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Restraint of Trade -- Fair Trade Acts -- Constitutionality

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alleged leave doubt as to whether the action has been brought within this period, the complaint will withstand demurrer.9 The requirement that the action be brought within a year is absolute, and no explanation as to why the institution of the action is delayed is availing.10 "The lapse of the statutory period not only bars the remedy but destroys the liability."11

The question remains as to the sufficiency of a complaint which fails to allege either the date of the death or that the action has been brought within one year of the death, assuming a cause of action to have been stated otherwise. Certain language in the Colyar case seems to indicate that such a complaint would withstand demurrer.12

It is believed that the result of the Colyar case is practical and based on sound reason. The purpose of this statutory time limit is said to be to give notice to the defendant so that the evidence may be secured and preserved.13 This notice is given when the plaintiff institutes his action within the year. It seems unduly technical to require a specific allegation that "this action is brought within one year of the death" when compliance with the statutory requirement may be shown by reference to the summons. If it were held that such an allegation is necessary, then questions would arise as to whether a complaint without this allegation failed to state a cause of action, or merely constituted a defective statement of a good cause of action. If it were held that such a complaint does not state a cause of action, then an amendment after the statutory period containing the required allegation would not relate back to the complaint, and the plaintiff would be defeated on a technicality.14 It must be remembered that the purpose of the pleadings is to frame the issues between the parties for a trial on the merits of the case, rather than to create a pitfall for the unwary pleader.

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Restraint of Trade—Fair Trade Acts—Constitutionality

Manufacturers have long sought ways to protect their good will in the trade-marks, brands, or names of their commodities. One means

9 Wilson v. Chastain, 230 N. C. 390, 53 S. E. 2d 290 (1949) (Complaint alleged death "... occurred on or about midnight of 21-22 November, 1947, and which is less than one year next proceeding the institution of this action..." Summons was served on November 22, 1948).
12 See 231 N. C. 318, 319, 56 S. E. 2d 647, 648 (1949) ("The plaintiff complied with the statute when she brought her suit within the prescribed time.").
employed is the fixing of the prices that the retailer is to charge the consumer, thus preventing that price-cutting by the retailer which is likely to create in the minds of the public a feeling that the goods are not worth the prices usually charged.

With the passage of the Sherman Anti-Trust Act in 1890, "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states, or with foreign nations" was declared illegal.

In Dr. Miles Medical Co. v. John D. Park & Sons Co., the Supreme Court of the United States held that price-fixing by means of minimum resale price maintenance contracts was prohibited by the Sherman Act. Some state courts reached the same result in cases involving intrastate commerce, basing their decisions on the contracts being in restraint of trade and illegal under common law principles or state anti-trust laws. The majority of the states, however, upheld their legality.

Various devices, such as refusing to sell to those who do not maintain prices, or the constituting of "good faith agencies," were used to circumvent the Supreme Court ruling in the Dr. Miles case; but they were not widely used and when attempted were difficult to administer.

1 FTC, 1 Resale Price Maintenance 8 (1929).
3 220 U. S. 373 (1911); accord, United States v. A. Schrader's Son, Inc., 252 U. S. 85 (1920).


6 United States v. General Electric Co., 272 U. S. 476 (1926) (retail dealers were appointed agents; goods consigned to them with the manufacturer paying transportation charges and the dealer meeting all other expenses, the dealer to account periodically, and the merchandise remaining the property of the manufacturer until sold by the dealers).

Another method was issuing bona fide licenses containing minimum resale price clauses as to patented articles. Weigel, The Fair Trade Acts 27 (1938).

Among the methods held illegal were:

1. Use by the manufacturer of "cooperative steps," which consisted in ascertaining price-cutters by an elaborate and market-wide follow-up system of espionage and reporting, and a refusal to sell to the price-cutters until securing their assurances of price maintenance. FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922), Resale Price Maintenance, 1 N. C. L. Rev. 36; Norwood, Trade Practice and Price Law 134 et seq. (1938).

