South Carolina Law Review

Volume 11 | Issue 1 Article 6

Fall 1958

Constitutional Law

Huger Sinkler

CONSTITUTIONAL LAW

HUGER SINKLER*

The Validity of the South Carolina Fair-Trade Act as Applied to a Non-signer of a Price-fixing Contract

Rogers-Kent, Inc. v. General Electric Co.[1] involves the validity of the South Carolina Fair-Trade Act,[2] as applied to non-signers of agreements between the manufacturer and his distributors regulating retail prices.

Although such a statute was at one time proscribed by a federal statute[3] which had been enacted pursuant to the third clause of Section 8 of Article I of the United States Constitution,[4] the Miller-Tydings Act,[5] as afterwards implemented by the McGuire Act,[6] specifically provides that such agreements shall not be illegal if the same would be lawful as applied to instrastate transactions under local law. Thus the question of the validity or invalidity of a state fair-trade act is now to be determined solely by an interpretation of the applicable State Constitution.

The plaintiff here was not one of the dealers or distributors in South Carolina who had bound themselves by written contract with the manufacturer to maintain a fixed schedule of retail prices. Presumably, the plaintiff had lawfully acquired General Electric products from others than the General Electric Company, and there was no contract or covenant in existence by which General Electric Company might claim that the plaintiff had obligated itself to follow any schedule of retail prices.

The South Carolina Fair-Trade Act provides that, if there is in existence a contract relating to a commodity which bears the name of the producer of such commodity, which, among

*Member of firm of Sinkler, Gibbs & Simons, Charleston; B.A., 1927, College of Charleston; legal education, 1929, University of South Carolina; member City Council of Charleston, 1939-43; member State Legislature, 1932-36 and 1945-46; member Charleston County, South Carolina and American Bar Associations.

1. 231 S. C. 636, 99 S. E. 2d 665 (1957).
2. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 66-91 — 66-95, inclusive.
3. The Sherman Anti-Trust Act, 26 STAT. 209 (1890), as amended, 15 U. S. C. §§ 1-7 (1952).
4. The so-called "commerce clause", giving Congress power to regulate commerce among the several states.
5. 50 STAT. 693 (1937), 15 U. S. C. § 1 (1952).
6. 66 STAT. 631, 15 U. S. C. § 45 (1952).

other things, prescribes minimum prices for its resale, it shall be unlawful for any third party to knowingly offer such commodity for sale at a price less than that prescribed by the contract between the manufacturer and distributor.

Perhaps it should again be emphasized that the decision here does not concern the validity of the agreement between the manufacturer and the distributor fixing retail prices. The case here relates only to the non-signing third party, who, with full knowledge of the existence of the contract, offers the product to the public at lower prices than prescribed by such contract.

Noting that statutes of this sort had their origin in the great Depression of the early 1930's, our Court first presents a box score of the holdings of other courts on this question. It notes that a majority of the courts have upheld state fair-trade acts, but that a recent trend has become adverse. Our Court then concludes that as applied to a non-signer, the South Carolina Fair-Trade Law violates the due process clause of the State Constitution. Its holding is predicated upon the proposition that property consists not merely in the ownership and possession of a thing, but in the unrestricted right of use, enjoyment and, finally, of disposal. It reaffirms the doctrine that any act which destroys any one or more of these attributes of property to that extent destroys the property itself. And it holds that the right of an owner of property to fix the price at which he will sell, is such an important attribute of property that to infringe upon this right deprives its owner of property in the constitutional sense.

Thus our Court allies itself with the modern trend in the interpretation of state fair-trade acts.

Always of interest is the Court's comment on the analogous decision of the Supreme Court of the United States. That Court had held that a non-signer would be bound by a price-fixing agreement, on the theory that the acquisition of the property came about with knowledge of the existing restrictions with respect to its re-sale.[7] The holding is premised on the theory that particular value exists in the brand or trade-name that accompanies the commodity. The South Carolina Supreme Court stated that it was not impressed with such reasoning.

