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Application of the Fair Trade Laws

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or testacy, as though he were actually of the blood of the person adopting and as though he had been born in lawful wedlock as the child of such adopting parent.

The statutes which would be affected particularly are section 15 (b) of the Wills Act of June 7, 1917, P. L. 413, 20 PS 252, as construed in *Russell's Estate,* supra, Section 2 (c) of the Fiduciaries Act of June 7, 1917, P. L. 447, as amended, 20 PS 343, and applied in *Reamer's Estate,* supra, and Section 1 of the Act of May 15, 1925, P. L. 806, 72 P.S. 2302 as construed in *Henner's Estate,* supra.

Respectfully submitted,

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of Committee

APPLICATION OF THE FAIR TRADE LAWS

It is our purpose to call attention to the application of the statutes, called Fair Trade Acts, which are directed against the uneconomic practice of predatory price-cutting carried on in various fields of commercial enterprise. A producer or regional distributor of articles of trade creates, over a period of years, by advertising and otherwise, valuable good will for its products. These products, coming ultimately into the hands of retailers for sale to the consumer, are sold under the distinctive trade-marks, brands, and names of the producer. The latter thus becomes identified with its product in the minds of the public and it is to these marks that the good will is incidental. Ordinarily, such products are sold at a uniform, well-known market price; but some retailers, in order to create the impression that other goods sold in their stores are sold at a reduced price, sell the well-known articles at prices conspicuously lower than their established price. This practice attracts to their stores consumers to whom the retailers sell their other merchandise at prices sufficiently high to meet the loss and achieve a general profit. Such activity injures the good will built up by the producer or distributor and causes serious damage to its business.[1]

[1]For an excellent discussion of the economic importance and effect of fair trade legislation, see 24 Calif. Law Rev. 640.

Attempts were made by producers to combat the evils of predatory price-cutting by means of contracts in which those to whom they sold agreed to resell at a fixed or minimum price. In the absence of statute, these attempts failed because the contracts were in most states, including Pennsylvania, held invalid under the common law[2] and under state statutes[3] as restraints of trade, and, so far as they affected interstate commerce, under the Sherman Anti-Trust Act of July 2, 1890.[4]

The Fair Trade Acts are designed to afford the desired protection to the producer's good will.[5] The act adopted by California in 1931,[6] as amended in 1933,[7] not only validates such price-fixing contracts, but brands as unfair competition the sale of articles at a price less than that fixed by contracts between producer and retailer, although the seller at retail *is not a party to any such agreement...* All but six of the United States have passed similar statutes modelled on the California act.[8] The Miller-Tydings Bill, enacted as an amendment to the Sherman Anti-Trust Act, validates resale price-fixing contracts

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[2]Ford Motor Co. v. Quinn, 70 Pa. Super. 337; W. H. Hill Co. v. Gray & Worcestor, 163 Mich. 12, 30 L.R.A. (N.S.) 327, 127 N.W. 803; Stewart v. W.T. Rawleigh Medical Co., 58 Okla. 344, L.R.A. 1917 A, 1276, 159 Pac. 1187.

The contracts were in some states upheld under certain circumstances. In Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 51 L.R.A. (N.S.) 522, 137 Pac. 144, the similarity between the conditions there required to be present and those set up by the Fair Trade Acts is striking: "Contracts fixing prices as incidental to some main contract, and involving less than a controlling part of a given commodity in a given market, not proceeding from, nor tending to create or to maintain a monopoly, will be sustained when the restriction is, under the circumstances of the particular case, reasonable in reference to the interests of the parties and reasonable in reference to the interests of the public; that is to say, when the price fixed is fairly necessary to the protection of the convenantee, and fair to the public in that it furnishes a reasonable profit to the contracting parties. Lacking these elements, such contracts are invalid as contrary to public policy." See also, W. T. Rawleigh Medical Co. v. Osborne, 177 Iowa 208, L.R.A. 1917 B, 803, 158 N.W. 566; Garst v. Harris, 177 Mass. 72, 58 N.E. 174; Grogan v. Chaffee, 156 Cal. 611, 27 L.R.A. (N.S.) 395, 105 Pac. 745; Walsh v. Dwight, 40 App. Div. 513, 58 N.Y. Supp. 91; John D. Parke & Sons v. National Wholesale Druggists' Asso., 175 N.Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N.E. 136.

