NOTES

ADMINISTRATIVE LAW—ARIZONA ADMINISTRATIVE PROCEDURE ACT—AGENCY REGULATIONS ADOPTED AND FILED MUST BE CERTIFIED TO BECOME EFFECTIVE.—The defendant was charged with violation of a regulation adopted by the Arizona Commission of Agriculture and Horticulture. Although the rule in question was filed in the office of the secretary of state and signed by the state entomologist, it was not certified as required by the Arizona Administrative Procedure Act.[1] On certification, *held*, strict compliance with statute required. Administrative rules and regulations filed with the secretary of state are of no force or effect unless they bear a certification signed by some officer in authority. *State v. Wacker*, 344 P.2d 1004 (Ariz. 1959).

For over a century, federal statutes conferring rule-making authority upon administrative agencies lacked definitive procedure governing preparation of regulations. Persons affected by the rules often remained unaware of their content; and legal advisers found it difficult, if not impossible, to secure knowledge of the subordinate legislation for guidance of their clients' conduct.[2] The embarrassing consequences of the famed *Hot Oil* case,[3] coupled with growing dissatisfaction with inadequate methods of publication, probably led to enactment of the Federal Register Act.[4] This statute and the later Federal Administrative Procedure Act[5] alleviated the main problems with regard to publication and notice of federal rules by requiring publication of regulations formulated and adopted by agencies for guidance of the public.[6] Indicative of current federal law, the Ninth Circuit has firmly held: "Unless the prescribed procedures are complied with, the agency (or administrative) rule has not been legally issued and consequently it is ineffective."[7]

[1] A.R.S. §§ 41-1004, -1005 (1956). Section 41-1004(A) provides: "Every rule adopted by each agency shall be certified and filed with the office of the secretary of state or shall be of no force or effect. . . ." Sections 41-1005 states: "No rule adopted or promulgated by an agency shall become effective until a certified copy thereof has been filed in the office of the secretary of state. . . ."

[2] GELLHORN & BYSE, CASES ON ADMINISTRATIVE LAW 90 (1954).

[3] Panama Refining Co. v. Ryan, 293 U.S. 388, 412 (1935). During oral argument counsel for the government was abashed by questions from the bench regarding publication of the "code" used by the NRA and was forced to admit no official publication. CORWIN, THE PRESIDENT 367 (1940).

[4] 49 Stat. 500 (1935), as amended, 44 U.S.C. §§ 301 to 314 (1952).

[5] Section 3(a), 60 Stat. 237 (1946), 5 U.S.C. § 1001 (1952).

[6] Newman, *Government and Ignorance—A Progress Report of Federal Regulations*, 63 HARV. L. REV. 929, 942 (1950).

[7] Hotch v. United States, 212 F.2d 280, 283 (9th Cir. 1954).

The federal archetype has been followed in many states. According to a 1953 study, there were twenty-four states which required filing of rules in a central office, usually with the secretary of state, and four which directed the agencies themselves to publish their regulations. Also fourteen states provided for codification and publication of the filed administrative rules.[8] The MODEL STATE ADMINISTRATIVE PROCEDURE ACT[9] has served as a guide for state legislation. Sections 3 and 4 furnish the procedure for filing certified copies of administrative rules in some centralized depository. Arizona's Administrative Procedure Act, which is patterned after the model act, requires filing of certified copies with the secretary of state.[10]

Regulations of sixty-one agencies were, prior to the instant case, on file with the secretary of state, but many unfiled amendments to such regulations were being enforced without protest. Although some superior courts have dismissed for non-compliance with filing requirements cases involving violation of agency rules, litigation in this area remains slight as the public generally has assumed without question the validity of the rules. This decision has induced several agencies, including the Arizona Commission of Agriculture and Horticulture, to file certified copies of their amendments and supplements with the proper authority.[11]

The decision of this case turns on a question of statutory construction. The primary rule of construction is to ascertain and declare the intention of the legislature,[12] and carry such intention into effect.[13] The purpose for which a statute is enacted is of primary importance in the interpretation thereof and is a proper subject of consideration.[14] The ultimate purpose of the act in question is to insure public notice of rules

[8] Davis, *Administrative Practice and Procedure: Comparative State Legislation*, 6 OKLA. L. REV. 29, 34-38 (1953). See also HEADY, ADMINISTRATIVE PROCEDURE LEGISLATION IN THE STATES 33-40 (1952); *cf.* Akers, *Your Administrative Regulation Program*, 17 KY. S.B.J. 141 (1953); Byse, *Administrative Procedure Reform in Pennsylvania*, 97 U. PA. L. REV. 22, 35-37 (1948); Nathanson, *Recent State Administrative Procedure Legislation*, 33 IOWA L. REV. 252, 256-259 (1948); Silk, *The Publication of Regulations and Other Delegated Legislation*, 20 CAN. B. REV. 604 (1942); and compare *Note, Judicial Notice of Administrative Regulations*, 60 HARV. L. REV. 1137 (1946).