7. Old Dearborn Distributing Co. v. Seagram Distillers Corp., 299 U. S. 183 (1936).

In passing, the South Carolina Court correctly observed that the only basis upon which legislation of this sort might be upheld was as a reasonable and proper exercise of the police power of the state. In other words, for the statute to be upheld, it would have to be found as a fact that the legislation was necessary in the interests of public order, health, safety, morals or general welfare.

Appealing as this holding is, one cannot but wonder what the result would have been had the attack here been made at the height of the great Depression. Economic adversity is ofttimes more persuasive than mere logic.

The Validity of a Special Act Establishing a Single Special Purpose District

The case of *Mills Mill v. Hawkins*,[8] decided in June of 1957, with certiorari to the United States Supreme Court, afterwards denied, is perhaps one of the most interesting and at the same time important cases relating to the special act provision of the State Constitution that has been decided in many years. The case also bristles with other questions which are of real public interest.

In 1955, the General Assembly passed an act (obviously special in nature), creating a public corporation known as the Una Water District of Spartanburg County. The act authorized the governing body of the Water District to acquire, by construction or otherwise, and to operate, public water and sewer systems. The act also authorized the governing body of the District to make provision for the collection and disposition of garbage. It was contended that the law was special legislation, and invalid because it violated Subdivision 9 of Section 34 of Article III of the Constitution.[9] A second challenge contended that the act violated the due process clauses of both State and Federal Constitutions.

Each contention was forcefully made and each question holds great interest. The case was twice argued, this circumstance doubtless arising from a division which manifested itself in a dissenting opinion concurred in by a circuit judge sitting as Acting Associate Justice. The dissent, evidently

8. 232 S. C. 515, 103 S. E. 2d 14 (1957), *cert. denied*, ____ U. S. ____ (1958).

9. "IX. . . . In all other cases, where a general law can be made applicable, no special law shall be enacted . . . ."

written as the majority opinion, itself requires special attention.

The chief contention of the plaintiff on the first point was that the existence of a general law on the subject proved without doubt that the act was a special law where a general law could be enacted. The existence of the so-called general law on the subject of water and sewer districts was one basis of dissenting Justice Legge's conclusion that the special law was invalid. And both to justify his holding on this point, and to distinguish his conclusion from a contrary holding in an earlier case,[10] he points out that at the time the earlier case was decided the General Assembly had not spoken, and thus the field was then one within which special legislation might be enacted. Since the dissenting opinion appears to misinterpret the meaning of Subdivision 9, special comment will be made on this point. Because too, the dissent can have serious and adverse effect on the marketing of South Carolina bonds, comment will be made in the unwillingness of Justice Legge to follow earlier decisions. Finally, the discussion and holding with respect to the due process question will prove, in the opinion of the writer, an important legal milestone. On this point all Justices agreed that one adversely affected by the creation of a special purpose district might challenge its enactment on the ground that it violated the due process clause. While the majority concluded that under the facts of this case, the plaintiff was not arbitrarily treated and was entitled to no relief, the minority concluded otherwise. But the result (which seems clearly correct) is not so important as the holding that the legislative finding of special benefit might be reviewed by the Court. The federal rule seems now to be otherwise.[11]

Was the Challenged Act a Special Act Where a General Law Could be Enacted?

The majority decision carefully notes that the controlling question here is not whether there is in existence a general law on the subject, but whether a general law can be made applicable. Attention has already been called to the fact that the dissenting opinion proceeds on the theory that while a

10. Rutledge v. Greater Greenville Sewer District, 139 S. C. 188, 137 S. E. 598 (1927).
11. Chesebro v. Los Angeles County Flood Control District, 306 U. S. 459 (1939).

special law might be valid if the General Assembly had not preempted the particular field of general legislation, if the General Assembly shall have enacted general legislation in a particular field, all subsequently enacted special legislation would be invalid. Actually, the Georgia Constitution is so written, and the wording of the comparable provision of the Georgia Constitution points up the differences between the two provisions. The Georgia Constitution provides "no special law shall be enacted in any case for which provision has been made by an existing general law." In connection with the meaning of that language, the Georgia Court has said:[12] "Under this provision, a general law may be repealed or modified by another general law, but it cannot be repealed or modified by a special or local law."