2. Issuing "licenses" which were obviously a sham to protect prices on patented articles. Strauss v. Victor Talking Machine Co., 243 U. S. 490 (1917) (manufacturer received full compensation before parting with the possession of the merchandise; no accounting by the retail dealer required; no recordation of title retention by the manufacturer); Boston Store v. American Graphophone Co., 246 U. S. 8 (1918).
Several states, with California in 1931 being the first, encouraged minimum resale price-fixing by enacting what were called Fair Trade Acts. These Acts provide that vertical contracts prescribing minimum resale prices for trade-marked, branded, or named commodities in free and open competition with commodities of other manufacturers of the same general class will be legal and enforceable. But in view of the Sherman Act such contract were legal only in intrastate commerce.

In 1937, Congress passed the Miller-Tydings Amendment to the Sherman Act legalizing minimum resale price maintenance contracts in interstate commerce where such contracts are legal in intrastate commerce under the law of the state where the resale is to be made. To date, Fair Trade Acts have been enacted in all jurisdictions except Missouri, Texas, Vermont, and the District of Columbia.

Immediately after their inception the constitutionality of the Fair Trade Acts was questioned on various grounds, including denial of due process, impairment of the obligation of contract, improper delegation of legislative power, denial of equal protection of the law, and miscellaneous state constitutional provisions. At first, several lower state courts, as well as the Court of Appeals of New York, held them unconstitutional. Reversing this early trend, the Supreme Court of the United States in Old Dearborn Distributing Co. v. Seagram-Distillers Corp. ruled that these Acts passed by the states were not in contra-

(3) Affixing a notice to a patented article warning that cut-price sales would constitute a patent infringement. Bauer v. O'Donnell, 229 U. S. 1 (1913).

WEIGEL, THE FAIR TRADE ACTS 32 et seq. (1938).

A vertical contract is one between manufacturer and retailer, or between wholesaler and retailer, etc., as distinguished from a horizontal contract, one between producers, between wholesalers, or between retailers.

An analysis of the different provisions of the state Fair Trade Acts is found in AMERICAN FAIR TRADE COUNCIL, INC., A PRACTICAL GUIDE TO FAIR TRADE LAW 10-11 (1948).

The Amendment, which expressly excludes horizontal contracts from its provisions, was passed as a rider to an appropriations bill for the District of Columbia. President Roosevelt, when signing the bill on August 17, 1937, denounced this practice and expressed fear that the law would lead to increased prices to consumers. 2 CCH TRADE REG. REP. ¶7058 (1948).

For a discussion of the Amendment's limitations, see NORWOOD, TRADE PRACTICE AND PRICE LAW 139 et seq. (1938).


By express statute, "fair trade" is illegal in Missouri, Texas, and the District of Columbia. 2 CCH TRADE REG. REP. ¶7098 (1949). Its status in Vermont is still uncertain. 2 CCH TRADE REG. REP. ¶7096 (1949).

See Note, 125 A. L. R. 1339 (1940).


See WEIGEL, THE FAIR TRADE ACTS 36 et seq. (1938) for the early history of the Fair Trade Acts and the uncertainty as to their constitutionality.

vention of the Constitution of the United States. Heavily relying on this affirmation of constitutionality, state courts, including North Carolina, almost uniformly held that the Fair Trade Acts did not violate the constitution of the state, all earlier decisions to the contrary being reversed or overruled.\(^{16}\)

Recently, "fair trade" has suffered what has been called its "stiffest blow" since its inception in California in 1931.\(^ {17}\) In *Liquor Store, Inc. v. Continental Distilling Corp.*,\(^ {18}\) the Florida Supreme Court held that the Florida Fair Trade Act violated the state constitution. The court stated that although the Florida Act may have been constitutional when passed in 1939, under present economic conditions it is arbitrary, unreasonable, and wholly outside the enacting powers of the state legislature.

The Florida Court should have recognized that whether "fair trade" be economically wise or unwise, the weighing of all the interests involved should more properly be a matter for legislative discretion than a subject for judicial pronouncement.\(^ {19}\)


The Florida Supreme Court, in Bristol Myers Co. v. Webb's Cut Rate Drug Co., 137 Fla. 508, 188 So. 91 (1939), declared the Florida Fair Trade Act unconstitutional since the title did not show that the Act applied to non-signers. This defect was soon remedied by legislative action.\(^ {17}\)

\(^{17}\)Business Week, April 23, 1949, p. 19.

\(^{18}\)40 So. 2d 371 (Fla. 1949).

