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Price-Fixing in Georgia

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PRICE-FIXING IN GEORGIA

In one respect the scope of this comment is broader than the title suggests, in another respect narrower. Price-fixing in Georgia cannot be adequately considered without giving some attention to price-fixing elsewhere, particularly in cases which have reached the United States Supreme Court. On the other hand, certain aspects of price-fixing will be purposely omitted from this discussion: those attempted under the N.I.R.A. during the depression; those growing out of War Powers, such as the Lever Act, the Office of Price Administration, and its successor, the Office of Price Stabilization. To deal with these would require a treatment far more extensive than is possible in a brief comment.

If the section considering other states seems disproportionately long in a paper which, by its title, should concentrate more on Georgia, it is because the writer feels that without fitting this state's experiences into the national pattern, the essential perspective cannot be achieved.

I. Price-Fixing Elsewhere

Price-fixing is, of course, very old. It was known in the Roman Empire under Diocletian and Julian, in the French laws of the Maximum, and in early British and colonial enactments.[1] According to an article in the *Harvard Law Review*,[2]

> In England, from the fourteenth century there were statutes fixing the prices in businesses not within the modern conception of public utilities,[3] and there is evidence that such statutes were passed by American provincial assemblies.[4] During the Revolution . . . at least eight of the thirteen states passed laws fixing the price of every commodity on the market. Within a few years they all seem to have been repealed . . . At the time the Fifth Amendment was ratified, however, at least two states had statutes providing for the regulation of the price of bread.[5]

Spanish America had such laws even before the first English colonists landed. In Mexico (New Spain), Cortez introduced price-fixing on bread, meat, and other necessities as early as 1524.[6]

1. Kent Stores v. Wilentz, 14 F.Supp. 1, 6 (D.N.J. 1936), citing, as source of this information, Wilkinson, State Regulation of Prices in Australia, pp. 98-117 and 240-243.
2. Note, 33 HARV. L. REV. 838 (1920).
3. 23 EDW. III, Stat. I, c. 6 (1349); 25 HEN. VII, c. 2 (1533); 31 GEO. II, c. 9, Sec. 7, 20 (1758).
4. 2 Acts of Assembly of Province of Pennsylvania, 327 (Act of 1758).
5. Maryland Laws of 1789, c. 8, Sec. 2 (HERTY'S DIGEST OF THE LAWS OF MARYLAND); 5 Statutes of South Carolina, 186 (1791) (1 South Carolina Acts of Assembly, 1791-94, p. 88).
6. Aiton, *Early American Price-Fixing Legislation*, 25 MICH. L. REV. 15 (1925).

Sir Matthew (Lord Chief Justice) Hale in a manuscript[7] estimated to have been written about 1670[8] has a passage pertaining to regulation of prices charged by wharfingers, ferrymen, and others. In it he writes:

> For now the wharf and the crane and other conveniences are affected with a publick interest, and they cease to be juris privati only; as if a man set out a street in a new building on his own land, it is now no longer bare private interest, but is affected with a publick interest.

Lord Hale died in 1676, and his manuscript was not published until 1787. But the phrase he (is believed to have) coined was to exert a profound effect on American jurisprudence.

It was first called to the attention of the United States Supreme Court in the now-famous *Munn v. Illinois* case.[9] Munn's attorneys were attacking the constitutionality of an Illinois statute which fixed the charges for storage made by proprietors of grain elevators; they contended that a legislature could not, under the Constitution, interfere with the freedom to contract unless the business involved was "affected with a public interest." Most of the justices were impressed by the phrase and acknowledged its validity. But the attorneys who introduced it defeated their own purpose. As a writer in the *Yale Law Journal* express it:[10]

> Counsel for the plaintiff-in-error presented to the United States Supreme Court a novel, erudite, and ingenious argument. . . . So Mr. Chief Justice Waite, with a rare impartiality, accepted the rule of law from the plaintiff-in-error, affected grain elevators with a public interest, and handed the decision to the state of Illinois.

But in the majority decision, written by Waite, Lord Hale's statement broadened. According to a writer in the *Harvard Law Review*,[11]

> . . . by translating the particulars, "the wharf and the crane and other conveniences," into the generic term, "private property," he transformed the whole course of the American Law of Price Regulation.

