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CONGRESSMAN CELLER'S FAMOUS PREDICTION that "the courts will have the devil's own job to unravel the tangle" [1] (of the Robinson-Patman Act) could aptly be applied to the judicial tangle of the fair trade decision of the Supreme Court of Ohio on May 8, 1963—*Hudson Distributors, Inc. v. The Upjohn Co., Hudson Distributors, Inc. v. Eli Lilly & Co.*[2]

In the *Hudson* cases, the Court upheld the constitutionality of the 1959 Ohio Fair Trade Act[3] by a 3-4 decision. The minority-vote decision affirmed the judgment of the Court of Appeals for Cuyahoga County that the 1959 Fair Trade Act was constitutional as required by the following sentence from Article IV, Section 2 of the Ohio Constitution:

> No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void.

Neither the three members speaking for the Court nor the four dissenters adverted to the confusion inevitably arising from a minority decision on constitutionality.

Since enactment of the original fair trade statute in California in 1931,[4] fair trade has had a tortuous and litigious career. Eventually all but four states (Alaska, Missouri, Texas and Vermont) passed fair trade laws; by latest unofficial count fair trade statutes other than Ohio's have been held unconstitutional at least in part in 21 states, and have been upheld in their entirety in 19 states.[5] The many arguments pro and con are not repeated

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1 80 Cong. Rec. 9419 (1936).

2 174 Ohio St. 487, 190 N. E. 2d 460 (1963).

3 §§ 1333.27-1333.34, Ohio Rev. Code. "Fair Trade" as used here of course refers to legislatively authorized vertical resale price maintenance.

4 Calif. Laws 1931, Ch. 278. Fair trade legislation has traditionally relied on *contract* doctrines as the basis for a resale price maintenance. But as early as 1916, New Jersey passed a statute providing for resale price maintenance by notice affixed to the goods. The statute was upheld and applied in Robert H. Ingersoll & Bro. v. Haline & Co., 89 N. J. Eq. 332, 108 A. 128 (1918).

5 2 CCH Trade Reg. Rep. par. 6041.

here; they abound in the legal literature.[6] In simplest summary, the legislative and judicial clash has been between the general philosophy of the Sherman Act[7] opposing restraints on competition (including vertical resale price maintenance) and the dual justification for the fair trade exemption from the Sherman Act where authorized by state law—the interest of a brand owner in protecting the property in his brand[8] and, emphasized much of late (particularly in the light of the modern rash of "discount" operations), the interest of independent retailers in enjoying satisfactory profit margins.[9] Proponents and opponents have asserted that the "public interest" supports their positions.

Developments in Ohio are illustrative of the checkered pattern of success of fair trade.

Ohio adopted its first Fair Trade Act in 1936.[10] The 1958 *Bargain Fair*[11] decision of the Ohio Supreme Court, striking down the nonsigner provision of the 1936 Act as unconstitutional, did not draw a dissent from the Court. The Court's very brief

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[6] See, for example, bibliography in Oppenheim, Federal Antitrust Laws—Cases and Comments 181, n. 1 (2d ed. 1959).

[7] 15 U. S. C. § 1 et seq. See Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373 (1911).

[8] "The value of any trademark is, of course, the demand for the product which it represents. The continued discount selling of a trademarked product eventually cheapens it in the eyes of the purchasing public. If such product is sold at a reduced price, the public will eventually get the idea that the product is cheap and turn to others, seeking higher quality merchandise." Hudson Distributors, Inc. v. Upjohn Co., 174 Ohio St. 487, 495, 190 N. E. 2d 460 (1963).

[9] "Even to the most casual observer it is readily apparent that the small independent merchant is gradually being forced out of business through the operation of the large merchandising establishments. * * * [A]s a result of the discounting of fair-trade merchandise, so much of his trade is being drained from him that he cannot afford to continue his business. Clearly, it is to the advantage of the general public that such establishments be preserved." Hudson Distributors, Inc. v. Upjohn Co., 174 Ohio St. 487, 494 (1963).

[10] Ohio Rev. Code, sec. 1333.07 et seq.

