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Constitutional Law - Validity of Louisiana Fair-Trade Law

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outside the jurisdiction of the United States against the laws of a foreign country.[23] American citizenship does not give an American immunity from prosecution for the commission of crimes in other countries, or entitle him to a trial in any other mode than that allowed to its own people by the country from the laws of which he has fled.[24] The only difference between a case of extradition and the instant case is that the respondent here is in military service. However, the fact that the respondent did not voluntarily leave the protection of continental United States law does not create in him a constitutional right which he had never had before, nor does it reduce the extent of the treaty-making power of the United States. The involuntary nature of a soldier's station is simply one more factor affecting the public opinion which the United States Government must consider in bargaining with another sovereign. It appears that the United States' adherence to comity in international relations is sufficient to justify a treaty by which American citizens are surrendered to foreign powers in derogation of what respondent would call his constitutional right to trial by the United States authorities. The extradition example of the needs of the sovereign as weighed against the rights of the individual would seem adequate precedent for a like result in the instant case. Therefore, it is submitted that the decision of the United States Supreme Court is legally sound.

William L. McLeod, Jr.

CONSTITUTIONAL LAW—VALIDITY OF LOUISIANA FAIR-TRADE LAW

Plaintiff sought to enjoin defendant from selling products bearing the plaintiff's brand at a price below the minimum which had been set in accordance with the Louisiana Fair-Trade Act.[1] Defendant challenged the constitutionality of the act, and particularly the "non-signer" clause which prohibited non-contracting retailers from wilfully selling plaintiff's products under

23. Neely v. Henkel, 180 U.S. 109 (1900); Argento v. Horn, 241 F.2d 258 (6th Cir. 1957), cert. denied, No. 183, U.S. Sup. Ct. Bull. Current Term, p. 8024 (October 14, 1957).

24. See note 23 *supra*.

1. La. Acts 1936, No. 13, p. 62, incorporated as LA. R.S. 51:394 (1950). The act consists of a contract clause providing that a contract shall not be invalid by reason of a stipulated minimum price, and the contested non-signer clause which states: "Wilfully and knowingly advertising, offering for sale or selling at less than the minimum price stipulated in any contract entered into pursuant to the provision of R.S. 51:392, whether the person so advertising, offering for sale, or selling is or is not a party to the contract, is unfair competition and is actionable by any person damaged."

the prices established by the plaintiff through contracts with other retailers. Injunction was granted by the trial court. On appeal the court of appeal affirmed the decision, dismissing defendant's contentions as having been settled adversely in a previous decision of the Louisiana Supreme Court.[2] On certiorari, *held,* reversed. By subjecting retailers' property rights to the will of private individuals, the act violated Article III, Section 1,[3] of the Louisiana Constitution in that it delegated legislative power to private persons. *Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Brothers Giant Super Markets,* 231 La. 51, 90 So.2d 343 (1956).

At the beginning of this century, contracts by which producers bound retailers to fixed prices were upheld by courts as permissible measures to protect goodwill created by brand or trade names.[4] However, in 1911 the United States Supreme Court held that any contract by which a producer attempted to maintain a system to control resale prices was unlawful not only as a violation of the Sherman Anti-Trust Act[5] but also as an unreasonable restraint of trade at common law.[6] Pressure tactics were used by some producers to continue price maintenance, though such efforts were to some extent curbed by the Federal Trade Commission.[7]

Finally, beginning in 1933, state legislatures opened the door for producers to maintain retail prices by passing fair-trade laws containing "non-signer" clauses.[8] In *Old Dearborn Distributing Co. v. Seagram Distiller*[9] the United States Supreme Court held such measures to be valid exercises of the state police power and not improper delegations of the legislative power violating the "due process" clause of the Fourteenth Amendment. The decision was based upon "due process" and did not erase the bar-

2. Pepsodent Co. v. Krauss Co., 200 La. 959, 9 So.2d 303 (1942).

3. "The legislative power of the state shall be vested in a legislature. . . ."

4. Fowle v. Park, 131 U.S. 88 (1889); Dr. Miles Medical Co. v. Platt, 142 Fed. 606 (N.D. Ill. 1906). See also Note, 60 U. PA. L. REV. 270 (1912).

5. Sherman Act of July 2, 1890, c. 647, § 1, 26 STAT. 209.

6. Dr. Miles Medical Co. v. Park, 220 U.S. 373 (1911).

7. United States v. Colgate, 250 U.S. 300 (1919). Here the producer was boycotting those retailers not complying with his desired price. No price fixing contract had been entered into. The court held that no unfair trade practice had been committed. For a discussion of cases involving fair trade and the Federal Trade Commission, see Note, 75 U. PA. L. REV. 248 (1927).