Actually, there is evidence that Lord Hale's phrase was not unknown to American courts even before *Munn v. Illinois*. In 1841[12] the validity of a city ordinance of Mobile, Alabama, regu-

7. *De Portibus Maris*, 1 HARG. L. TR. 78 (1787).
8. Estimated by McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. REV. 759 (1930).
9. 94 U.S. 113, 24 L. Ed. 77 (1876).
10. Hamilton, *Affectation with a Public Interest*, 39 YALE L.J. 1089 (1930). 43 HARV. L. REV. 759, 768 (1930).
11. McAllister, *Lord Hale and Business Affected with a Public Interest*,
12. Yuille v. Mobile, 3 Ala. (New Series) 137 (1841).

lating the asize and price of bread was attacked but upheld by the Supreme Court of Alabama. Ormond, J. in that case wrote:

> There is no motive for this interference . . . with the lawful actions of individuals or the mode in which private property shall be enjoyed *unless such calling affects the public interest* [italics supplied] or private property is employed in a manner which directly affects the body of the people.[13]

In *Munn v. Illinois* the doctrine had not been accepted unanimously. Field, J. (Dissenting),[14] wrote:

> I do not doubt the justice of the encomiums passed upon Sir Matthew Hale as a learned jurist of his day, but I am unable to perceive the pertinency of his observations upon public ferries and wharves . . . to the questions presented by the warehousing law of Illinois.

But the test had been established, and was to persist from 1876 until at least 1933. Using it as a measuring rod the Court upheld laws regulating railway rates,[15] fire insurance premiums,[16] commissions on fire insurance premiums,[17] charges by stockyards,[18] fees of attorneys certain claims,[19] and charges by private contract carriers.[20] By the same test, statutes were declared unconstitutional which attempted to fix the price of gasoline[21] and milk,[22] the fee for resale of theatre tickets,[23] charges by private employment agencies[24] (subsequently overruled[25]), minimum wages for women and children,[26] and minimum wages in the meat-packing industry.[27]

During this period the phrase was a sort of magic talisman.

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13. *Ibid.* p. 140.
14. 94 U.S. 113, 24 L. Ed. 77, 93 (1876).
15. Chicago B. & Q. R.R. v. Iowa, 94 U.S. 155, 24 L. Ed. 94 (1877); Peik v. Chicago & N.W. R.R., 94 U.S. 164, 24 L. Ed. 97 (1877).
16. German Alliance Insurance Co. v. Lewis, 233 U.S. 389, 34 S.Ct. 612, 58 L. Ed. 1011 (1914).
17. O'Gorman & Young v. Hartford Insurance Co., 282 U.S. 251, 51 S.Ct. 130, 75 L. Ed. 324 (1931).
18. Cotting v. Kansas City Stockyards, 183 U.S. 79, 22 S.Ct. 30, 46 L. Ed. 92 (1901).
19. Frisbie v. United States, 157 U.S. 160, 15 S.Ct. 586, 39 L. Ed. 657 (1895).
20. Stephenson v. Binford, 287 U.S. 251-274, 53 S.Ct. 181, 77 L. Ed. 288 (1932).
21. Williams v. Standard Oil Co., 278 U.S. 235, 49 S.Ct. 115, 73 L. Ed. 287-308 (1929).
22. Fairmont Creamery v. Minnesota, 274 U.S. 1, 47 S.Ct. 506, 71 L. Ed. 893 (1927).
23. Tyson Bros. United Theatre Ticket Offices v. Banton, 273 U.S. 418, 47 S.Ct. 426, 71 L.Ed. 718 (1927).
24. Ribnik v. McBride, 277 U.S. 350, 48 S.Ct. 545, 72 L. Ed. (1928).
25. Olsen v. Nebraska, 313 U.S. 236, 61 S.Ct. 862, 85 L. Ed. 1305 (1941).
26. Adkins v. Children's Hospital of District of Columbia, 261 U.S. 525, 43 S.Ct. 394, 67 L. Ed. 785 (1923).
27. Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103 (1923).

In the *Tyson* case, the Court said, through Mr. Justice Sutherland:[28]

> Lord Hale's statement that when private property is "affected with a public interest it ceases to be juris private only," is accepted by this court as the guiding principle in cases of this character.

Only the most venturesome dared to challenge its validity. Also in the *Tyson* case, Mr. Justice Holmes (dissenting),[29] wrote:

> . . . and the notion that business is clothed with a public interest is little more than a fiction to beautify what is disagreeable to the sufferers.