[9] HANDBOOK OF NATIONAL CONFERENCE OF COMMISIONERS ON UNIFORM STATE LAWS 83-6 (1943).

[10] A.R.S. §§ 41-1001 to 41-1008 (1956).

[11] Interview With Secretary of State Wesley Bolin, Nov. 6, 1959.

[12] See, *e.g.*, State *ex rel.* Sullivan v. Burns, 51 Ariz. 384, 77 P.2d 215 (1938); see also Arizona Eastern R.R. v. Matthews, 20 Ariz. 282, 180 Pac. 159 (1919), overruled on another point in Consol. Arizona Smelting Co. v. Egich, 22 Ariz. 543, 199 Pac. 132 (1920).

[13] See, *e.g.*, Hill v. Gila County, 56 Ariz. 317, 107 P.2d 377 (1940); see also Automatic Registering Mach. Co. v. Pima County, 36 Ariz. 367, 285 Pac. 1034 (1930).

[14] See, *e.g.*, Carr v. Frohmiller, 47 Ariz. 430, 56 P.2d 644 (1936); see also Street v. Commercial Credit Co., 35 Ariz. 479, 281 Pac. 46 (1929).

[15] Interview With Secretary of State Wesley Bolin, Nov. 6, 1959.

adopted by administrative agencies.[15] The statutory requirements of filing and publication of such regulations give notice of their existence to the public, satisfying this purpose.[16] Failure to file has been held to invalidate a regulation, and such a result is probably in accord with legislative intent.[17]

Where actual notice of the regulation's existence is clear, it has been held that even lack of filing does not invalidate the administrative rule. For example, *People v. Calabro*,[18] stated that the primary purpose of a constitutional provision denying effect to unfiled regulations and requiring speedy publication of such rules was to assure public knowledge. Also a 1958 New Mexico case[19] based on a similar statute held that all unfiled regulations are not ineffective, but such unfiled rules merely are invalid as against persons who have no actual knowledge of their content. Since this is so, non-compliance with the subsidiary requirement of certification, *a fortiori*, should not be allowed to defeat the accomplished purpose. Here the rule in question was adopted by the commission, filed with the secretary of state, accepted and published as though it were properly certified. Effect was denied solely because of a technical error, one which leaves little doubt that the purpose of the statute was substantially carried out.

Indeed, it is a wholesome and necessary principle that an administrative agency must pursue the procedure and rules enjoined upon it by statute, and show a *substantial* compliance therewith, to give validity to its action.[20] The rule of strict construction, however, should not be carried beyond the reason for its existence. Nevertheless, the interpretation rendered will awaken state administrative agencies from their incautious slumber to a sharpened awareness of procedural requirements animated by this decision.

Bernard C. Porter

CONSTITUTIONAL LAW—FAIR TRADE ACT—NON-SIGNER PROVISION CONSTITUTIONAL.—The plaintiff, General Electric Co., had contracts with retailers setting minimum retail prices at which "GE" products could be resold. It sought an injunction under the Arizona Fair

[16] *Ibid.*

[17] Magis v. Lyman-Richey Sand and Gravel Corp., 189 F.2d 130 (8th Cir), *cert. denied* 342 U.S. 877 (1951); Mondovi Co-op. Equity Ass'n v. State, 258 Wis. 505, 46 N.W.2d 825 (1951).

[18] 170 N.Y.S.2d 876 (1957); N. Y. CONST. art. IV, § 8.

[19] Maestas v. Christmas, 63 N.M. 447, 321 P.2d 631 (1958).

[20] Panama Refining Co. v. Ryan, *supra* note 3; Wichita R.R. & Light Co. v. Pub. Util. Comm'n, 260 U.S. 48 (1922).

Trade Act[1] to enjoin the defendant, a "non-signer" retailer, from future sales of its products below the fixed price. The defendant challenged the constitutionality of the statute, and prevailed in the superior court. On appeal, *held,* reversed. The Arizona Fair Trade Act does not unconstitutionally create a monopoly, nor deny due process or equal protection of the law as it affects non-signers of minimum price agreements made thereunder. *General Electric Co. v. Telco Supply, Inc.,* 84 Ariz. 132, 325 P.2d 394 (1958).