8. California was the first state to adopt a fair trade act. See CALIF. BUSINESS AND PROFESSIONS CODE ANN. §§ 16900-16905 (Deering 1951). This act and all other statutes referred to as "fair trade acts" are substantially the same, containing a contract clause and a non-signer clause. See note 1 *supra.*

9. 299 U.S. 183 (1936).

rier presented by the Sherman Act. However, Congress passed the Miller-Tydings Act[10] which exempted from condemnation of the Sherman Act contracts which prescribed minimum prices, if such contracts were in accordance with state laws. Thus the states were left to decide whether to allow fair trade; and all but three states eventually passed fair-trade acts containing the "non-signer" clause.[11] But the Miller-Tydings Act had neglected to include the "non-signer" clause in authorizing state fair-trade laws. Because of this omission, the Supreme Court of the United States in 1951 declared the "non-signer" clause in the Louisiana Fair Trade Act a violation of the Sherman Act.[12] However, once again Congress acted, this time passing the McGuire Act[13] which amended the Miller-Tydings Act so as to contain the "non-signer" clause. Of the twenty-one fair-trade laws reviewed since passage of the McGuire Act, twelve have been declared unconstitutional.[14]

The validity of the Louisiana Fair Trade Act was considered and upheld by the Supreme Court of this state under the anti-

10. 50 STAT. 693 (1937), 15 U.S.C. §§ 1-7 (1948).

11. Every state but Texas, Vermont, and Missouri passed similar statutes. Until 1952, only two courts of last resort had declared a fair trade act invalid. See Liquor Store Inc. v. Continental Distilling Corp., 40 So.2d 371 (Fla. 1949); Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952).

12. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

13. 66 STAT. 631, 632 (1952), 15 U.S.C. § 45 (1952).

14. The following cases held state fair trade acts invalid: Union Carbide & Carbon Corp. v. White River Distributors, 224 Ark. 558, 275 S.W.2d 455 (1955); Olin Mathieson Chemical Corp. v. Francis, 301 P.2d 139 (Colo. 1956); Miles Laboratories v. Eckerd, 73 So.2d 680 (Fla. 1954); Grayson-Robinson Stores v. Oneida, Ltd., 209 Ga. 613, 75 S.E.2d 161 (1952); Bargain Barn, Inc. v. Arvin Industries Inc., CCH TRADE REG. REP. (1955 Trade Cas.) ¶ 68074, at 70463 (Super. Ct. Marion County, 1955) (Ind.); General Electric Co. v. American Buyers, CCH TRADE REG. REP. (1956 Trade Cas.) ¶ 68341, at 71514 (Jefferson County Cir., 1956) (Ky.); McGraw Electric Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N.W.2d 608 (1955); Skaggs Drug Center v. General Electric Co., CCH TRADE REG. REP. (1957 Trade Cas.) ¶ 68823, at 73329 (Sup. Ct. Colo. 1957); General Electric Co. v. Wahle, 207 Ore. 302, 296 P.2d 635 (1956); Rogers-Kent, Inc. v. Westinghouse Electric Corp., CCH TRADE GEG. REP. (1955 Trade Cas.) ¶ 68084, at 70481 (Richland County, 1955) (S.C.); General Electric Co. v. Thrifty Sales Inc., 5 Utah 2d 326, 301 P.2d 741 (1956); Benruss Co. v. Smith-Williams Jewelers, CCH TRADE REG REP. (1955 Trade Cas.) ¶ 67985, at 70197 (Richmond Law & Eq. Ct., 1955) (Va.). Those state courts holding for the validity of fair trade acts since 1952 are the following: Scovill Manufacturing Co. v. Skaggs Pay Less Drug Stores, 45 Cal.2d 281, 291 P.2d 936 (1955); General Electric Co. v. Klein, 106 A.2d 206 (Del. 1954); Home Utilities Co. v. Revere Copper & Brass, 122 A.2d 109 (Md. 1956); General Electric Co. v. Kimball Jewelers, 132 N.E.2d 652 (Mass. 1956); Lionel Corp. v. Grayson-Robinson Stores, 15 N.J. 191, 104 A.2d 304 (1954); General Electric Co. v. Masters Inc., 307 N.Y. 229, 120 N.E.2d 255 (1955); Union Carbide and Carbon Corp. v. Bargain Fair, 130 N.E.2d 255 (Ohio Com. Pl. 1955); Burche Co. v. General Electric Co., 382 Pa. 370, 115 A.2d 361 (1956); Bulova Watch Co. v. Anderson, 270 Wis. 21, 70 N.W.2d 243 (1955).

trust provision of the Louisiana Constitution[15] in *Pepsodent Co. v. Krauss*.[16] The court held in that case that the constitutional provision in question did not limit the state in exercising its police power; the police power was only limited in that it could not be used arbitrarily or unreasonably. Using the rationale of the *Dearborn* decision,[17] the court held that the act was not an abuse of the police power.