Mr. Justice Stone, joining him in dissent, wrote:[30]

> The phrase "business affected with a public interest" seems to me to be too vague and illusory to carry us very far on the way to a solution.

In 1933 the revolt finally triumphed, though by the slimmest of margins (five-four). This was in the famous *Nebbia* case,[31] which held the New York Milk Control Act constitutional. Much attention was given to the "peculiar and uncontrollable factors" determining milk prices, the perishability of the product, and the need for "assuring an ample supply of wholesome milk." But the Court did not stop here. It went on to say:[32]

> On proper occasion and by appropriate measures, a state may regulate a business [*Quaere*: *any* business?] in any of its aspects, including selling prices of products or commodities. . . . Due process clause does not prevent any state from adopting any economic policy reasonably deemed to promote public welfare, or from enforcing such policy by legislation adapted to its purpose.

As to the hitherto sacrosanct phrase:[33]

> The phrase "affected with a public interest" can mean no more than that an industry for adequate reason is subject to control for the public good . . . there is no closed class or category of businesses affected with such interest.

Mr. Justice McReynolds' vigorous dissent[34] cannot be overlooked:

> It [the lower court] has not attempted to indicate how higher charges at stores to impoverished customers, when the output is excessive and sales prices by producers are unrestrained, can possibly increase receipts at the farm. . . . It is not true, as stated,

28. 273 U.S. 418, 47 S.Ct. 426, 71 L. Ed. 718, 725 (1927).
29. *Ibid.* p. 729 (in 71 L. Ed).
30. *Ibid.* p. 731 (in 71 L.Ed.).
31. Nebbia v. People of the State of New York, 291 U.S. 502, 54 S.Ct. 505, 78 L. Ed. 940 (1933).
32. *Ibid.* p. 957 (in 78 L. Ed.).
33. *Ibid.* p. 956 (in 78 L. Ed.).
34. *Ibid.* p. 967 (in 78 L. Ed.).

> that "the State seeks to protect the producer by fixing a minimum price for his milk." She carefully refrained from doing this, but did not undertake to fix the price until the milk had passed to other owners. . . . If here we have an emergency sufficient to empower the legislature to fix prices, then whenever there is too much or too little of an essential thing—whether of milk or grain or pork or shoes or clothes—constitutional provisions may be declared inoperative.

But the old order was passing. The troublesome stumbing block now removed, the Court proceeded along the path it had chosen. In 1937 it approved a Georgia statute fixing warehouse charges to growers of tobacco;[35] in 1940 a statute fixing prices to be paid growers of citrus fruit by canners[36] and an Act of Congress fixing the price of coal in interstate commerce;[37] in 1941 a statute fixing compensation of private employment agencies;[38] and in 1950 a statute fixing the price of natural gas.[39] It is worthy of note that in the last-mentioned case, Mr. Justice Black, specially concurring, characterized the attack on the law's constitutionality as "frivolous."

It seems evident, now, that the United States Supreme Court has placed its stamp of approval on price-fixing whenever the legislature feels that conditions warrant it. But the highest court has consistently re-affirmed the power of the courts to invalidate such legislation if they think it "arbitrary and unreasonable."

The Fair Trade Acts belong in a somewhat different category and have had a somewhat different history. There is some doubt as to whether they are "price-fixing" at all. Those which forbid the sale of merchandise "below cost" (a term variously defined) and prescribed criminal penalties for violations might be justly so described. Most of the acts, however, merely authorize contracts between producer and dealer which themselves fix the minimum price at which certain trade-marked goods are to be sold, and give the producer a right of civil action for breach of such contracts. Such laws were not uncommon even in the last century.[40]

The passage of the Sherman Act[41] in 1890 was, though not immediately, to result in a temporary eclipse of such statutes.

35. Townsend v. Yeomans, 301 U.S. 441, 57 S.Ct. 842, 81 L. Ed. 1210 (1937).
36. Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 60 S.Ct. 517, 84 L. Ed. 774 (1940).
37. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L. Ed. 1263 (1940).
38. Olsen v. Nebraska, 313 U.S. 236, 61 S.Ct. 862, 85 L. Ed. 1305 (1941).
39. Cities Service Gas Co. v. Peerless Oil and Gas Co., 340 U.S. 179, 71 S.Ct. 215, 95 L. Ed. 190 (1950).
40. N. Y. Ice Co. v. Parker, 21 How. Pr. 302 (N.Y. 1861); Fowle v. Park, 131 U.S. 88, 33 L. Ed. 67 (1889).
41. 26 STAT. 209 (1890), 15 U.S.C.A. § 1 (1927).