To reach its conclusion that the challenged act did not constitute a special law where a general law could be enacted, the majority opinion carefully considered the scope and effect of the so-called general law. It noted that the general law did not provide that water and sewer districts might be created, and it points out that under the general law there is no assurance that such results will follow in any given case. The majority reasoned:

> Evidently the General Assembly concluded that a water and sewer district covering this area would not be formed either under the 1929 Act or that of 1934 by voluntary action on the part of the freeholders and qualified electors or that the creation of same would be considerably delayed, and for the protection of the public health immediate State action was necessary. The apparent apathy on the part of some in this area doubtless led to the provision in the 1955 Act authorizing the commissioners to compel the residents to use water and sewer facilities. We do not think that the effort to remove the unsanitary conditions prevailing in this territory by special legislation was obnoxious to Article III, Section 34, Subdivision IX of the Constitution. Under the circumstances, there was no general law applicable.

The majority opinion goes on to state that as far as the writer thereof was concerned, the enactment could be sustained by reason of Section 11 of Article VII of the Consti-

12. State Highway Department v. H. G. Hastings Co., 187 Ga. 819, 199 S. E. 793 (1938).

tution which authorizes special provisions for "municipal government" in the counties.[13] What the significance of the language "speaking only for himself" may be, is not entirely clear. It must be remembered that the prohibition against special legislation is no ancient, ingrained proposition of constitutional restriction, insofar as South Carolina is concerned. In none of the earlier South Carolina Constitutions did such a prohibition exist. It first appears in the Constitution adopted in 1895. Since it is provided in our present Constitution that all powers not taken away from the General Assembly remain to it, it can be observed that the Constitution of 1895 would have been far less voluminous had it not been for the insertion of the special legislation provision.[14]

The special act provision of our Constitution is a common one, insofar as state constitutions are concerned. It is the provision designed to check the so-called legislative practice of logrolling, and it results from a basic weakness in the United States Constitution on that point. That weakness, coupled with the absence of power in the Executive to veto specific items in appropriation bills, has long been noted. Those who wrote the Constitution of the Confederate States were careful to vest in the Executive the power to control the public purse by giving him the right to veto items in appropriation bills. But at the time the South Carolina Constitution was written, a more serious problem than legisla-

13. Article VIII of the Constitution of 1895 is the Article dealing with incorporated cities and towns. Article VII of that document is headed: "Counties and County Government." Section 11 of Article VII reads in part:

> Each of the several townships of this State, with names and boundaries as now established by law, shall constitute a body politic and corporate, but this shall not prevent the General Assembly from organizing other townships or changing the boundaries of those already established; and the General Assembly may provide such system of township government as it shall think proper in any and all the Counties, and may make special provision for municipal government and for the protection of chartered rights and powers of municipalities.

There seems good reason to assume that Section 11 of Article VII was put in after the full effect of Paragraph 9 of Section 34 of Article III was realized.

14. In a long line of cases the Supreme Court of South Carolina has held that the prohibition against special laws found in Section 34, of Article III, has no application if the special law is specifically authorized by any other provision of the Constitution. Cases to this effect are: State v. Touchberry, 121 S. C. 5, 113 S. E. 345 (1922); Shelor v. Pace, 151 S. C. 99, 148 S. E. 726 (1929); Anderson v. Page, 208 S. C. 146, 37 S. E. 2d 289 (1946); Moseley v. Welsh, 209 S. C. 19, 39 S. E. 2d 133 (1946); Gaud v. Walker, 214 S. C. 451, 53 S. E. 2d 316 (1949).

tive logrolling faced its people. The state had barely recovered from Reconstruction days, and while white supremacy had been restored on a state-wide basis, it had not been restored throughout all of the counties of the state. In 1895 there were many counties in which the substantial black majority remained in political control. The framers of the Constitution intended that the General Assembly protect such counties. And if they had intended that the counties and their subdivisions should be governed entirely through the operation of general laws, it is hard to see how the black majorities in several of the low-country counties would be circumvented.