The fact that the *Pepsodent* case dealt with the constitutionality of the Fair Trade Act under the anti-trust provision of the Louisiana Constitution and did not treat the problem of delegation of legislative power distinguishes that case from the present one. The court in the instant case reasoned that an individual possesses a right to sell his property at whatever price he pleases, and that this right can be taken away and regulated only by the Legislature in the exercise of its police power. Thus, in allowing producers and distributors to fix minimum prices binding non-contracting parties, the Legislature was delegating its power and subjecting the retailer's rights to the will of private persons, contrary to Article III, Section 1, of the State Constitution.[18] To justify the delegation of the price-fixing function to producers would be impossible unless the producer could be said to retain same property right in the commodity after it was sold to the retailer. Such a right, as the court pointed out, would amount to burdening ownership of a chattel by imposition of some implied covenant, condition, or servitude — devices not recognized in Louisiana law.[19] The main problem facing the court was the *Dearborn* decision, which, though dealing with a federal constitutional question, nevertheless was cited with favor in the *Pepsodent* case. The court pointed out that the *Pepsodent* case did not deal with delegation of power, nor could the United States Supreme Court in a situation such as that presented in the

15. LA. CONST. art. XIX, § 14. This provision condemns all "combinations, trusts, or conspiracies in restraint of trade, commerce, or business."

16. 200 La. 959, 9 So.2d 303 (1942).

17. 299 U.S. 183 (1936).

18. See note 3 *supra*.

19. Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets, 231 La. 51, 71, 90 So.2d 343, 350, n. 10 (1957): "Equitable servitudes running with a movable and restraints on the alienation of movable property are disfavored under the public policy of this State. Once a movable is sold, the seller relinquishes all interest therein and conditional sales, whereby the vendor retains title to the property, are not recognized in Louisiana. Barber Asphalt Paving Co. v. St. Louis Cypress Co., 121 La. 152, 46 So. 193 (1908); Lee Const. Co. v. L.M. Ray Const. Corp., 219 La. 246, 52 So.2d 841 and cases there cited. And, until 1912, chattel mortgages were unknown in this State." The court also cited LA. CIVIL CODE arts. 490-491 (1870).

Dearborn case resolve conflicts between state legislation and the State Constitution. The court furthermore observed that in 1951 the United States Supreme Court had found the Louisiana statute to be a "price-fixing" statute, a finding contrary to that in the *Dearborn* case.[20]

The decision in the present case reflects a trend toward reappraisal of fair trade legislation,[21] apparently incited by the United States Supreme Court decision in 1952,[22] and the subsequent McGuire Act. That fair trade perhaps protects good will of producers and stops "loss leading" tactics is an issue not to be entirely disregarded. But the chief argument for fair trade is that it affords protection for the "little man" who cannot withstand competition of large-scale operations.[23] On the other hand, opponents of fair trade point out that the public is hurt by being denied the benefits of this competition.[24] Thus, in the context of public policy, the result of the instant case is to preserve the benefits of competition by permitting the large-scale operators to offer fair-trade goods for sale at lower prices. Also, the legal determination by the court in this instance protects the retailers' property rights against an unfettered exercise of the will by private persons.

James Farrier

CRIMINAL LAW—MISAPPROPRIATION OF FUNDS OF A COMMERCIAL PARTNERSHIP BY ONE OF THE PARTNERS

Defendant partner allegedly withdrew funds from the partnership bank account and converted them to his own use. The district court sustained a motion to quash the information filed against the defendant for theft of partnership funds. On appeal by the state, *held*, affirmed. Since the partner can eventually be held liable for the entire debt of a commercial partnership of

20. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). The argument that the Supreme Court in this case had overruled the *Dearborn* decision was quashed in Schwegmann Bros. v. Eli Lily & Co., 205 F.2d 788 (5th Cir. 1953). This case considered and upheld the McGuire Act.

21. See note 14 *supra*.

22. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

23. Two chief arguments for fair trade are that the manufacturer's trade mark has been "exploited and cheapened" and the small retailers driven out of business by sales of brands below cost. The chief fear is of "price wars" which will trample the little men down. See Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175 (1954), for a full analysis of arguments for and against fair trade.

24. "In addition many newspapers and magazines throughout the country hailed the *Schwegmann* decision as a victory for the consumer and the free enterprise system . . . *Fortune* magazine repeatedly attacked the fair-trade laws as economically unsound and harmful to the best interests of consumers." *Id.* at 186-87.