In the *Hartman* case[42] a Federal court dissolved an injunction obtained by the manufacturers of "Peruna" restraining a dealer from inducing distributors to violate their contracts with plaintiff. This was in 1907. The leading case, however, was decided four years later. This was *Dr. Miles Medical Co. v. Park & Sons*.[43] In it the United States Supreme Court held resale price maintenance contracts an unlawful restraint of trade under the Sherman Act. Next, in *Federal Trade Commission v. Beech-Nut Packing Co.*,[44] resale price maintenance was held a violation of the Federal Trade Commission Act.[45] (Mr. Justice Holmes, not uncharacteristically, dissented.) So for a time the Fair Trade Acts disappeared.

But not for long. As a writer in the *University of Pennsylvania Law Review*[46] expresses it:

> The federal law against resale price maintenance was not doomed to be demolished by a frontal attack, however. A flanking movement through the state legislatures proved to be much more effective.

The first was California.[47] Other states soon followed. The United States Supreme Court, in 1936, held valid the Fair Trade Acts of California[48] and Illinois.[49] In the following year, the Miller-Tydings Amendment[50] exempted from the Sherman Act resale price maintenance contracts lawful in the state where the resale was to be made. Encouraged, more and more states enacted laws favoring such contracts until, in 1950, according to a writer in the *Illinois Law Review*,[51] forty-five states had passed such laws, the exceptions being Missouri, Texas, and Vermont.

Cases in which Fair Trade Acts have been upheld are too numerous to be listed here.[52] In eight states—Minnesota, Arizona, Pennsylvania, Nebraska, New Jersey, Maryland, Florida, and Mississippi—such acts have been invalidated by the courts, but in most of these the act has been subsequently amended and accepted as satisfactory.

42. Park & Sons v. Hartman, 153 Fed. 24 (6th Cir., 1907).
43. 220 U.S. 373, 397-98, 31 S.Ct. 376, L. Ed. 502 (1911).
44. 257 U.S. 441, 42 S.Ct. 150, 66 L. Ed. 307 (1922).
45. 38 STAT. 714, 719 (1914), 15 U.S.C.A. § 45 (1927).
46. McLaughlin, *Fair Trade Acts*, 86 U. OF PENN. L. REV. 803 (1938).
47. CAL. STAT. 1931, c. 278; CAL. STAT. 1933, c. 260.
48. Pep Boys v. Pyroil Sales Co., 299 U.S. 198, 57 S.Ct. 147, 81 L. Ed. 122 (1936).
49. Old Dearborn Distributing Co. v. Seagram Distillers, Inc. 299 U.S. 183, 57 S.Ct. 139, 81 L. Ed. 109 (1936).
50. PUBLIC ACT 314, 1937, 15 U.S.C.A. § 1 (Supp. 1937).
51. (Author's name not given), *Constitutionality of Fair Trade Pricing Re-Examined*, 45 ILL. L. REV. 378 (1950).
52. For partial list, see Notes, 128 A.L.R. 1126 (1940); 118 A.L.R. 506 (1939).

In the Minnesota case[53] the court declared the act "arbitrary and discriminatory" and its cost survey provision "vague and indefinite." In the Arizona case[54] the court objected chiefly to the vagueness of the term, "sales at prices which cannot be justified by existing market conditions." In the Pennsylvania case[55] the court was more concerned with a sin of omission: while striking down the act as it stood, it acknowledged that "if the Act confined itself to prohibiting sales below cost *when intending to destroy competition* [italics supplied], it would undoubtedly be valid." (Certainly the legislature could be expected to take so obvious a hint!) But even though the Nebraska Act *did* include the saving phrase, the court[56] declared it violative of the state constitution, "which guarantees (to a person) the right to dispose of property in such innocent manner as he pleases, and to sell at such price as he can obtain in a fair barter." In the New Jersey case[57] the court asserted, "The constitutional guaranties of the Bill of Rights give to every person the right to acquire and possess property . . . and to sell such property at any price that can be obtained in a fair trade." Noticeably, it adds that the sale of groceries is not "affected with a public interest." (This was in 1939, six years after the United States Supreme Court had abandoned the phrase.) In the Maryland case[58] the Fair Trade Act was held "invalid for uncertainty and for its potential inequities," and its regulations were called "unnecessary and burdensome." In the Florida case[59] the court decided that the Fair Trade Act was "no longer in the public interest," and that it was "in fact a price-fixing statute favoring a minority group to the detriment of the public welfare." In the Mississippi case[60] that state's Fair Trade Act was held unconstitutional as "inimicable to public welfare, violative of public policy, repugnant to the public interest in the right of free trade and legitimate competition in business."