Then too, another reason for Section 11 is apparent. At the time of the framing of the Constitution the mill village had come into existence. One reason the mills came to South Carolina was because it was possible to locate outside of incorporated cities and thus be relieved from a part of the tax burden, then only known in terms of ad valorem taxes. Nevertheless, the mill village required policing and other services generally furnished by municipal governments, and without question this factor was one basis for the inclusion of Section 11 of Article VII into the Constitution.

A case decided almost contemporaneously with the adoption of the Constitution, *Carolina Grocery Co. v. Burnet*,[15] has this to say:

> . . . It is no doubt true that the strict application of the term "municipal" would limit it to incorporated cities, towns and villages; but it is also true, it may properly be used in characterizing the government of a county or township. "Municipal corporations are administrative agencies established for the local government of towns, cities, counties or other particular districts, &c." Black Constitutional Law, p. 374. In 15 A. & E. Ency. Law, 953, it is stated, "A municipal corporation in its broader sense is a body politic such as a State and each of the governmental subdivisions of the State, such as counties, parishes, townships, hundreds, New England 'towns,' and school districts, as well as cities and incorporated towns, villages, and boroughs. Every one of these is properly susceptible of the general appel-

15. 61 S. C. 205, 39 S. E. 381 (1901).

> lation." This broad sense seems to have been the one intended in this particular section, whatever may be said of its use in other sections or articles; for the article containing it is devoted, as shown by its title, to "counties and county government," whereas art. 8 is devoted to the government of cities and towns. This section was evidently framed in view of the provisions of art. III, sec. 34, and was intended to give the legislature a wider latitude in the making of special provisions for county and township government.

Stare Decisis in the Field of Public Finance

The majority opinion was eminently correct in recognizing the importance of stare decisis in the field of public finance. It noted that there were many instances in which the legislature had created special-purpose districts and that there had been many decisions upholding the validity of those legislative enactments. It pointed out that upon the strength of those decisions, millions of dollars in bonds have been issued and are outstanding, and it stated that in this field, as in the case of the law relating to real estate, it is very important that there be stability and uniformity in our decisions. The Court said:[15a]

> There may be some foundation for the statement in one of the briefs that our decisions are not entirely clear as to the basis upon which it has been held that legislation creating special purpose districts is not within the prohibition of Article III, Section 34 of the Constitution. But the reasoning is not as important as the result.

In the field of public finance stare decisis is even more important than in the field of the real property law. This is peculiarly true in South Carolina because of the fact that the Constitution of 1895 was "amended" on several occasions by judicial fiat during the 1920's.[16]

While it is perfectly obvious that the Court as it is now constituted does not approve of amending written constitutions by judicial fiat, a favorite pastime with the United States Supreme Court, the fact remains that the State Constitution has been amended in that fashion. Illustrative are

15a. 103 S. E. 2d at 19.

16. 3 S. C. L. Q. 303 (1951). In this article instances of patent disregard for the constitutional limitations on the incurring of public debt are listed.

holdings which permit the issuance of General Obligation Bonds of the State of South Carolina without the election required by the Constitution.[17] In a recent case,[18] the writer of the majority decision here had this to say in a special concurring opinion about the proposition that bonds of the State could be issued without an election:

> I do not agree with the interpretation which the Court there placed upon the foregoing section of the Constitution, but am bound by that decision. It is too late now to question the doctrine there established.

That is not the only place where the Constitution of South Carolina has been amended by judicial fiat. Those who wrote the State Constitution were very careful to limit the extent to which debt might be incurred. Not only was there a limitation of 8% imposed against each municipality or subdivision which issued bonds, but there was also imposed a 15% overall limitation, so that the aggregate of debt incurred by all who might have the power to issue bonds should not exceed 15% of the assessed value of the taxable property upon which ad valorem taxes were to be levied to pay such debt. But during the 1920's the 15% limitation was written out of the Constitution in a series of cases discussed in an earlier article in the South Carolina Law Quarterly.[19] At a later date, in the case of *Ashmore v. Greater Greenville Sewer District*,[20] the Supreme Court, composed of three Justices now sitting, said: "The result of these decisions, to which we adhere, was that the particular subdivisions validly issued and sold bonds." (Despite the 15% limitation).