[11] Union Carbide & Carbon Corp. v. Bargain Fair, Inc., 167 Ohio St. 182, 147 N. E. 2d 481 (1958). A typical "nonsigner" clause, such as that contained in the 1936 Ohio act, provides that wilfully and knowingly advertising, offering for sale or selling fair traded commodities (i.e., those branded commodities as to which the manufacturer has entered into a contract providing for resale price maintenance) at less than the stipulated prices, whether by a party to the contract *or by some other person,* is unfair competition actionable at the suit of any person damaged thereby. Taft, J., wrote a separate concurring opinion in Bargain Fair which would have avoided the constitutional issue by holding that the fair trade agreement before the Court, upon which operation of the nonsigner provision depended, was not a "contract" because of lack of any definite promises by the manufacturer or other legal consideration to support the promises of the retailer.

statement of reasons for its decision, following citation of representative decisions in other states either for or against fair trade, seems to be tripartite: the 1936 Act (with respect to a nonsigner provision, under which the suit in *Bargain Fair* was brought) was (a) an unauthorized exercise of the police power since there was no substantial relation to the public safety, morals or general welfare, (b) in contravention of the due process provision of the Ohio Bill of Rights (by depriving the retailer of the privilege of disposing of his property on his own terms), and (c) a delegation of legislative power and discretion to private persons.

The reaction of the legislature was prompt and decisive. In 1959, one year after *Bargain Fair,* it enacted a "notice" type fair trade statute, such as had been adopted in Virginia. The votes in overruling the Governor's veto were 112-6 in the House and 30-3 in the Senate. The heart of the new statute[12] was the "implied contract" concept—any distributor (reseller) "who, with notice that the proprietor (brand owner) has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor." The statute provides that a person who sells, offers to sell or advertises such a commodity at a price lower than the established minimum resale price, having acquired the commodity after notice, commits an unfair act of competition.

Shortly after enactment, a rash of fair trade litigation commenced in various courts in the State. The companion *Hudson* cases which ultimately reached the Supreme Court were two of several declaratory judgment actions brought by a retailer in the Court of Common Pleas for Cuyahoga County seeking to have the law declared invalid, in which the defendant manufacturers cross-petitioned for fair trade enforcement. Trial in these two cases was held only on the (amended) petitions, not the cross-petitions as well; by stipulation the causes were tried on affidavits and exhibits and the deposition of the sales manager of the Cleveland branch of Upjohn.

On July 28, 1960, Judge McNeill (of Van Wert County, sitting by designation) held the 1959 statute unconstitutional on the ground that it constituted an improper delegation of legis-

[12] Ohio Rev. Code, sections 1333.27-1333.34, inclusive.

lative authority.[13] On July 13, 1961, the Court of Appeals for the Eighth Judicial District (Cuyahoga County) reversed, in a 2-1 decision.[14] The majority opinion relied heavily on the United States Supreme Court decision in the *Old Dearborn* case,[15] which had rejected arguments that one of the early fair trade acts violated federal delegation of authority, due process and equal protection requirements; the opinion did not refer to or discuss the opinion of Judge McNeill. The brief dissenting opinion stated that the judge was "in accord with the opinion" of Judge McNeill.

The Ohio Supreme Court affirmance two years later again demonstrated the closeness of the fair trade issue. The Court's opinion concluded that the constitutional objections to the 1936 Act expressed in *Bargain Fair* had been met in the new statute. After discussion of the dual justifications offered for fair trade noted above, the Court concluded:

> When the general welfare of the small merchant is considered together with the necessity of protecting the goodwill and value attached to a trademark, it was clearly within the legislative power to enact such protective legislation, and the court will not substitute its judgment in this instance for that of the General Assembly.[16]

Differentiating the 1936 and 1959 Acts, the Court emphasized that the 1959 Act "introduces into the law two entirely new concepts"—(1) the concept that a trademark owner retains a proprietary interest in a trademarked commodity after he has sold it to distributors (because of his interest in stimulating demand for the commodity and in protecting the goodwill associated with the trademark), and (2) the "notice" concept under which a distributor who accepts a commodity with notice that the trademark owner has established a minimum resale price therefor "shall thereby have entered into an agreement[17] [with the trademark owner] not to resell such commodity at less than the mini-

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[13] Hudson Distributors, Inc. v. Upjohn Co., 1960 CCH Trade Cases para. 69,778 (1960).

[14] Hudson Distributors, Inc. v. Upjohn Co., 18 Ohio Op. 2d 182, 176 N. E. 2d 236 (Ohio App. 1961).

[15] Old Dearborn Distributing Co. v. Seagram Distillers Corp., 229 U. S. 183 (1936).

[16] Hudson Distributors, Inc. v. Upjohn Co., 174 Ohio St. 487, 495. (See notes *supra.*)

[17] The retailer in the Hudson case argued the legislatively-recognized contract did not constitute a "contract or agreement" within the meaning of those terms in the McGuire Act, 15 U. S. C. § 45(a), and thus the McGuire enabling exemption from the Sherman Act was not available.

mum price." The Court observed that Article XIII, Section 2—providing that the General Assembly can pass laws "regulating the sale and conveyance" of personal property—"should not be read out of the Ohio Constitution or rendered meaningless."