The Arizona statute is typical of the numerous[2] fair trade acts in that it permits a producer or distributor of trade marked or brand goods in fair (free) and open competition with commodities of the same general class to stipulate in a contract with one buyer a resale price which is binding upon all who have notice of the price so set.[3] The statute gives a cause of action to anyone damaged as a result of a willful sale at less than the stipulated price.[4]

Under the Sherman Anti-trust Act of 1890,[5] price fixing was illegal *per se.*[6] The Miller-Tydings Act of 1937[7] legalized vertical fair trade price agreements between the contracting parties,[8] but this was held by the United States Supreme Court not to authorize the non-signer clause.[9] Congress soon thereafter enacted the McGuire Act which specifically exempted the non-signer clause from federal anti-trust laws.[10]

The California Fair Trade Act as amended in 1933 to include the non-signer clause,[11] became the prototype of most state fair trade statutes. In the case of *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*[12] the United States Supreme Court, in interpreting a similar Illinois statute, held that the good will symbolized in the trade-mark remains the property of the producer, and a proper subject of legislative protection. It then concluded that the fair trade law was not so arbitrary and unfair as to constitute a denial of due process or equal protection. This remains the interpretation in the federal courts,

[1] A.R.S. §§ 44-1421 to 44-1426 (1956).
[2] Only the states of Alaska, Missouri, and Texas have not enacted the fair trade act. Vermont has not enacted the non-signer clause into its fair trade act. 11 ARK. L. REV. 105 (1957).
[3] A.R.S. §§ 44-1422, -1423 (1956).
[4] A.R.S. § 44-1423 (1956).
[5] 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1952).
[6] Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 (1951), United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
[7] 50 Stat. 693 (1937), 15 U.S.C. § 1 (1952).
[8] *Ibid.*
[9] Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).
[10] 66 Stat. 632 (1952), 15 U.S.C. § 45 (a) (1-4) (Supp. 1958).
[11] CAL. BUS. & PRO. CODE §§ 16900-16906.
[12] 299 U.S. 183 (1936).

as evidenced by the 1953 decision of the Fifth Circuit Court of Appeals,[13] despite a strong recommendation for reappraisal voiced in the dissent,[14] and by the district judge.[15]

Of the 32 states that have passed upon the constitutionality of the non-signer clause, 16[16] have sustained it as valid and 16[17] have found some constitutional fault with it. Of the 20 states that have passed on the question since 1952, 5 have held the acts valid,[18] while 15 have struck them down.[19] The most frequent criticisms of the non-signer clause which have prevailed are: denial of due process (12);[20] exceeding the police power (10);[21] and unlawful delegation of legislative authority

[13] Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co., 205 F.2d 788 (5th Cir.), *cert. denied* 346 U.S. 856 (1953).

[14] *Id.* at 793.

[15] Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co., 109 F. Supp. 269 E.D. La. (1953).

[16] General Electric Co., v. Telco Supply, Inc., 84 Ariz. 132, 325 P.2d 394 (1958); Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 55 P.2d 177 (1936); Burroughs Wellcome & Co. v. Johnson Wholesale Perfume Co., 128 Conn. 596, 24 A.2d 206 (1942); Klien v. National Pressure Cooker Co., 31 Del. Ch. 459, 64 A.2d 529 (1949); Seagram-Distillers Corp. v. Old Dearborn Distribution Co., 336 Ill. 610, 2 N.E.2d 940 (1936); Goldsmith v. Mead Johnson & Co., 176 Md. 682, 7 A.2d 176 (1939); General Electric Co. v. Kimball Jewelers Inc., 333 Mass. 665, 132 N.E.2d 652 (1956); W.A. Sheaffer Pen Co. v. Barrett, 209 Miss. 1, 45 So.2d 838 (1950); Lionel Corp. v. Grayson-Robinson Stores, Inc., 27 N.J. 54, 98 A.2d 623 (1954); Bourgois Sales Corp. v. Dorfman, 273 N.Y. 167, 7 N.E.2d 30 (1937); Eli Lilly & Co. v. Saunders, 216 N.C. 163, 4 S.E.2d 528 (1939); Burche Co. v. General Electric Co., 382 Pa. 370, 115 A.2d 361 (1955); Miles Laboratories v. Owl Drug Co., 67 S.D. 523, 295 N.W. 292 (1940); Frankfort Distillers Corp. v. Liberto, 190 Tenn. 478, 230 S.W.2d 971 (1950); Sears v. Western Thrift Stores of Olympia, 10 Wash. 2d 372, 116 P.2d 756 (1941); Bulova Watch Co. v. Anderson, 270 Wis. 21, 70 N.W.2d 243 (1955).

