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## Benrus Watch Co. Case - Judicial Recognition of Implied Repeal of Virginia Fair Trade Act

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## NOTES

### BENRUS WATCH CO v. KIRSCH

The decision in *Benrus Watch Co. v. Kirsch*<sup>1</sup> represents judicial recognition of an apparently unintended repeal by implication of the Virginia Fair Trade Act.<sup>2</sup> In order to explain this conclusion it will be necessary to briefly review the recent history of the so-called "fair trade" laws, the relationship of the Federal and State laws in the field and the nature of the legislative action which laid the foundation for the decision.

Fair trade laws were apparently products of the economic depression period of the 1930's. They are, in essence, statutory sanctions of resale price maintenance—the fixing of the retail price of various brand-identified products by means of contractual agreements between parties at different levels in the vertical chain of distribution. These laws include a controversial and essential feature which is known appropriately as the "non-signer" clause.<sup>3</sup> By means of these "non-signer" provisions the fair trade agreement is made binding upon third persons, not parties to the agreement, who have knowledge of its existence. For example, an agreement between a wholesaler and a retailer as to the resale price of a particular article can theoretically bind the retail trade of an entire jurisdiction by means of the civil right of action created in the original parties against third persons who wilfully and knowingly sell the subject article at less than the agreed price.<sup>4</sup>

Obviously this legislation provides for and sanctions a practice, i. e., combinations of persons to fix prices, which is directly in conflict with the theory, and the usual express provisions, of anti-monopoly legislation.<sup>5</sup> As a consequence, its survival has had to be assured by the action of state and federal legislative bodies in pro-

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<sup>1</sup> 198 Va. 94, 92 S.E.2d 384 (1956). And see 42 Va.L.Rev. 996 (1957).

<sup>2</sup> Va. Code §§59-1 to 59-8 (1950).

<sup>3</sup> Va. Code §59-7 (1950).

<sup>4</sup> The principal case involved an action under the Virginia statute brought by a manufacturer against a non-signing, non-complying retailer.

<sup>5</sup> See Va. Code §59-20 (1950).

viding statutory immunity from the operation of their respective anti-monopoly laws.<sup>6</sup>

The Federal statutes, which were enacted in order to exempt "fair trade" practices from the operation of the Sherman Anti-Trust Act and to make state laws applicable to goods moving in interstate commerce, are so worded that they authorize the application of "fair trade" principles to certain classes of goods moving in interstate commerce where the state involved has itself authorized such practices. The Virginia procedure was to provide a saving clause in its Anti-Monopoly Act which exempted from the operation of that Act those practices which could meet the test prescribed by the laws of the United States.<sup>7</sup> Thus "fair trade," being permissible on a national level, became permissible in Virginia.

In 1950 the General Assembly re-enacted and amended a part of the Anti-Monopoly Act, and for our purposes, accomplished two things: first, the enactment date of the Anti-Monopoly Act was thereby made more recent than that of the Fair Trade Act, and, second, the italicized words were removed from Section 59-40 of the Anti-Monopoly Act which had previously read as follows:<sup>8</sup>

*This chapter shall apply to those trusts, combinations and monopolies which are unreasonable or inimical to the public welfare, as hereinbefore defined and are prohibited and penalized under the provisions of any law of the United States or would be prohibited and penalized under the provisions of any law of the United States if their activities extended to interstate as well as intrastate commerce.*

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<sup>6</sup> See Miller-Tydings Act of 1937, 50 Stat. 693, 15 U.S.C. §1; McGuire Act of 1952, 66 Stat. 632, 15 U.S.C. §45; Va. Code §§59-1 to 59-40 (1950). It should be noted that an effort is made to preserve the traditional element of competition by the stipulation that, in order to be eligible to be "fair traded", goods must be in free and open competition with other goods of the same general class produced and distributed by others. The question of whether or not this provision is effective in assuring the public of the benefits of competitive pricing is the subject of much debate.

<sup>7</sup> Va. Code §59-40 (1950).

<sup>8</sup> Prior to the 1950 amendment, this section had been interpreted as limiting the effect of the Anti-Monopoly Act to those trusts and monopolies which would be prohibited or penalized under any law of the United States if their activities extended to interstate commerce. *Werth v. Fire Companies Adjustment Bureau*, 160 Va. 845, 171 S.E. 255 (1933).