The brief dissenting opinion of Zimmerman, J., who had written the Court's opinion in *Bargain Fair*, stated that the reasons expressed in *Bargain Fair* "are still valid in relation to the new act."

Thus the implied contract provision was a sufficient basis for distinguishing the 1936 Act and the *Bargain Fair* decision, in the view of the Court.[18]

There is little that is new in the substantive fair trade aspects of the *Hudson* case aside from the crucial fact that the Court felt that the notice provision was a basis of distinction between the 1936 and 1959 Acts. The debate as to fair trade goes on.

Perhaps of greater academic interest is the reminder again of the peculiar Ohio constitutional clause under which *Hudson* was affirmed, quoted above. This "minority control" provision, adopted by the Ohio Constitutional Convention of 1912, has caused the courts and counsel many headaches and has promoted a considerable volume of litigation in its half-century of operation. Its original purpose has been explained as follows:

> What were the objectives sought by the convention of 1912? It must be remembered that the convention met in a year when a progressive movement was at its height. Theodore Roosevelt and his followers bolted the Republican Party in that year, and Woodrow Wilson was elected President of the United States. Furthermore, in the period immediately prior to and after the meeting of the convention, workmen's compensation laws were passed by a large majority of the states, and numerous other acts regulating hours of labor and other labor conditions were being enacted. Many of these acts met with unfavorable reception in the courts, particularly in the highest courts of the states and the nation. As a result the progressives felt that the courts were out of sympathy with the wishes of the people, and that it would

[18] In upholding a similar "notice" statute, the Virginia Supreme Court of Appeals referred to the "elimination of the coercive 'non-signer' provision [of the old statute] and inclusion of the permissively contractual provision" of the new act (i.e., the contract by notice provision). Standard Drug Co. v. General Electric Co., 1960 Trade Cases par. 69,858 (1960). The Court was not specifically faced with the issue of distinction since the earlier Virginia decision, Benrus Watch Co. v. Kirsch, 198 Va. 94, 92 S. E. 2d 384 (1956), had been decided not on constitutional grounds but on the ground that the earlier Virginia fair trade act had been repealed by implication by reason of subsequent antitrust legislation in Virginia.

> be necessary to reform the courts in order to put the new programs into operation. Theodore Roosevelt advocated the recall of judicial decision on constitutional questions, while William J. Bryan looked not unfavorably upon a plan to require unanimous approval of the supreme court before a legislative act should be declared unconstitutional.
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> In the Ohio Constitutional Convention there was a very pronounced opinion to the effect that the state supreme court was too far removed from the people, and, its powers in favor, first, of the lower courts, and, second, of the legislature. * * * [19]

Intended to be a check on judicial review, the provision has been severely criticized in rather outspoken language in several opinions of the Supreme Court of Ohio. In 1927 the Court stated that "members of this Court deplore such a constitutional provision"; [20] seven years later the Court, opining that this view deploring the provision "reflects the general sentiment of our bench and bar," also described the effect of the provision as "a situation already anomalous in our judicial system." [21] In another opinion the Court observed that the provision "places this Court in an unenviable, not to say ridiculous, light before courts and lawyers of other states." [22]

The weird results which may flow from this unhappy experiment in constitutional control of the judiciary are illustrated in the long and untidy history of litigation involving Section 3963 of the old Ohio General Code, which prohibited a city or village from making a charge for supplying water for use in public school buildings. Among the many decisions on the constitutionality of this statute, the following skeleton collection illustrates the problems created by the constitutional minority vote provision.

In the *East Cleveland* case[23] in 1925 the Supreme Court affirmed, in a 2-5 decision, a ruling of constitutionality of Section

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[19] Stene, Is There Minority Control of Court Decisions in Ohio, 9 U. Cin. L. Rev. 23 at 25 (1935). North Dakota and Nebraska enacted similar constitutional amendments in 1918 and 1920, respectively. See Dodd, The Course of Judicial Review in the State of Ohio, 25 Am. Pol. Sci. Rev. 367 at 374, n. 30 (1931). See n. 34, *infra.*

[20] State ex rel. Jones v. Zangerle, 117 Ohio St. 507, 511, 159 N. E. 564 (1927).

[21] Village of Brewster v. Hill, 128 Ohio St. 354, 356, 191 N. E. 364 (1934).

[22] Board of Education v. City of Columbus, 118 Ohio St. 295, 305, 160 N. E. 902 (1928).

