughout the country, places of amusement are not considered the same as other premises where a person enters the property as the invitee of the tenant. Amusement places are considered an exception to the general rule of caveat emptor with respect to the lessor's liability. *Junkerman v. Tilyou Realty Co.*, 213 N.Y. 404, 108 N.E. 190 (1915); 123 A.L.R. 872 (1939). This exception recognizes a duty of the lessor to the public of exercising ordinary care to provide against defects in construction, defects caused by the property being in a state of disrepair at the time of the lease, or a condition which, because of the nature of the thing, will eventually result in the property being dangerous when put to the use intended. *Tulsa Entertainment Co. v. Greenlees*, 85 Okla. 113, 205 Pac. 179 (1922); *Beaman v. Grooms*, 138 Tenn. 320, 197 S.W. 1090 (1917).

A Pennsylvania case with facts similar to the instant case held the lessor liable to patrons for injuries sustained in the fall of a leased grandstand containing defective timber when the lessor could have discovered the defect. *Folkman v. Lauer* and *Kane v. Lauer,* 244 Pa. 605, 91 Atl. 218 (1914). The Pennsylvania court followed the majority rule in holding the lessor was liable for injuries suffered by a third person because of defects in the premises at the time the lease was made which were known by him or could have been known by him with the exercise of due care. 4 THOMPSON ON REAL PROPERTY §1555. These courts conclude that the lessor should have expected that the lessee would admit his patrons before the land was put in reasonably safe condition for their reception. The two reasons for this conclusion are that the lease was for so short a period as to make it unreasonable to expect that the lessee will make any change while using the land, and that it may be leased for a use so immediate that the lessee has no opportunity to make the repairs or alterations necessary to make the land safe for visitors. RESTATEMENT, TORTS §359 (1934).

In Ohio, as in the majority of states, the courts have followed the common law proposition that the lessor is not liable for the defective condition of the property to the lessee or to third parties who come there by right of the lessee; but Ohio has not followed the exception to this rule concerning amusement places. *Marqua v. Martin,* 109 Ohio St. 56, 141 N.E. 654 (1923); 24 O. JUR. 951. Ohio courts say that a landlord who has demised property, parting with possession and control thereof to a tenant in occupation is not responsible for injuries arising from the defective condition of such premises. Their reasoning is that persons who claim damages because they were invited into a dangerous place in which they received injuries must seek their remedy against the person who invited them. *Burdick v. Cheadle,* 26 Ohio St. 393 (1875); *Stackhouse v. Close,* 83 Ohio St. 339, 94 N.E. 746 (1911).

Since Ohio courts do not recognize this exception, the injured party must show that the landlord was in possession and control of a part of the demised premises. If this is shown then the landlord is liable for damage caused by his negligence. *Devou v. Hughes,* 89 Ohio St. 453, 106 N.E. 1053, (1914); *Medley v. Seiter,* 39 Ohio App. 570, 178 N.E. 37 (1931).

In the instant case we see the Ohio court following this practice. They say that one having neither occupation nor control of premises ordinarily has no legal duty to an invitee of another with respect to the condition or use of these premises. Then to show this occupation or control, they say that the lessor had the power and right to admit such individuals to the premises or exclude them.

Thus having established that the lessor had not substantially relinquished to his lessee all occupation and control over a portion of the leased premises and has actually exercised his right of occupation and control over such portion, the lessor is under the duty to exercise ordinary care with respect to the condition of such portion and that duty extends to an invitee of the lessee.

To determine whether occupation and control was retained by the lessor, the Ohio court has held in other cases that if the lessor has agreed to make repairs, his right to enter upon the premises and make those repairs does not amount to retaining such occupation and control of the premises as to subject him to liability if he failed or neglected to make repairs. *Ripple v. Mahoning National Bank,* 143 Ohio St. 614, 56 N.E. 2d 289 (1944); *Cooper v. Roose,* 151 Ohio St. 316, 85 N.E. 2d 545 (1949).

In the *Cooper* case, *supra,* the owner had made an agreement to make repairs. The court there held that liability of the landlord can be based only on occupation and control, and that the landlord's agreement to repair did not reserve to him this power and right to admit and exclude people from the porch where the plaintiff was injured. The court in the instant case says that the *Cooper* case indicates that the unexercised power and right of a lessor to occupation and control of premises may not be inconsistent with such lessor's complete relinquishment of occupation and control of the premises. But to get their result the court says that the instant case does not involve the mere existence of a right and power to occupy and control premises. Instead they say it involves a substantial exercise of that right and power.