Certainty in the law is the one thing that Anglo-American jurisprudence seeks. For so long as the law is certain, injustice will less frequently occur. The doctrine of stare decisis rests upon the principle that law by which men are governed should be fixed, definite, and known; that when law is declared by a court of competent jurisdiction authorized to construe it, such a declaration, in the absence of palpable mistake or error, is itself evidence of the law until changed by competent authority. The decisions of a court should be

17. These are duly listed in State *ex rel.* Arthur v. Byrnes, 224 S. C. 51, 77 S. E. 2d 311 (1953).
18. State *ex rel.* Roddey v. Byrnes, 219 S. C. 485, 66 S. E. 2d 33 (1951).
19. 3 S. C. L. Q. 303 (1951).
20. 211 S. C. 77, 44 S. E. 2d 88 (1947).

overruled by its successor only under unusual circumstances, for if that is to happen frequently, the law will have a transient efficacy which will result in many evils.

Notwithstanding the obvious importance of adhereing to its former decisions in this particular field, the dissenting opinion endeavors to carefully differentiate the earlier holdings. It is quite true that in many of those earlier holdings the reasoning does not suggest itself to praise. It is also equally true that were those cases presented as cases of first impression at this time, a different result would almost surely follow, but that is beside the point. The situation was that the questions were raised, they were raised before a tribunal empowered to decide them, they were decided specifically, and should remain the law of the State until overruled by legislative processes.

The Right of the Aggrieved Property-Holder to Challenge the Legislative Finding of Benefit

The majority holding that special purpose districts may be created by special acts will probably be sustained against any subsequent attack. Certainly it can never be argued that this question was not squarely before the Court. Most assuredly it cannot be said that the question was not affirmatively resolved. As a consequence, the second question involved may oft arise, *viz.*: What relief has a property owner against the inclusion of his property in a special-purpose district? Has the legislature unlimited power in this respect? May it create a water district anywhere in South Carolina? The answer here is *No.* While of course legislative enactments must be given great weight, the very fact that the Court entertained the question is proof that it can be raised. Once again the Court found itself in disagreement as to result. The majority concluded that the action of the Legislature in including the property of the complainant was not unjust or arbitrary, and that its action was valid. The minority opinion concludes that the action was arbitrary and did deprive the plaintiff of its property without process of law. But the result here is not important. The important thing is that the question can be raised. How different is the situation here from that prevailing under the decisions of the United States Supreme Court! In the early case of *Valley*

Farms v. Westchester County,[21] the Supreme Court, in upholding the validity of a special-purpose district which included lands of the plaintiff which were so situate that they could never avail themselves of any part of the sewer system established, and were so isolated as to need no protection from a health standpoint, the Supreme Court of the United States made an effort to reconcile an earlier statement that it was the plain duty of the Court to strike down such legislation, if it found that such legislation was arbitrary and constituted an abuse of power. However, following that decision is the case of *Chesebro v. Los Angeles County Flood Control District*.[22] There the pronouncement of the United States Supreme Court is that "where the legislature has created a drainage, sewer, or other improvement district, and fixed its areas, the landowners included therein are not entitled to a hearing on question as to whether their lands will be benefitted. Prior inquiry by the legislative body is presumed, and its finding is conclusive." That holding had been noted by our Supreme Court in the case of *Sanders v. Greater Greenville Sewer District*.[23] But the Court stated that it was not called upon to adopt such a doctrine. That action of our Court proved wise. For, in the light of this case, there now exists a basis for any property owner, feeling himself hurt by the inclusion of his property in a special-purpose district, to attack the validity of the legislative act as an abuse of due process. The very fact that laws of this sort may be enacted by special legislation makes it imperative that an opportunity exists for the property owner to attack the validity of them as violative of the due process guaranty.

21. 261 U. S. 155 (1923).
22. See note 11 *supra*.
23. 211 S. C. 141, 44 S. E. 2d 185 (1947).