A good many commentators have doubted the wisdom of

53. Great Atlantic & Pacific Tea Co. v. Ervin, 23 F. Supp. 70 (D. Minn. 1938).
54. State v. Walgreen Drug Co., 57 Ariz. 308, 113 P.2d 650 (1941).
55. Commonwealth v. Zasloff, 338 Pa. 457, 13 A.2d 67, 128 A.L.R. 1120 (1940).
56. State *ex. rel.* English v. Ruback, 135 Neb. 335, 281 N.W. 607 (1938).
57. State on Complaint of Lief v. Packard-Bamberger & Co., 123 N.J.L. 180, 8 A.2d 291 (1939).
58. Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co., 178 Md. 38, 12 A.2d 201 (1940).
59. Liquor Store Inc. v. Continental Distilling Corp., 40 So.2d 371 (Fla. 1949).
60. Sheaffer Pen Co. v. Barrett, ctied as Miss. Ct. of Chancery, 5th D.C., March 12, 1949, in 45 ILL. L. REV. 379 (q.v.)

Fair Trade Acts. One (already quoted), in the *University of Pennsylvania Law Review*,[61] wrote:

> A legitimate conclusion seems to be that Fair Trade Laws are definitely inconsistent with the theory and spirit of the anti-trust laws. . . . Viewed in their most obvious light as a direct product of the high-pressure political lobbying by groups asserting narrow and unenlightened interests, they present a definite challenge.

It is also worth noting that the Federal Trade Commission has twice[62] recommended the repeal of the Miller-Tydings Amendment which made these Acts possible. But it is doubtful if the recommendation will be adopted. Such decisions as those quoted above have been rare. On the whole, Fair Trade Acts, despite (or perhaps *because of*) their question-begging titles, have come to be a part of the American Way of Life. They will probably be with us for some time yet.

II. Price-Fixing in Georgia

Two Georgia cases which involved real or alleged price-fixing have reached the United States Supreme Court. In the first (1932),[63] a Newnan city ordinance which required laundries to file with the city a schedule of their prices before issuing them a license was upheld because, "it is not price-fixing, and therefore not unconstitutional." In the second (1937),[64] the highest court of the land upheld a Georgia law fixing the maximum price to be charged growers of tobacco for handling and selling leaf tobacco because, "the necessity of protecting the growers from exorbitant warehouses must be presumed to have been fully known to members of the legislature." Otherwise, Georgia price-fixing has been judged only by Georgia's own highest court.

Of greatest interest at this time is, of course, the Milk Control Act.[65] Four times it has been before the Georgia Supreme Court. In two of these cases, *Bohannon v. Duncan*[66] and *Holcombe v. Georgia Milk Producers Corporation*,[67] the constitu-

61. McLaughlin, *Fair Trade Acts*, 86 U. of Penn. L. Rev. 803, 822 (1938).
62. Temporary National Economic Committee Report of the Federal Trade Commission of 1941; Report of Federal Trade Commission, Summary and Conclusion, Dec. 13, 1945, p. LX.
63. Atlanta Laundries v. City of Newnan, 286 U.S. 526, 52 S.Ct. 495, 76 L. Ed. 1269 (1932).
64. Townsend v. Yeomans, 301 U.S. 441, 57 S.Ct. 842, 81 L. Ed. 1210 (1937).
65. First passed in March, 1937 (Ga. Laws, 1937, pp. 247-264); amended in 1939 (Ga. Laws, 1939, pp. 132-134); in 1941 (Ga. Laws, 1941, pp. 256-257); in 1945 (Ga. Laws, 1945, pp. 410-415); in 1949 (Ga. Laws, 1948-49, pp. 78-87); in 1950 (Ga. Laws, 1950, pp. 136-139); in 1951 (Ga. Laws, 1951, pp. 47-53); Ga. Code Ann. §§ 42-523 *et seq.* (*Supp.* 1951).
66. 185 Ga. 840, 196 S.E. 897 (1938).
67. 188 Ga. 538, 3 S.E.2d 705 (1939).