[23] City of East Cleveland v. Board of Education, 112 Ohio St. 607, 148 N. E. 350 (1925).

3963 by the Court of Appeals for the Eighth District. The same parties apparently then took the same issue to the Court of Appeals for the Ninth District; it also upheld the constitutionality of Section 3963.[24] In 1928 the same issue arose in the *Columbus* case,[25] an appeal from a ruling of unconstitutionality of Section 3963 by the Court of Appeals for the Second District; the five dissenting judges in the *East Cleveland* case, now speaking for the Court, affirmed the judgment below and noted that the effect of the Court's ruling was as follows:

> * * * In the Second appellate district section 3963 is unconstitutional and void, and must be so treated by all the municipalities of that district. In the Eighth and Ninth appellate districts the statute is valid, and must be so administered. In the other six appellate districts, municipalities may not know whether that section is valid and applicable to municipalities within their jurisdictions until the question has been submitted to the various courts of appeals of those districts, but all municipalities in those districts may be assured that whatever judgments are rendered by their respective Courts of Appeals will be affirmed by this court until such time as either the constitutional provision is abrogated or changes occur in the personnel of this court. It would be difficult to describe or even imagine a more deplorable situation.[26]

The Court of Appeals which was affirmed in the *Columbus* case had stated that it had not decided the case upon the opinions in the *East Cleveland* case but upon its own judgment, and the Supreme Court approved this method on analogy to the principle that a decision by a federal court evenly divided is not an authoritative precedent.

Subsequently the Court of Common Pleas for Licking County, in the Fifth District, considered the same issue. It held Section 3963 unconstitutional[27] on the theory that a Common Pleas Court should follow the latest pronouncement of the Supreme Court (then the *Columbus* case) until reversed by its own Court of Appeals.

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[24] Referred to in Board of Education v. City of Columbus, *supra* note 22. The same result of constitutionality of sec. 3963 was reached in a suit between the same parties after the 1925 East Cleveland case in City of East Cleveland v. Board of Education, 25 Ohio App. 192, 157 N. E. 575 (Eighth District 1927).

[25] Board of Education v. City of Columbus, *supra* note 22.

[26] 118 Ohio St. 295, 299 (1928).

[27] City of Newark v. Board of Education, 28 Ohio Nisi Prius (N. S.) 297 (Ohio Com. Pl. 1931).

Eventually Section 3963 was declared unconstitutional by the constitutional majority of six members of the Supreme Court (its personnel having changed) in *Board of Education v. Village of Willard,*[28] and the result was interpreted as creating "the now statewide unconstitutionality of the statute." [29] Oddly, the *Willard* case was not even cited in a 1944 Court of Appeals opinion in the Second District,[30] the court relying solely upon the 1928 *Columbus* decision as fixing the unconstitutionality of Section 3963 in the Second District.

There were numerous other decisions involving Section 3963; but the key point is that during the 10-year period between the 1925-minority-vote decision of constitutionality in the *East Cleveland* case and the 1935 six-vote decision of unconstitutionality in the *Willard* case, the status of the law was in hopeless confusion.

Is there an advantage gained sufficient to offset this confusion? A system of litigating a statute appellate district by appellate district may produce activity for attorneys but it has little else to commend it, at least where the issues are not essentially local matters inevitably turning on peculiar fact and policy factors in each community. And what of the asserted evils which led the Constitutional Convention 50 years ago to adopt this unique provision? The judicial climate has changed markedly since 1912; at that time there was much popular discussion of techniques for curbing what was considered excessive judicial power in striking down state statutes. While current proposals to limit the power of the United States Supreme Court, at least in certain defined areas, have been made, these are specialized efforts not directed to limiting judicial power generally.

But the fact that judicial disposition to invalidate economic legislation has waned markedly in the decades since the 1912 Convention is not the only reason, in addition to those present at the time of adoption, that time has shown to support deletion of this Ohio provision. One point, emphasized by legal history, is that the provision applies to all constitutional issues involving state statutes, not just those of the categories which concerned the Convention. More importantly, the Section 3963 history and other examples demonstrate that this was not a sound method of

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[28] 130 Ohio St. 311, 199 N. E. 74 (1935).

[29] Kasch v. Peoples Hospital Co., 54 Ohio App. 80, 83, 5 N. E. 2d 1020 (1936).