Thus the court arrived at the right result in the principle case, but felt compelled to reach it through a tortuous process of reasoning. Better reasoning which the other states follow is to hold the lessor liable when the public is invited upon the property and the lessee is to be in possession a relatively short time. It is always better to meet the problem squarely than to try to reach a result by a fictitious method. This case presented an opportunity to develop in Ohio the beneficial doctrine which is generally accepted elsewhere.

Carl E. Juergens

TORTS — GUEST STATUTE — WHO IS GUEST

From the allegations of the petition and opening statement of counsel it appeared that plaintiff, a twelve year old boy scout, and defendant, his assistant scout master, were engaged in collecting waste paper from premises along the public streets and trans-

porting it to a central point as an enterprise for the benefit of the scout troop. Plaintiff was assisting in the project by collecting, placing, and securing the paper on a trailer attached to defendant's automobile, during which process he mounted and dismounted from the trailer and received transportation thereon. In attempting to regain his position on the trailer, the plaintiff was injured through defendant's negligent operation of the automobile and trailer. Defendant's motion for judgment on the petition and opening statement of counsel was denied. On appeal by defendant, *held,* affirmed. The pleadings and opening statement of counsel allege facts which disclose the plaintiff to be other than a guest within the meaning of the guest statute and therefor the allegation of negligence raises an issue for the jury. *Vest v. Kramer,* 158 Ohio St. 78, 107 N. E. 2d 105 (1952).

The Ohio guest statute became effective June 15, 1933. OHIO GEN. CODE Sec. 6303-6. Prior to that time the operator of a motor vehicle owed a duty of reasonable care to an invited guest. *Sparrow v. Levine,* 19 Ohio App. 94 (1923); *Mester v. Unkefer,* 24 Ohio App. 420, 157 N. E. 714 (1927). The guest statute completely abrogates liability to a guest except for wilful and wanton misconduct. *Cunningham v. Bell,* 149 Ohio St. 103, 77 N. E. 2d 918 (1948); *O'Rourke v. Gunsley,* 154 Ohio St. 375, 96 N. E. 2d 1 (1950). The question then is, who is a guest within the meaning of the statute?

Most American courts have adopted the designations "passenger" and "guest" for determining this question, defining a guest as one carried gratuitously, riding for his own pleasure upon invitation of the driver, and passenger as one who is transported for compensation or reward. *Kruzie v. Sanders,* 23 Cal. 2d 237, 143 P. 2d 704 (1943); *Miller v. Miller,* 395 Ill. 273, 69 N. E. 2d 878 (1946); *Shields v. Audette,* 119 Conn. 75, 174 Atl. 323 (1934); RESTATEMENT, TORTS, sec 490. It is generally held that compensation or benefit to the driver need not be money, but any substantial benefit or recompense to the driver making it worthwhile to furnish the ride is enough to make the rider a passenger and not a guest. *George v. Stanfield,* 33 F. Supp. 486 (S.D. Idaho 1940); *Shields v. Audette, supra;* 60 C.J.S., Motor Vehicles, sec. 399; 5 AM. JUR., AUTOMOBILES, sec. 239.

In Ohio it was decided that since the guest statute was in derogation of the common law it must be strictly construed; therefore, if the rider falls in any category other than guest, the driver is not relieved of liability for negligence. *Miller v. Fairly,* 141 Ohio St. 327, 48 N. E. 2d 217 (1943); *Kitchens v. Dullefield,* 149 Ohio St. 500, N. E. 2d 906 (1948). According to the guest statute, a person making payment for his transportation is not a

guest and the problem arises in the interpretation of the word payment. If payment for the transportation is agreed upon, the rider in the automobile is of course a passenger and not a guest. *Dougherty Adm'r. v. Hall,* 70 Ohio App. 163, 45 N. E. 2d 608 (1941). But what, other than this agreed upon payment, will take the driver out of the protection of the statute?