tionality of the price-fixing features of the law was attacked but upheld; these, however, were not full-bench decisions. In the third, *Gibbs v. Milk Control Board of Georgia*,[68] only certain allegedly discriminatory features of the law were attacked—e.g., the exemption from its provisions of those producers who do not have more than six cows. Here, too, the law was upheld.

On November 13, 1951, the *Harris v. Duncan*[69] case came to the Supreme Court of Georgia. In the majority decision, Atkinson, P.J., pointed out that the *Bohannon* and *Holcombe* cases (supra), not being full-bench decisions, were not binding authority. Furthermore, he asserted (citing the (*Nebbia* case[70]) that the Georgia Court, in construing its state constitution, is not bound by decisions of the United States Supreme Court. He went on to say:[71]

> Before the General Assembly can authorize price-fixing without violating the due-process clause of our constitution, among other requirements, it must be done in a business or where property involved is "affected with a public interest," and the milk industry does not come within that scope. . . . While we recognize that the General Assembly was authorized to find that the milk industry was large, milk was a product of universal use throughout the state, that it was perishable, important as a human food, and affected the health of the people, and to further find that it was important to keep an adequate and constant supply at a fair price to both producer and consumer; yet such facts would not qualify the milk industry as being a business "affected with a public interest," notwithstanding the public or the General Assembly would have a feeling of concern in regard to its maintenance.

Chief Justice Duckworth, specially concurring, conceded that the court was precluded by the *Nebbia* decision from considering the Milk Control Law an offense against the Federal Constitution (on which grounds it had also been attacked), but asserted that the court could still consider an offense against the state constitution. He also referred to the strong dissent by Mr. Justice McReynolds in the *Nebbia* case, and pointed out that the decision in that case was a five-four split.

In the *Harris-Duncan* case all the justices concurred. And so Lord Hale's phrase was resuscitated.

Almost immediately the Georgia Legislature set about repairing the "damage." H.B. 764,[72] introduced by Campbell of Oconee, Sivell of Harris, Aycock of Jenkins, and others, became law in February, 1952. Its most significant portions (considerably boiled down) are as follows: In order to preserve free-

68. 185 Ga. 844, 196 S.E. 791 (1938).
69. 208 Ga. 561, 67 S.E.2d 692 (1951).
70. 291 U.S. 502, 54 S.Ct. 505, 78 L. Ed. 940 (1933).
71. 208 Ga. 561, 67 S.E.2d 692, 693, 694 (1951).
72. The writer wishes to thank Mr. W. Horace Vandiver, Representative from Bibb County, for sending him a copy of H.B. No. 764.

dom of contract (and to achieve several other purposes specified), it provides that contracts relating to the purchase and sale of milk shall contain twelve provisions, some of which are lengthy and complicated, and shall be filed with the Milk Board within ten days and thereafter be subject to public inspection "including the press"; that single cash transactions for the sale of milk shall be accompanied by a receipt from the buyer to the seller, indicating the address of the buyer, date and time of sale, place of delivery, quantity and type, grade, butterfat content, number and types of containers received and returned or exchanged, amount and terms of any container deposit made, and price paid; and that such receipts (or executed counterparts thereof) shall be filed with the Board within five days, also subject to public inspection. The act goes on to say that the Milk Control Board may, after investigation of the industry, recommend (*not* "fix") a suitable price for milk; and that when the requirements prescribed for contracts and for single cash transactions are not complied with, "it shall be deemed as a matter of law" that the transaction shall be in accordance with the provisions of this section, i.e., at the "recommended" price of milk. Stripped to its barest essentials, this means that one may sell milk at whatever price he likes if he complies with requirements that many will think burdensome; that if he sells milk at the recommended price, he need not comply with them.