[30] Wayne Furniture Co. v. Dayton, 43 Ohio L. Abs. 1, 57 N. E. 2d 167 (Ohio App. 1944).

accomplishing the intended result. To permit up to nine or ten courts of last resort in the state on fundamental constitutional issues, depending on how and when the issue is litigated, sacrifices the usually desirable result of uniformity of law and breeds uncertainty and litigation. The legal history shows that even if the original purpose of limitation of judicial power were thought to be salutary, the "except" clause was necessarily a litigation-fomenting device. There seems to be little sentiment in support of the continued existence of this unique constitutional provision in Ohio.

As to the *Hudson* case, this peculiar Ohio constitutional provision injects another legal issue into fair trade enforcement. The legal history of fair trade statutes has been one of constant litigation. Many parties have asserted and litigated many legal issues in fair trade cases; and this background is support for the view that the *Hudson* decision is not the last word in interpretation and application of the 1959 Ohio Fair Trade Act.

Assuming that there will be further litigation, what are the scope and effect of the *Hudson* decision? Already one question arises. In several cases in the Court of Appeals for Franklin County,[31] the 1959 Fair Trade Act has been held unconstitutional. In some of these cases the Supreme Court dismissed the appeal of right "for the reason that no debatable constitutional question is involved." [32] Thus, under the *Columbus* case rationale (or at least until the Court of Appeals for Franklin County acts again) the statute is constitutional in Cuyahoga County and unconstitutional in Franklin County. The state of the law in the counties in the judicial districts other than the Second and the Eighth is, to state it most graciously, unclear. Perhaps each Court of Common Pleas, and then each Court of Appeals, for these other counties, can reach its own independent decision; perhaps, under the Licking County Common Pleas analysis noted above, Courts of Common Pleas and perhaps even Courts of Appeals in these other counties should follow *Hudson,* it now being the latest pronouncement of the Supreme Court on the issue. But clarification must await decisions of the courts.

[31] See Mead Johnson & Co. v. Columbus Vitamin and Cosmetic Distributors, Inc., 1962 CCH Trade Cases par. 70,360 (Franklin C. A. 1962).

[32] See Mead Johnson & Co. v. Columbus Vitamin and Cosmetic Distributors, Inc., 1963 CCH Trade Cases par. 70,782 (1963). The significance of this action is doubtful, particularly since the appellant was apparently the discount house, which was the successful party in the Court of Appeals.

Thus the *Hudson* case has dual significance. First, it is important in its holding of a relatively new concept in fair trade legislation—the "notice" or "implied contract" doctrine under which resellers are deemed to have entered into a legislatively defined contract by accepting goods with notice of the fair trade price limitations. This concept, previously upheld in Virginia, finds its counterpart in the current Quality Stabilization Bills pending in Congress which would include provision for a federal right to enforce resale price maintenance against resellers of branded commodities who are given prior notice of price restrictions.[33]

A second respect in which the *Hudson* case may acquire significance lies in the renewed attention to Article IV, Section 2 of the Ohio Constitution which it may invite, depending on future developments in litigation under the 1959 Ohio Fair Trade Act. Wholly apart from whatever view one takes toward fair trade, the *Hudson* decision serves as a reminder that this Ohio constitutional provision has not worked well throughout its history and the asserted need for the provision is not present now, whatever the situation may have been in 1912. Its repeal was recommended in connection with the 1952 submission to the electorate of the question of the desirability of a convention to amend or revise the state constitution; [34] undoubtedly repeal of this provision will be suggested again in connection with the next constitutionally required vote on the desirability of such a convention in 1972, if not before. Whether the subsequent history of *Hudson* will be important at that time cannot be foreseen. But the case has value in calling attention to a constitutional oddity which by its nature serves to frustrate uniformity of law.[35]

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[33] E.g., H. R. 3669, 88th Congress.

[34] Deletion was proposed in Report of the Committee on Ohio Judicial System, Ohio State Bar Association, 24 Ohio Bar 654, 658 (1951). Arguments in favor of, and against, the basic objective were summarized in an early article, Cushman, Constitutional Decisions by a Bare Majority of the Court, 19 Mich. L. Rev. 771, 797-803 (1921). Neither the Nebraska nor the North Dakota provision includes a counterpart of Ohio's "except" clause with respect to lower court rulings. Neb. Constn., Art. V, Sec. 2, 2 Rev. Stat. Neb. 118-119 (1943) (5 of 7 judges required for ruling of unconstitutionality); N. D. Constn. Sec. 89, 13 N. D. Century Code 183 (1960) (4 of 5 judges required).

[35] The effect of Hudson on other fair trade cases is in litigation; the foregoing is intended to suggest the need to amend the Constitution in the future, and not to indicate how it should be applied in any case under the existing provision.