As thus amended, this Section no longer provides protection for any activity clearly described by the express provisions of the Anti-Monopoly Act. In the principal case, the court recognized the direct conflict between the provisions of the two acts<sup>9</sup> and, applying an established rule of law,<sup>10</sup> held that the Fair Trade Act had been repealed by implication.

Upon first examination it appears that the cause and effect in this case are so logically interrelated that the only reasonable conclusion to be drawn is that the amendment of 1950 was made with the deliberate intention of bringing about the repeal of the Fair Trade Act. Further study has revealed that "fair trade" was not merely actively shielded by the repealed saving clause, *supra*.

In February of 1950 the state was faced with a prospective telephone employees strike. The Governor had seized the city transit lines in Richmond, Norfolk and Portsmouth as a result of a labor dispute. A widespread coal miners strike had resulted in an increasingly critical fuel shortage in Virginia and in well publicized violence in the mining areas of the western part of the State. As a consequence, anti-labor feeling was running high and a series of bills having to do with labor matters was introduced in the General Assembly. Among these, newspaper accounts briefly refer to a bill (House Bill 588) intended to make labor unions subject to the Anti-Monopoly Act. In order to accomplish this it was necessary to eliminate Section 59-30 of that Act which was another saving clause expressly exempting labor unions, among other groups, from the restrictions to the parent act. This alone would not have been sufficient, however, to accomplish the desired result inasmuch as Section 59-40 with its broad savings clause would have precluded action under the Act against any practice sanctioned by the liberal Federal labor laws.<sup>11</sup> Both of these ends were accomplished by the previously discussed amendment of 1950<sup>12</sup> which had as its origin House Bill 588.

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<sup>9</sup> Compare the sanctions of the Fair Trade Act with the express prohibitions of §59-20.

<sup>10</sup> *Norfolk & W.R.Co. v. Virginian R. Co.*, 110 Va. 631, 66 S.E. 863 (1910); *Gaskill v. Commonwealth*, 185 Va. 440, 39 S.E.2d 296 (1946).

<sup>11</sup> See the provisions of this section which have been transcribed in the body of this article.

<sup>12</sup> Acts of Assembly, 1950, Ch. 396, p. 703.

These circumstances, and the absence of any contemporary newspaper accounts mentioning the normally controversial subject of "fair trade" in connection with this proposed legislation, lead to the conclusion that the legislators did not intend a repeal of the Fair Trade Act and that the consumer public has been the recipient of a "windfall."

At this point, it seems appropriate to speculate as to the prospects for reenactment of the Fair Trade Act and its prospects for survival in the courts if reenacted.

As indicated, these laws appear to have been products of the depression period of the 1930's. Then and now they seem to be intended to benefit a limited, although numerous, class of business enterprises. Indirect benefits to the consumer public are claimed by the proponents, but it seems to be the consensus of non-partisan opinion that the consumer carries the burden in the form of higher than necessary prices. In practice the theoretical benefits to certain business elements have been severely curtailed by difficulties of enforcement and other malfunctions in the system.<sup>13</sup> As a result only a limited number of the theoretical beneficiaries are strongly in favor of "fair trade" as a practical matter. Despite this, those elements which do benefit are ardent in their demands for "fair trade" assistance from the legislatures and a local member of such a retailer's association has indicated that that group<sup>14</sup> will sponsor a new bill in the next session of the General Assembly. The prospects for the enactment of such a bill appear to depend upon whether the change in business conditions plus the factor of lessened business support can overcome the advantage which aggressive special interest groups have often held over the anonymous consumer.

If "fair trade" makes a comeback, it is likely to be subjected to a prompt test on constitutional grounds. Since 1952 a large number of state "fair trade" acts have been so challenged and, according to a trade paper,<sup>15</sup> roughly fifty percent of those so tested have been held to be unconstitutional under state constitutions. The usual attack seems to be based upon the theory that various constitutional rights have been encroached upon by an unwarranted

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<sup>13</sup> See: Herman, *A Note on Fair Trade*, 65 Yale L.J. 23 (1955); Note, 69 Harv. L.Rev. 316 (1955).

<sup>14</sup> Retail Druggists Association.

