Opinion No. 37-1553

March 16, 1937

BY: FRANK H. PATTON, Attorney General

TO: Honorable Clyde Tingley Governor of New Mexico Santa Fe, New Mexico

*{*59}* You have made inquiry in your letter of even date as to the constitutionality of House Bills 99 and 203.

House Bill 99 is an act to regulate and control the barber industry, and House Bill 203 is a bill to regulate and control the cosmetology or beauty culture industry. Both acts are similar in nature and content. Section 1 of both acts contains legislative findings to the effect that unfair competition exists in these industries, necessitating legislation designed to fix prices. Section 12 of each act provides in substance that the Board of Barber Examiners and Cosmetology Board may have power to approve price agreements which are arrived at upon the following basis: In the event seventy-five percent of all persons in any judicial district engaged in these particular followings sign price agreements, the same may be adopted and approved by the Boards and the prices fixed thereby shall be minimum prices for all barbering and beauty parlor work done in that district. In addition to that, subsection (c) of House Bill 99 gives the Board power to raise such minimum prices from time to time after proper investigation. Subsection (c) of House Bill 203 is somewhat different in that the Board may vacate any order fixing minimum prices and require submission of new agreements for its approval.

Price fixing legislation is unconstitutional unless the businesses in which the prices sought to be fixed are affected with the public interest. Tyson & Bros. vs. Banton, 273 U.S. 418; 71 L. Ed. 718. The fact that the legislature declares that such a business is affected with the public interest is not conclusive but is open to judicial construction. Tyson & Bros. vs. Banton (supra). The courts have construed many different cases where the question presented was whether or not a certain business was affected with the public interest, and none of them have included barbering. To the contrary, businesses affected with public interest, justifying the fixing of rates or prices, have generally been confined to public utilities, grain elevators, insurance companies, or other businesses where the particular industry is dedicated to a "public use." See the classifications in Chas. Wolff Packing Company vs. Court of Ind. Rel., 262 U.S. 422, 67 L. Ed. 1103, and Tyson & Bros. vs. Banton (supra). It is our opinion that the rationale of these cases would exclude the classification of the barbering or cosmetology business as ones affected with public interest. The wording of sections 1 and 12 of both of these acts leaves no doubt but that their purpose is to fix minimum prices, either directly or indirectly, for these particular followings, and as such we believe they transcend both the fifth and fourteenth amendments to the Federal Constitution, and Article II, Section 18 of the New Mexico Constitution. Under these constitutional provisions, a person not only has the right to follow a vocation, but has the right to use all lawful and legitimate means essential to the conduct of such business. Allegyar vs. Louisiana, 169 U.S. 78.

This, we think, would naturally include the right to sell his services at whatever price he pleased. Tyson & Bros. vs. Banton (supra).

I have carefully considered the able arguments of Mr. C. R. McIntosh, attorney for the Board of Barber Examiners. It is his contention that this act does not purport *{*60}* to establish legislative price fixing, but to the contrary merely authorizes the Board to ratify a contract by the members of the profession agreeing to such prices. He relies upon the Supreme Court case of Old Dearborn Distributing Company vs. Seagram-Distillers Corporation, 81 Law Ed. page 130. It is our opinion that the fallacy of Mr. McIntosh's contention lies in the fact that in the event all members of the profession do not sign the agreement, the will of the majority may be imposed upon the minority. In other words, such persons will be bound by the contracts to which they are not parties. It is our opinion that in so far as the Legislature seeks to delegate such power to the members of the particular profession it is invalid. A question similar to the one presented here was considered in the recent case of Carter vs. Carter Coal Company, 298 U.S. 338, 80 L. Ed. 1160. In that case, a statute authorized the fixing of minimum hours and wages in the coal industry in particular districts upon the execution of an agreement by two-thirds of the coal miners and one-half of the operators in such districts. The procedure was much the same as set out in Section 12 of the acts under consideration. In passing upon this question, the court said:

"The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities. In some, coal dealers compete among themselves. In other localities, they also compete with the mechanical production of electrical energy and of natural gas. Some coal producers favor the code; others oppose it; and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests. The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question."

The case of Old Dearborn Distributing Company vs. Seagram-Distillers Corporation relied upon by Mr. McIntosh, in our opinion, is not in point. The holding of that case was merely to the effect that fair trade agreements as applied to merchandise bearing a trade mark would be enforced even as to those who were not parties to the contract provided they had notice of such agreement. The fair trade cases are in a class by themselves, and, in our opinion, do not apply to the situation presented under these

acts. For example, a person selling a commodity bearing a trade mark has a good will interest which is entitled to protection and the courts have uniformly granted them protection in such cases. Even if we *{*61}* assume that the general purpose of the act is valid, it is our opinion that the classification is questionable. For example, the various districts for price fixing are the nine judicial districts. It is submitted that conditions in Santa Fe where there are several barber shops would be quite different from conditions in Tierra Amarilla where there is but one or perhaps only a few barber shops. Carrying the analogy one step further, we might assume a legislative act where it is sought to classify restaurants that in one particular district there are several restaurants serving high class food while there is one restaurant serving hamburgers and chili. Under such an act, it would be entirely impossible for one majority to sign an agreement making the price of hamburgers thirty cents apiece and the price of a bowl of chili fifty cents, thus depriving this person of pursuing a legitimate livelihood.

In conclusion, I may say that it is difficult to determine the constitutionality of any act, and it is with some hesitation that we do so. However, it is our opinion that under the principles announced in the cases above cited and the case of State vs. Henry, 37 N.M. 536, 25 Pac. (2nd) 204, these acts are invalid.

By: RICHARD E. MANSON,

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