This is very ingenious. But will the new law get by the Supreme Court? Probably not, if the Justices remain of the same mind. To impose rather inconvenient and perhaps even expensive restrictions upon sellers who do not comply with the Board's recommendations likely will be held a substantial interference with their freedom to contract; and so long as the Court feels that the milk industry is not affected with a public interest, it is not likely to tolerate such interference.

Georgia also has an "Unfair Cigarette Sales Act."[73] Since an article in an earlier issue of the *Mercer Law Review*[74] has already described adequately the provisions of this act, it will not be treated in detail here. Broadly, however, its essentials may be mentioned. Cost to the wholesaler and cost to the retailer are defined as the basic cost of the cigarettes plus the cost of doing business, which, in the absence of proof of a greater or lesser cost shall be presumed to be four and one-half percent (plus cartage) to the wholesaler and eight percent to the retailer.[75] The act makes it unlawful to sell cigarettes at less than

73. GA. CODE ANN., §§ 84-2801, *et. seq.* (Supp. 1951).
74. O'Neal and Quarles, *Some Significant Recent Georgia Legislation*, 1 MERCER L. REV. 27, 34 (1949).
75. GA. CODE ANN., § 84-2802, j. k. (Supp. 1951).

"cost," as thus defined, with intent to injure competitors.[76] Furthermore, sale (or offer to sell) at less than such cost "shall be prima facie evidence of intent to injure competitors."[77]

How have such statutes fared in other states? Few laws confined to cigarettes have been tested in court, although many tests of Fair Trade Acts in which cigarettes were the commodity actually sold have reached the courts. The leading case of an Unfair Cigarette Sales Act seems to be *Serrer v. Cigarette Service Co.*[78] In it, the Ohio Court of Appeals denounced the definition of "cost to the wholesaler" as "arbitrary and unreasonable." This was in 1946. In 1950, however, an Iowa Unfair Cigarette Sales Act was held valid as "a reasonable exercise of police power," in *May's Drug Store v. State Tax Commissioner.*[79]

How would our Georgia law fare if subjected to a court test? The answer is obvious. If the dairy industry is not affected with a public interest, certainly the sale of cigarettes is even less so. The only reason why the Unfair Cigarette Sales Act remains on our books is that it has never come before the Georgia Supreme Court. Practically, if the purpose of the act was to establish uniform prices for cigarettes, the failure to achieve that purpose has indeed been miserable, as every cigarette-smoker knows. In Atlanta, when the act was passed, some dealers were selling popular brands of cigarettes for nineteen cents, others for twenty-one cents. Those who charged the lower price had to raise it to twenty-one cents. Quite promptly, most of the dealers who had been selling twenty-one cents raised their price to twenty-three cents. Although subsequent changes in taxes have caused the price to go up or down several times, that two-cent differential remains in practically every town of any size in Georgia.

One is inclined to wonder why Georgia's Fair Trade Act (*vide infra*) was not already adequate protection against unconscionable price-cutting in cigarette sales. It seems to have sufficed as to other commodities. Is the cigarette business so unique that it requires this additional legislation? Why does the act have nothing to say about cigars, pipe tobacco, chewing-tobacco? Or snuff?

The city of Macon has ordinances which fix the prices to be charged by barbers[80] and beauticians.[81] Actually, they empower

76. GA. CODE ANN., § 84-9947 (Supp. 1951).
77. GA. CODE ANN., § 84-9947 (Supp. 1951).
78. 148 Ohio St. 519, 74 N.E.2d 853 (1947).
79. 45 N.W.2d 245 (Iowa 1950).
80. CITY OF MACON CODE (1947), §§ 33-102, 104.
81. *Ibid.*, §§ 33-202, 204.

a City Barber Board and a City Beauty Board to do the actual price-fixing, which, before it becomes official, must be agreed to by a majority of Macon barbers or beauticians, whichever group is affected. The constitutionality of this ordinance has not been attacked. Similar laws in other states, however, have not passed unchallenged. They have been declared unconstitutional in Florida,[82] Arkansas,[83] Iowa,[84] Tennessee,[85] and Arizona.[86] They have been upheld as valid in Oklahoma,[87] Louisiana,[88] Minnesota,[89] and New Mexico.[90] Only one of these (Iowa) was a city ordinance. The others were statutes passed by the state legislatures. The Macon ordinance attempts to justify itself by pointing out the need for maintaining sanitary conditions in barber shops and beauty parlors. Yet it is difficult to see why this consideration would not be equally applicable—if, indeed, not more so—to hospitals, physicians, dentists, restaurants, grocery stores, drugstores, and perhaps a host of others.