\(^{19}\)In an attempt to get around the court's decision, the 1949 Florida legislature passed a new Fair Trade Act, SEN. BILL NO. 592, Laws of 1949, effective June 1, 1949, with two notable changes: (1) A "finding of fact" by the legislature that "fair trade" best serves the interests and general welfare of the state of Florida (To this the court would probably reply, "... the mere designation of an act as best serving [the interests and general welfare of the state] does not preclude judicial appraisal, and courts of equity will not be misled by mere devices or baffled by mere forms, but they will disregard names and penetrate disguises of form to discover the substance of an act or transaction." Liquor Stores, Inc. v. Continental Distilling Corp., 40 So. 2d 371, 385 (Fla. 1949)), and (2) the Attorney-General is empowered "to bring actions to restrain performance of any fair-trade contracts that prevent competition in the manufacture, making, transportation, sale, or purchase of commodities of the same general class." Business Week, June 18, 1949, p. 72; 63 HARv. L. REV. 546 (1950).
Indeed, it was not even necessary for the Florida court to consider the question of constitutionality. By the court's own admission, the contracts under consideration could have been declared invalid since there was not that free and open competition which the Miller-Tydings Amendment and the Florida Fair Trade Act require, inasmuch as the plaintiff was a subsidiary of a corporation which with four others controlled from eighty to ninety per cent of the supply of alcoholic liquors in the United States. Nevertheless, contrary to the usual judicial procedure, the court went out of its way to declare the Act unconstitutional.

Soon after the decision of the Florida Supreme Court, a Mississippi lower court, faced with questions similar to those posed before the Florida Court, decided that the Fair Trade Act of that state was unconstitutional. In states where the power of the legislature to pass Fair Trade Acts has been affirmed, courts have recently been critical of the manner in which the legislature has undertaken to exercise this power. The Illinois court has ruled that the Mandatory Fair Trade Act, requiring all liquor sold in Illinois to be "fair-traded" and a list of such prices filed with the state liquor-regulatory body, is unconstitutional since it is not complete in itself but refers to the Fair Trade Act without explaining what constitutes "fair trade." New York has held that the legislature unduly delegated its powers when it created a commission with authority to decide for itself whether or not liquor should be "fair-traded," and at what prices it should be sold.

Oklahoma has taken the same critical attitude. Where the "fair trade" price allowed the retailer a profit of about 375%, resale at that price was ruled unenforceable as being an arbitrarily and capriciously fixed price which allowed an unreasonable margin of profit. If the reasoning of the Oklahoma court is followed, courts may be able to eliminate some of the evils of high prices resulting from "fair trade" without the necessity of declaring the Fair Trade Act itself unconstitutional.

There has never been a direct ruling on the constitutionality of the Miller-Tydings Amendment, but anti-fair traders think the present Supreme Court would declare that it contravenes the United States Constitution. About thirty states have yet to rule on the constitu-

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tionality of their Fair Trade Acts. The Anti-Trust Division of the Department of Justice and the Federal Trade Commission are at present leading an attack in Congress on the Miller-Tydings Amendment; and bills have been introduced in at least three state legislatures to repeal or emasculate the Fair Trade Act of that state. If either attack on the federal law should prove successful, then minimum resale price maintenance contracts would be illegal in interstate commerce under the provisions of the Sherman Anti-Trust Act. In the event of a successful attack on a state law, resale price maintenance contracts in that state would probably be illegal in intrastate commerce; in which case the Miller-Tydings Amendment, even if retained, makes them illegal in interstate commerce if the resale is to take place in a state where the contracts are not valid.

Among the chief grounds of attack on “fair trade” in the legislatures will be the assertions that it tends to eliminate competition, that the property rights of the retailer in the goods are encroached upon, and

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26 See note 16 supra. Only three out of the six judges who held the Fair Trade Act of North Carolina constitutional in Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. 2d 528 (1939) are still on the bench. The lone dissenter, J. Barnhill, is still on the court.

27 Herbert A. Bergson, head of the Anti-Trust Division of the Dept. of Justice, has said, "It [the Miller-Tydings Amendment] creates a disturbing conflict between legal price fixing and the general price fixing inhibitions of the Sherman Act." Shoenfeld, Congress Squares Off for a Scrap on Fair Trade Repeal, 62 Sales Management, p. 81, 83 (June 1, 1949). See TNEC, Investigation of Concentration of Economic Power, Final Report and Recommendations 232 et seq. (1941), attacking the manner in which the enactment of the Miller-Tydings Amendment and the state Fair Trade Acts was secured, and asserting that many “fair trade” contracts do not comply with one or both of those laws.