[3]Hubb-Diggs Co. v. Mitchell,—Tex. Civ. App.—, 231 S.W. 425; United Artists' Corp. v. Mills, 135 Kan. 655, 11 Pac. (2nd) 1025; Quinlan v. Brown Oil Co., 96 Mont. 147, 29 Pac. (2nd) 374.

[4]Ford Motor Co. v. Quinn, 70 Pa. Super. 337; Stewart v. W. T. Rawleigh Medical Co., 58 Okla. 344, L.R.A. 1917A, 1276, 159 Pac. 1187; Brooks v. J. R. Watkins Medical Co., 81 Okla. 82, 196 Pac. 956; Boston Stores v. American Graphophone Co., 246 U.S. 8, 62 L. Ed. 551, 38 Sup. Ct. 257; United States v. Kellog Toasted Corn Flake Co., 222 Fed. 725, Ann. Cas. 1916A, 78; Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 55 L. Ed. 502, 31 Sup. Ct. 376.

[5]Max Factor & Co. v. Kunsman,—Cal.—, 55 Pac. (2nd) 177.

[6]Cal. Stats., 1931, p. 583.

[7]Cal. Stats., 1931, p. 793.

[8]The only states remaining without such legislation are Ala., Del., Miss., Mo., Texas, and Vt. 12 Temple Law Quarterly 3.

in interstate commerce if the commodities to which the contracts relate are to be resold in a state where such contracts are valid.[9] The constitutionality of the Fair Trade laws was at first seriously questioned, but their validity is now established.[10]

The Pennsylvania Act of June 5, 1935, P. L. 266,[11] may be taken as being representative.[12] The important sections read as follows:

> Section 1. "That no contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand or the name of the producer or owner of such commodity, and which is in fair and open competition with commodities of the same general class produced by others, shall be deemed in violation of any law of the State of Pennsylvania by reason of any of the following provisions which may be contained in such contract:
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> (a) That the buyer will not resell such commodity, except at the price stipulated by the vendor.
>
> (b) That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not in turn resell except at the price stipulated by such vendor or such vendee.

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[9]Pub. No. 314, 75th Congress, First Session, August 17, 1937, 15 U.S.C.A. Sec. 1. The Federal law contains the same qualifications as the state Fair Trade Acts. The rule established by the amendment had already been applied before its passage. See Weco Products Co. v. Reed Drug Co.,—Wisconsin—, 274 N.W. 426.

[10]See Max Factor & Co. v. Kunsman,—Calif.—, 55 Pac. (2nd) 177, and Pyroil Sales Co., Inc. v. The Pep Boys, Manny, Moe & Jack of California, affirmed by the U.S. Supreme Ct. in The Pep Boys, Manny, Moe & Jack, of California v. Pyroil Sales Co., Inc.—Kunsman v. Max Factor & Co., 299 U.S. 198, 57 Sup. Ct. 147, 81 L. Ed. 122. Also, Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N.E. (2d) 929, and Seagrams Distillers Corp. v. Old Dearborn Distributing Co., 363 Ill. 610, 2 N.E. (2nd) 940, affirmed by the U.S. Supreme Ct. in Old Dearborn Distributing Co. v. Seagrams Distillers Corp.—McNeil v. Joseph Triner Corp., 299 U.S. 183, 57 Sup. Ct. 139, 81 L. Ed. 109.