Except for the Georgia Fair Trade Act—which has been purposely reserved for final treatment—the only other examples of price fixing found in the Georgia Code have to do with insurance,[91] rates of interest,[92] fees to be charged by seaport pilots,[93] fees to be charged by attorneys in prosecuting certain claims,[94] and fees of attorneys, physicians, and hospitals for services under the Workmen's Compensation Act.[95] None of these, apparently has ever been attacked in the courts—at least not in the appellate courts. It is presumed that they are generally accepted as valid.[96]

82. State *ex rel.* Fulton v. Ives, 123 Fla. 401, 167 So. 394 (1936).
83. Noble v. Davis, 204 Ark. 156, 161 S.W.2d 189 (1942).
84. Duncan v. City of Des Moines, 222 Iowa 218, 268 N.W. 547 (1936).
85. State v. Greeson, 174 Tenn. 178, 124 S.W.2d 253 (1939).
86. Edwards v. State Board of Barber Examiners, 231 P.2d 450 (Ariz. 1951).
87. Herrin v. Arnold, 183 Okla. 322, 82 P.2d 977 (1938).
88. Board of Barber Examiners v. Parker, 190 La. 214, 182 So. 485 (1938).
89. State v. McMasters, 204 Minn. 438, 283 N.W. 767 (1939).
90. Arnold v. Board of Barber Examiners, 45 N.M. 57, 109 P.2d 779 (1941).
91. GA. CODE ANN., §§ 56-20, 21 (Supp. 1951).
92. GA. CODE ANN., §§ 57-101, *et seq.*; 12-612 (Supp. 1951).
93. GA. CODE ANN, § 80-108 (Supp. 1951).
94. GA. CODE ANN., § 30-219 (Supp. 1951).
95. GA. CODE ANN., § 114-714 (Supp. 1951).
96. The recent Supreme Court case of Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 71 S.Ct. 745, 95 L. Ed. 1035 (1951), did not involve the validity of state fair trade laws, but rather was a decision involving the interpretation to be put on the Federal Miller-Tydings Act, which exempts contracts prescribing minimum prices from the prohibitions of the Sherman Act where such contracts are lawful under local law. The Court held that enforcement of the price arangement against a nonsigner violated the Sherman Act, since only voluntary minimum price arrangements were exempted therefrom by the Miller-Tydings Act. This was purely a question of statutory construction.

The Georgia Fair Trade Act[97] can hardly be called price-fixing at all. It merely provides that a dealer in trade-marked goods may not sell such goods at a lower price than the minimum price stipulated in the contract with the producer or distributor. It provides no criminal penalities. It merely gives a right of civil action to anyone damaged by breach of such contracts. Far less drastic than the laws of some other states which have been upheld, it is not likely to be challenged in the courts. Far from interfering with freedom to contract, it would seem to be dedicated to the protection of such freedom. Apparently its constitutionality has never been seriously attacked; nor do I anticipate such an attack.

CONCLUSION

To conclude, it would seem that the Georgia Supreme Court is, on the whole, less inclined to permit price-fixing than the courts of most of its sister states or the United States Supreme Court. Those who challenge the constitutionality of a price-fixing act are more likely to find a respective bench here than elsewhere. Free enterprise, which has become an almost meaningless term in many of the forty-eight states, may still find protection in Georgia. Its advocates may avail themselves of this protection if they wish to do so. So long as Mr. Chief Justice Duckworth and Mr. Presiding Justice Atkinson remain on the bench, they will find a sympathetic ear. For these judges enunciated, in 1939 (dissenting in the *Holcombe case,*[98] a principle from which they have never retreated:

> It [the Milk Control Act] thus takes from the seller and purchaser the right to agree upon the price of their choice, if it be different from that fixed by the Board. Agreement as to price is essentially a part of the contract. The right to contract is essentially a property right which is protected by the due-process clause of our State and Federal Constitutions. The legislative power of our General Assembly is very broad, but it is not above the constitution. The police power of the state, exercised by the General Assembly, is very broad, but not above the constitution.

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97. GA. CODE ANN., § 106-4 (Supp. 1951).
98. 188 Ga. 840, 3 S.E.2d 705, 717 (1939).