28 "The Miller-Tydings Amendment legalizes contracts whose object is to require all dealers to sell at not less than the resale price stipulated by contract without reference to their individual selling costs or selling policies. The Commission believes that the consumer is not only entitled to competition between rival products but to competition between dealers handling the same branded product." Report of the Federal Trade Commission on Resale Price Maintenance, LXIV (1945).


30 Business Week, April 23, 1949, p. 19; Shoenfeld, Congress Squares Off for a Scrap on Fair Trade Repeal, 62 Sales Management 81 (June 1, 1949).

As an indication of the trend in thought, the North Carolina House of Representatives rejected by a 41-40 vote a measure to put into effect in North Carolina the Unfair Practices Act, now law in about thirty states, which would have made it illegal for merchants to sell goods at less than cost in order to discourage or destroy competition. News and Observer, April 20, 1949, p. 14, col. 3.


32 See note 4 supra.

33 Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, 400 (1911).

that higher prices result from these contracts.\textsuperscript{35} Leading counter-arguments will be that this method is the only effective way to protect the good will of the manufacturer,\textsuperscript{36} that the dealer takes the goods with the contract attached,\textsuperscript{37} and that the prices on non-fair-traded goods have risen more sharply than those on fair-traded commodities.\textsuperscript{38}

Future litigation and legislative controversy over resale price maintenance appear to be a certainty. Whether “fair trade” be economically wise or unwise, the trend shows that it is in for some minute examination by the courts and legislative bodies.

\textbf{Kirby Sullivan.}

\underline{Trial Practice—Prosecutor’s Comments—Arguing Possibility of Parole or Pardon as Reason for Withholding Recommendation for Life Imprisonment}

“Gentlemen, . . . With our system in Georgia, a man is entitled to parole or pardon after seven years, and when his application is put in all the judges or interested parties are usually out of office and no one recalls the facts in the crime. If this jury sentenced this defendant to life imprisonment and he should be given his release on parole in seven

\textsuperscript{35} XXXIX Fortune, April 1949, p. 75; XXXIX Fortune, Jan. 1949, p. 85; Shoenfeld, \textit{Congress Squares Off for a Scrap on Fair Trade Repeal}, 62 \textit{SALES MANAGEMENT} 81 (June 1, 1949).

\textsuperscript{36} Other arguments of those opposed to “fair trade” are:

(1) As the “fair trade” fields become more crowded there will tend to be an elimination of the small retailer since the old-timers will try to restrict the number of new dealers. XXXIX Fortune, April 1949, p. 75, 76. This is claimed to have already happened to some extent in England. XXXIX Fortune, Jan. 1949, p. 70, 166.

(2) The manufacturer can adequately protect his good will by refusing to sell to those who refuse to comply with a resale price agreement. Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371, 388 (Fla. 1949).

(3) Chain stores reap unnecessarily juicy profits by reason of less expense in marketing “fair-traded” goods, and they often sell similar products under their own brand or trade name at cheaper prices. XXXIX Fortune, April 1949, p. 75; TNEC \textit{INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, FINAL REPORT AND RECOMMENDATIONS} 232, 234-5 (1941).

\textsuperscript{37} Newcomb, \textit{In Defense of Fair Trade}, 13 \textit{JOURNAL OF MARKETING} 84, 85 (July 1948).

\textsuperscript{38} Callman, \textit{“Fair Trade” and Anti-Trust Law}, 10 U. OF PITT. L. REV. 443, 462 (1949).

\textsuperscript{39} Griffiths, \textit{Further Comments on Fair Trade}, 13 \textit{JOURNAL OF MARKETING} 85 (July 1948).

Other arguments urged in support of “fair trade” are:


(2) “Fair trade” protects the consumer from deceptive price-cutting tactics. \textit{AMERICAN FAIR TRADE COUNCIL, INC., A PRACTICAL GUIDE TO FAIR TRADE LAWS} 34 (1948).


(4) In those states allowing fixed prices, the manufacturer may hold down prices.