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REGULATION OF BUSINESS-RESALE PRICE MAINTENANCE-CONSTITUTIONALITY OF NON-SIGNER PROVION IN MICHIGAN FAIR TRADE ACT

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REGULATION OF BUSINESS—RESALE PRICE MAINTENANCE—CONSTITUTIONALITY OF NON-SIGNER PROVISION IN MICHIGAN FAIR TRADE ACT—Plaintiff, a manufacturer of trade-marked products, brought a bill to restrain defendant-retailer from selling plaintiff's products at prices below the minimum prices established by plaintiff in contracts made pursuant to the Michigan Fair Trade Act.[1] Defendant admitted such sales, but contended that because it had not signed a fair trade agreement with plaintiff, enforcement of the Michigan act against defendant would violate its rights under the due process clause of the state constitution.[2] The trial court, treating the transactions involved as being exclusively in intrastate commerce, held the Michigan Fair Trade Act, as applied to non-signers of fair trade agreements, unconstitutional as a deprivation of property without due process of law. On appeal, *held*, affirmed. The non-signer provision in the Michigan Fair Trade Act is beyond the scope of the state police power inasmuch as it bears no reasonable relation to public morals, health, safety or the general welfare. Justices Butzel and Reid dissented as to this ground for decision. *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.*, 334 Mich. 109, 54 N.W. (2d) 268 (1952).

[1] Mich. Comp. Laws (1948) §445.151 et seq.; Mich. Stat. Ann. (1951 Cum. Supp.) §19.321 et seq.

[2] MICH. CONST. (1908) art. 2, §16.

During the past two decades, resale price maintenance of trade-marked and branded products under state fair trade acts has become an integral feature of the national economy.[3] The movement for state fair trade acts gained impetus from economic conditions during the depression of the 1930's and won federal sanction in the 1936 Supreme Court decision, *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*[4] and in the Miller-Tydings Act of 1937.[5] Although there are slight variations in the state legislation,[6] the core of the statutory fair trade system, and also the principal target for legal objection, lies in the non-signer provision by which price-cutting dealers, wholesale or retail, may be enjoined from selling below the established price even though they are not parties to an agreement with the manufacturer. Recent attack upon the non-signer provision on the federal level won temporary victory in the Supreme Court holding that the Miller-Tydings Act did not immunize the non-signer provision against charges under the Sherman Act,[7] but Congress quickly closed this breach in the fair trade system by passing the McGuire Act.[8] The decision in the principal case, and a similar recent holding in Florida,[9] suggest, however, that the constitutional issues surrounding fair trade legislation bear re-examination. At present, Michigan and Florida are alone in finding their fair trade statutes unconstitutional,[10] but the change in economic conditions since the 1930's may well prompt relitigation of the question.[11] The more or less uniform constitutional rationale for fair trade legislation proceeds upon the rather questionable assumption that its primary purpose is to protect the good will of the producer of

[3] Only Missouri, Texas, Vermont and the District of Columbia have failed to enact fair trade acts. For table of state fair trade acts, see 3 CALLMANN, UNFAIR COMPETITION AND TRADE-MARKS 1764 (1945).

[4] 299 U.S. 183, 57 S.Ct. 139 (1936), holding the non-signer provision in the Illinois Fair Trade Act valid under the Federal Constitution.

[5] 15 U.S.C. (1946) §§1-7. This federal enabling statute excepted from the operation of the Sherman Act and the Federal Trade Commission Act vertical contracts setting minimum resale prices on trade-marked articles so long as such contracts were valid under state law.

[6] For a comparison of the different types of statutes, see 1 CALLMANN, UNFAIR COMPETITION AND TRADE-MARKS 361, and model statutes in 3 CALLMANN at p. 1759 (1945).

[7] Schwegmann Bros. v. Calvert Dist. Corp., 341 U.S. 384, 71 S.Ct. 745 (1951).

[8] H.R. 5767, approved as P.L. 542, July 14, 1952. This act removes the non-signer provision from the operation of the Sherman Act or the Federal Trade Commission Act, and would seem to foreclose further attack on the fair trade system on a federal level, except perhaps under the Fifth Amendment due process clause. But see comment in 8 UNIV. CHI. L. REV. 745 (1941) for an interesting discussion of the legal possibilities in regarding some vertical fair trade agreements as little more than a facade for otherwise illegal horizontal agreements among retailers.