[17] Union Carbide & Carbon Corp. v. White River Distributors, Inc., 224 Ark. 558, 275 S.W.2d 455 (1955); Olin Mathieson Chemical Corp. v. Francis, 134 Colo. 160, 301 P.2d 139 (1956); Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949); Cox v. General Electric Co., 211 Ga. 268, 85 S.E.2d 514 (1955); Bissell Carpet Sweeper Co. v. Shane Co., 237 Ind. 188, 143 N.W.2d 415 (1957); Quality Oil Co. v. E. I. du Pont de Nemours & Co., 182 Kan. 488, 322 P.2d 731 (1958); General Electric Co. v. American Buyers Cooperative, Inc., 316 S.W.2d 354 (Ky. 1958); Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets, 231 La. 51, 90 So. 2d 343 (1956); Shakespeare Co. v. Lippman's Tool Shop Sporting Goods, 334 Mich. 109, 54 N.W.2d 268 (1952); McGraw Electric Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N.W.2d 608 (1955); Skaggs Drug Center v. General Electric Co., 63 N.M. 215, 315 P.2d (1957); Union Carbide & Carbon Co. v. Bargain Fair, Inc., 167 Ohio St. 182, 147 N.E.2d (1958); General Electric Co. v. Whale, 207 Ore. 302, 296 P.2d 635 (1956); Rogers-Kent, Inc. v. General Electric Co., 231 S.C. 636, 99 S.E.2d 665 (1957); General Electric Co. v. Thrifty Sales, 5 Utah 2d 326, 301 P.2d 741 (1956); General Electric Co. v. Dandy Appliance Co., 103 S.E.2d 310 (W.Va. 1958).

[18] See note 16 *supra.*

[19] See note 17 *supra.*

[20] See Annot., 60 A.L.R.2d 420 (1958). See also General Electric Co. v. American Buyers Cooperative, Inc., *supra* note 17.

[21] Annot., 60 A.L.R.2d *supra* note 20.

[22] *Ibid.*

[23] *Ibid.*

(5).[22] Also, charges of denial of equal protection[23] and creation of monopolies have been upheld.[24]

In the instant case, in response to the contention that the fair trade act tended to create a monopoly in violation of the state constitution,[25] the Arizona Supreme Court pointed out that "an exclusive privilege or right is indispensable to the existence of a monopoly. . . ." and that the act expressly applies only to commodities in free and open competition. The court asserted that the guarantees in the Arizona Constitution of due process[26] and of equal protection[27] are the same as those in the 5th and 14th amendments of the U.S. Constitution, and followed the *Old Dearborn* case, *supra*, in its interpretation of these provisions. By such action the Arizona Supreme Court went against the current trend of state courts, and of writers who have, with almost universal accord, voiced the opinion that the present fair trade laws conflict with basic concepts of free competition, rights of property, and the exercise of the police power.[28] It is worthy to note that in 1945 the Federal Trade Commission recommended that the Miller-Tydings Act be repealed,[29] and that the Attorney General's National Committee to Study the Anti-Trust Laws has recommended the repeal of both the Miller-Tydings Act and the McGuire Act.[30]

The Arizona Supreme Court might well have given greater weight to the recent decisions of other jurisdictions which have acted to protect the property rights of the non-signer from restrictions which are clear and certain as opposed to the debatable and speculative dangers which threaten a producer's good will. The cogent argument that the legislature is without power to fix arbitrarily a minimum retail price, and therefore cannot delegate such a power to a select few, has not adequately been met. To permit a producer and a single retailer to so fix a price binding the whole retail industry is to permit these two to do that which would be illegal if accomplished by the concerted action of the entire retail industry.[31] Thus the signing retailer has bound the non-signer to the terms of a contract not of the latter's making, and which the two retailers would be prevented by law from entering into with each other.

[24] *Ibid.*
[25] ARIZ. CONST. art. 14 § 15.
[26] ARIZ. CONST. art. 2 § 4.
[27] ARIZ. CONST. art. 2 § 13.
[28] See Shulman, *The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels*, 49 YALE L.J. 607 (1940). See also Rahl, *Resale Price Maintenance, State Action, and the Antitrust Laws: Effect of Schwegmann Brothers v. Calvert Distillers Corp.*, 46 ILL. L. REV. 349 (1951).
[29] FTC Rep. on Resale Price Maintenance LXI, LXIV (1945).
[30] Att'y Gen. Nat'l Comm. Antitrust Rep. (1951).
[31] See note 5 *supra*.

It is submitted that the arguments of the *Old Dearborn* case, born in the chaos of a depression and followed *sub silento* throughout the post war readjustment period, are not sufficient to withstand the current challenge that the real purpose of the fair trade laws may well be ". . . to protect the retailer from competition with another retailer, who, because of his efficient merchandising methods is able to reduce his distributive costs and consequently his retail price. . . ."[32]

John F. Taylor

[32] Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co., 109 F. Supp. *supra* at 272.