In *Duncan v. Hutchinson,* 139 Ohio St. 185, 39 N. E. 2d 140 (1942), the Ohio Supreme Court declared that it is not necessary that payment be made in money to constitute an individual transported a passenger and not a guest. It was pointed out that payment for transportation may be made in numerous ways, such as, "when the host has a financial or business interest in the time or service of the passenger and the purpose of the transportation is to take the passenger to or from his place of employment"; "when a substantial or tangible benefit is conferred upon the host"; or "when the compensation is paid by a third person." In *Dern v. Village of North Olmstead,* 133 Ohio St. 375, 14 N. E. 2d 11 (1938), a guest was defined as one who is invited, either directly or by implication, to enjoy the hospitality of the driver of a motor vehicle, who accepts such hospitality and rides for his own pleasure or business without making any return to, or conferring any benefit upon, the driver, other than the mere pleasure of his company.

In line with the prevailing test of American courts, the Ohio Supreme Court in the case of *Hasbrook v. Wingate,* 152 Ohio St. 50, 87 N. E. 2d 87 (1949), distinguished between passenger and guest and held that if the transportation confers a benefit only on the rider, and no benefit, other than such as are incidental to hospitality, good will, or the like, on the person furnishing the transportation, the rider is a guest; but if his carriage tends to promote the mutual interests of both himself and the driver for their common benefit, thus creating a business relationship, or where the rider accompanies the driver at the instance of the latter for the purpose of having the rider render a benefit or service to the driver, the rider is a passenger and not a guest.

From these definitions and distinctions it would seem to follow that in the principal case plaintiff was not a guest. The court decided that either plaintiff was rendering a service to defendant, or it was an enterprise of mutual interest for their common benefit, either of which would render plaintiff a passenger and thus not a guest within the meaning of the Ohio guest statute.

Milton Bartholomew

TRADE REGULATION — CONSTITUTIONALITY OF THE LOUISIANA FAIR TRADE ACT

Plaintiff, a manufacturer of drug products, brought a bill to restrain defendants, operators of two supermarkets in the city of New Orleans, from selling its products below the minimum price fixed by contracts between plaintiff and other retailers pursuant to the Louisiana Fair Trade Act. LSA-R. S. 51:392-51:394. The act provides that signers or non-signers of the contracts shall not sell below the contract price fixed by the producer of a commodity bearing a trade-mark, brand, or name of the producer thereof. Defendants, admitting sales in violation of the act, challenge its constitutionality as well as the constitutionality of the McGuire Act, 15 U. S. C. § 45 (1952), which exempts state fair trade acts from the provisions of the Sherman Anti-Trust Act, 15 U. S. C. § 1 (1890). The United States District Court held that the above legislation does not violate the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution as the price-fixing is reasonably related to the valid objective of protecting the producer's property right in the brand name and good will of the product. *Eli Lilly & Co. v. Schwegmann Bros. Grant Supermarkets,* 109 F. Supp. 269 (E. D. La. 1953).

The Supreme Court of the United States held that resale price maintenance contracts were invalid as an unreasonable restraint of trade both under the common law and under the Sherman Anti-Trust Act, but indicated that such contracts would be valid under appropriate legislation. *Dr. Miles Medical Company v. John D. Park & Sons,* 220 U. S. 373 (1911); *Boston Store of Chicago v. American Graphophone Co.,* 246 U. S. 8 (1918). From 1914 until 1932, thirty bills were introduced into Congress to legalize resale price contracts in interstate commerce, but none was passed. SELGMAN AND LOVE, PRICE CUTTING AND PRICE MAINTENANCE 479 (1932). From 1931 until 1936, fourteen state fair trade acts, similar to the act involved in the principal case, were passed, and twenty-eight more were enacted in 1937; today, all states have the acts except Texas, Vermont, and Missouri. For a table of acts, see 3 CALLMAN, UNFAIR COMPETITION AND TRADE-MARKS 1764 (1945). The alleged purpose of these acts is to protect retailers from being under-sold by large chain stores. See Note, 49 YALE L. J. 145 (1939). In 1937, Congressional support was given to the policy behind these acts by the passage of the Miller-Tydings Act exempting resale price contracts under state fair trade acts from the scope of the Sherman and Clayton Anti-Trust Acts. 50 STAT. 693 (1937), 15 U. S. C. 1-7 (1940), amending 26 STAT. 209 (1890) and 49 STAT. 1526 (1936). When the immunity of the Miller-Tydings Act was interpreted to exclude enforcement of the fair trade acts as against non-signers,

Schwegmann Brothers v. Calvert Distillers Corp., 341 U. S. 384 (1951), Congress immediately passed the McGuire Act to bind non-signers.