[9] Liquor Store Inc. v. Continental Dist. Corp., (Fla. 1949) 40 S. (2d) 371.

[10] For state authority to the contrary, see cases collected in 19 A.L.R. (2d) 1139 (1951).

[11] The Florida court indicated that changed economic conditions cast a new light on the question, case cited in note 9, supra, at 374 and 382. But see W. A. Scheaffer Pen Co. v. Barrett, 209 Miss. 1, 45 S. (2d) 838 (1950), and Frankfort Dist. Corp. v. Liberto, 190 Tenn. 478, 230 S.W. (2d) 971 (1950), where the courts noted the Florida dissent from the majority position but aligned themselves with the majority.

trade-marked goods from the harmful effects of an erratic retail price structure.[12] Since this good will remains the property of the producer despite the sale of individual trade-marked items to the retailer, it is considered reasonable and consonant with due process to permit the producer to establish price restrictions and enforce them even against non-signers.[13] The non-signer is bound by these price restrictions, not because of any legislative delegation of price-fixing power to the producer, but rather because of the harm that price-cutting might do to the producer's good will.[14] The Michigan court, in rejecting this ingenious, though rather oblique, line of reasoning, takes the position that the need for a reasonable relation to the general welfare is not satisfied simply by finding a property interest at stake, for no property interest is absolute, and further, that legislation which has the effect of impairing the non-signer's freedom to cut prices in retail competition bears no reasonable relation to the general welfare.[15] While the Michigan decision frames the issue in more realistic terms, inherent in the decision is a socio-economic policy judgment that the general welfare is better served by unrestricted competition on the retail level. Whatever the present economic merits of the fair trade system,[16] it would seem that the legislature, possessing more adequate means to ascertain the facts as well as a closer contact with the economic needs of society, should be the forum for such re-evaluation.[17] The extent to which legislative regulation of the economy should be submitted to the vague test of due process is, of course, a question of degree, but it is submitted that the Michigan decision represents a marked departure from the prevailing theory that the legislature should enjoy wide discretion in determining what serves the general welfare, so long as there is in fact a divergency of reasonable opinion on the problem.[18] Under the principal decision,

[12] Justice Sutherland in the Old Dearborn decision, note 4 supra, at 193, apparently adopted this position from language in Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N.E. (2d) 929 (1936), and Max Factor and Co. v. Kunsman, 5 Cal. (2d) 446, 55 P. (2d) 177 (1936), but the history of fair trade legislation seems to compel the conclusion that the real purpose of the legislation was the desire of some retailers to prevent price-cutting and the use of the "loss leader." 49 YALE L.J. 145 (1939).

[13] The price restriction ran with and conditioned the acquisition of the goods much like an equitable servitude on land, Old Dearborn decision, note 4 supra, at 194. And see Max Factor and Co. v. Kunsman, note 12 supra, at 464, for an analogy to legislative protection against the tort of malicious interference with contract relations.

[14] For an extended analysis of the constitutional arguments for fair trade legislation, see 47 MICH. L. REV. 821 (1949), and 45 ILL. L. REV. 378 (1950).

[15] Principal case at 113 and 115.

[16] Competing arguments and statistics may be found in "The Not-So-Fair Trade Laws," FORTUNE MAGAZINE 70, January, 1949; "A Chance for Really Fair Trade," FORTUNE MAGAZINE 79, March, 1952; debate attending the passage of the McGuire Act, CONG. REC. 82d Cong., 2d sess., July 1, 1952, beginning at 8907, and July 2, 1952 beginning at 9086; and the extended study, REPORT OF THE FEDERAL TRADE COMMISSION ON RESALE PRICE MAINTENANCE, Dec. 13, 1945.

[17] See Butzel, J., in his dissent in the principal case at 121-122.

[18] Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505 (1934), and Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525, 69 S.Ct. 251 (1949). This would seem to be the underlying motivation in decisions upholding the fair trade acts. See cases cited, notes 11 and 12 supra.

there appears to be little chance for a legislative revival of the fair trade system in Michigan.[19]

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[19] The Florida legislature attempted to obviate their Supreme Court's adverse holding by enacting a prefatory fact-finding statement that this statute did serve the general welfare, but the court has thus far avoided a ruling on this change. Seagram-Distillers Corp. v. Ben Greene Inc., (Fla. 1951) 54 S. (2d) 235.