<sup>15</sup> Drug Topics, issue of about April 30, 1957.

exercise of the police power. The principal case included such an attack, and, in the trial court, the decision was based on that point alone. The appellate court found it unnecessary to decide the point, but did refer to the "very serious" nature of the question raised as measured by the Virginia Constitution and cases interpreting it. The case specifically referred to was decided in 1903<sup>16</sup> and applied a strict "public health, safety and morals"<sup>17</sup> test to limit the exercise of the State's police power and to invalidate a statute prohibiting the use of the now notorious trading stamp in retail sales. Subsequent cases indicate a much broader interpretation of the proper scope of the police power.<sup>18</sup> The key words now seem to be "public welfare," and the courts are free to uphold a much wider exercise of the police power. The economic difficulties of the times doubtless were responsible for the advent of more liberal views in the 1930's, and it seems logical to assume that, in any contest of this right of the state to promote the public welfare to the detriment of the individual rights, it is going to be necessary for the court to make its decision as to the propriety of any particular form of state action in the light of existing circumstances.<sup>19</sup> What was appropriate in the 1930's could well be found to be unwarranted interference with the rights of the individual during the current days of prosperity. Incidentally, there appear to have been no appellate level tests of the Fair Trade Act prior to the principal case, and there are, accordingly, no bases for speculation which are directly in point.

Despite the changed economic conditions, one element which may be decisive in a future test of "fair trade" is the policy of the court to uphold the considered acts of the legislature in doubtful cases unless the action which has been taken is clearly unconstitu-

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<sup>16</sup> *Young v. Commonwealth*, 101 Va. 853, 45 S.E. 327 (1903).

<sup>17</sup> "It follows therefore, that, unless the statute in question is one which in some way provides for the public safety, pertains to the public health, or concerns the public morals, it is not a valid exercise of the police power." *Young v. Commonwealth*, 101 Va. 853, 863, 45 S.E. 327, 329 (1903).

<sup>18</sup> *Gorieb v. Fox*, 145 Va. 554, 134 S.E. 914 (1926); *West Bros. Brick Co. v. Alexandria*, 169 Va. 271, 192 S.E. 881 (1937), appeal dismissed, 302 U.S. 658, 58 S.Ct. 369, 82 L.Ed. 508 (1937); *Sanitation Comm. v. Craft*, 196 Va. 1140, 87 S.E.2d 153 (1955).

<sup>19</sup> "General welfare can no more be defined than can police power. These are terms which take on new definitions when we come to face new conditions. General welfare in Alexandria today may warrant regulations which would have been fantastic in Sherwood Forest." *West Bros. Brick Co. v. Alexandria*, 169 Va. 271, 288, 192 S.E. 881, 888 (1937).

tional.<sup>20</sup> With this in mind, it does not seem unreasonable to conclude that, if the special interest groups secure the enactment of "fair trade" legislation, the court must give considerable weight to the legislative decision as to what is in the best interest of the public. The fact that the greatest theoretical benefit from these laws runs to the small, local businessman,<sup>21</sup> of whom there are many, certainly would lend plausibility to such a decision on the part of the legislature.

To summarize, it would appear that the principal case did not conclusively decide the future status of "fair trade" in Virginia; that enactment of replacement legislation is quite possible and that, if enacted, there is only a prospect that the courts will find it to be unconstitutional as violative of Article I, Section 1 of the Constitution of Virginia.<sup>22</sup>

F. V. E.

## COUNCIL v. COMMONWEALTH— NUNC PRO TUNC ORDERS IN VIRGINIA

What began in England over six-hundred years ago<sup>1</sup> as a simple correction of a one-letter or one syllable error, judgment *nunc pro tunc*, has evolved into a modern-day tool of unforeseen possibility of both justice and injustice. Virginia, by its decision in *Council v. Commonwealth*,<sup>2</sup> has joined the states who are firmly committed to the course of adding to the tangled mass of progeny the rule has begotten since its inception in the days of Edward III.

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<sup>20</sup> *Almond v. Gilmer*, 188 Va. 822, 51 S.E.2d 272 (1949); *City of Newport News v. Elizabeth City County*, 189 Va. 825, 55 S.E.2d 56 (1949); *Sanitation Comm. v. Craft*, 196 Va. 1140, 87 S.E.2d 153 (1955).

<sup>21</sup> Where effective the agreements fix the resale price at a level at which the smaller, less efficient seller can make a comfortable profit and, at the same time, the efficient, large volume seller is precluded from gaining a competitive advantage by reducing his price.

<sup>22</sup> "Equality and rights of men.—That men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

<sup>1</sup> 14 Edw. III, Chap. 6.

<sup>2</sup> 198 Va. 288, 94 S.E.2d 245 (1956).