Frequently, the fair trade acts have been attacked as fixing prices in violation of the federal and state constitutions. In 1936, the New York Fair Trade Act was held to violate the due process clause of the state constitution as fixing prices of commodities not affected with the public interest. *Doubleday, Doran & Co. v. R. H. Macy & Co.*, 269 N. Y. 272, 199 N. E. 409 (1936). However, later in 1936, the Supreme Court of the United States in an unanimous decision upheld the constitutionality of the Illinois Fair Trade Act as being an "appropriate means" of protecting the property of the producer in the good will and brand name of the commodity otherwise owned by the non-signing retailer. *Old Dearborn Distilling Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936); for a collection of cases prior to the *Old Dearborn* case, *supra,* see 7 A.L.R. 449 (1920), 19 A.L.R. 926 (1922), and 32 A.L.R. 1087 (1924). The unsettled position of small business during the thirties seemed to be implicitly determinative of the holding in the *Old Dearborn* case. In view of the *Old Dearborn* case, *supra,* the New York court felt duty bound to overrule the *Doubleday* case, *supra,* although it had been decided on state constitutional grounds. *Bourjois Sale Corp., v. Dorfman,* 273 N. Y. 167 7 N. E. 2d 30 (1937). During the ensuing years, the acts were repeatedly held constitutional by various state courts. For a collection of cases, see 19 A.L.R. 2d 1139 (1951). These courts repeatedly bolstered the acts by relying on the good will theory, although the more direct but unsupportable objective was to protect independent retailers from vigorous chain store price competition.

Recently, the judicial trend has been to adopt a more critical attitude toward the fair trade acts. In 1949, the Florida Supreme Court, recognizing the anti-competitive feature of their fair trade act, held it unconstitutional as an invalid use of the police power for a private, not a public purpose. *Liquor Store, Inc., v. Continental Distilling Corp.*, 40 So. 2d 371 (1949). In 1950, two state fair trade acts were held to be constitutional although both courts noted the Florida decision. *W. A. Scheaffer Pen Co. v. Barrett,* 209 Miss. 1, 45 So. 2d 838 (1950); *Frankfort Distillers Corp. v. Liberato,* 190 Tenn. 478, 230 S.W. 2d 971 (1950). Later, the Michigan Supreme Court held their act unconstitutional, expressly approving the *Liquor Store* case, *supra,* and recognizing the act as fixing prices of goods not "affected with public interest." *Shakespeare Company v. Lippmann's Sporting Goods Co.*, 334 Mich. 109, 54 N.W. 2d 268 (1952). In holding their fair trade act unconstitutional on other

grounds, the Georgia Supreme Court, as an additional reason for its decision, indicated that the act violated the due process clause of the state constitution by fixing prices of commodities not affected with the public interest. *Grayson Robinson Stores, Inc. v. Oneida, Lts., CCH* TRADE CASES 67442 (1953).

Because the fair trade acts have resulted in the economic evil of forcing manufacturers to set higher prices, the Federal Trade Commission recommended the repeal of the Miller-Tydings Act. *Federal Trade Commission Report on Price Maintenance* LXI, LXIV (1945); see also *Final Report and Recommendations of the T.N.E.C.*, SEN. Doc. No. 35, 77th Cong., 1st Sess. 33, 121, (1941). A lower federal court has said by dictum that the Supreme Court of the United States today might hold the fair trade acts unconstitutional as the economic conditions that prompted the decision in the *Old Dearborn* case, *supra,* in 1936, no longer obtain. *Sunbeam Corp. v. Wentling,* 185 F. 2d 903 (3rd Cir. 1950); *rev'd on other grounds,* 341 U.S. 944 (1951). If good will were the controlling factor, and not economic considerations, a change in economic views should not affect the result. But the dicta of these decisions seem to indicate that such is not the case. The principal case indicated that the Supreme Court of the United States, if faced with the question today, might reverse itself and decide that the real objective of the act was price-fixing and not protecting the good will of the producer, but hesitated to override the *Old Dearborn* case, *supra.* The hope is expressed that the present trend towards holding the fair trade acts unconstitutional will continue since the inflexible price arrangements which they sanction are not in line with the traditional concepts of free competition.

Robert E. McGinnis

PROFESSOR ROBERT MILLER HUNTER

1895 — 1952