The attacks centered upon the section of the acts which provides that all retailers, whether the goods were originally sold to them under a contract fixing the resale price or not, may not knowingly resell them at less than the fixed price. The court of New Jersey and New York at first took a contrary view which they were later forced by the Supreme Court decisions to retract. See Bourjois Sales Corp. v. Dorfman, 273 N.Y. 167, 7 N.E. (2nd) 30, reversing Doubleday, Doran & Co., Inc. v. R. H. Macy & Co., 269 N.Y. 272, 199 N.E. 409, and Johnson & Johnson v. Weissband, 121 N.J. Eq. 505, 191 A. 873, reversing Johnson & Johnson v. Weissband, 120 N.J. Eq. 314, 184 A. 783.

[11]73 P.S. sec. 7.

[12]The pertinent sections, 1, 2, and 3 of the Pa. act are identical with the corresponding sections of the Calif. act except: the phrase "or in the execution of any writ or distress" is added in sec. 1, c to the corresponding sec. 1, 3 of the Calif. act; and, the order of the words "producers" and "wholesalers" in sec. 3 is reversed in the Pa. act.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodities may be resold without reference to such agreement in the following cases:

(a) In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

(b) When the goods are damaged or deteriorated in quality, and notice is given the public thereof.

(c) By any officer acting under orders of any court or in the execution of any writ or distress.

Section 2. "Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is, or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Section 3. "This act shall not apply to any contract between wholesalers or between producers or between retailers as to sale or resale prices."

Parts of the statutes are intended to guard against the obvious danger of legalized monopoly. This is the effect of the provision that the articles to which the contracts relate is restricted to those in fair and open competition with commodities of the same general class produced by others.[13] The provisions of section three also have this effect.[14] Under this section, the contracting parties may not belong to the same class of distributors. Contracts between e. g., wholesale distributors and retailers, are denominated *vertical* price-fixing contracts. Such contracts are permitted by the statute; but, contracts between wholesale distributors or between retail distributors are denominated *horizontal* price-fixing contracts. The latter type are not within its terms because of their character as combinations in restraint of trade, and are uniformly held invalid. It is the relation between the parties in the scheme of commercial distribution that the courts regard; and, it is immaterial that both parties sell at wholesale if the relation between the seller and the purchasing wholesaler is different from the relation *among* such purchasing wholesalers.[15]

The Act does not require any special contract and no special or particular type of consideration or counter-promise is necessary on the part of the prom-

[13]Joseph Triner Corp. v. McNeil, 363 Ill. 559, 2 N.E. (2nd) 929.

[14]Ibid.

[15]Seagrams Distillers Corp. v. Old Dearborn Distributing Co., 363 Ill. 610, 2 N.E. (2nd) 940.

isee. The benefit which the promisor expects to derive from the sale and delivery to him by the promisee of the articles to which the contract relates is consideration if such was the intention of the parties. Furthermore, the producer is under no legal obligation to establish a fixed price. By fixing a price, he invokes for the benefit of the retailer the protection incidentally afforded the latter by the statute against the competition of underselling by other retailers. This benefit is also good consideration.[16]

A price must be fixed pursuant to the contract, and a bill seeking to enjoin sales below a certain retail price is insufficient if it alleges merely that the price has been suggested by a distributor to a wholesaler and is the prevailing price within the state. It has further been intimated that where the contract provides that the purchaser will not resell except at prices that may be set by the seller in the future, a price thus set would not come within the statute.[17]

One contract with a single retailer is sufficient to put the statute in operation. It need not be with a large dealer, nor does it matter that his sales are insignificant in number. Thus, where the only contracting retailer had sold only a dozen bottles of nail polish during the three months between the making of the contract and filing of the suit, his contract with the complainant was held sufficient to sustain an injunction against a third party, a price-cutting retailer. The transaction must be in good faith, however, and a contract with one who does not sell or expect to sell the product would be a fraud on the statute; it could not be used as a vehicle to invoke the Act.[18]

One of the parties to the contract fixing the commodity price must be the owner or agent of the owner of the trade-mark, brand, or name attached to the product which is the subject of the agreement.[19] According to the New Jersey courts, it is not enough that one of the parties is the "sole immediate distributor" of a product produced by "certain affiliated" firms. It would seem that there must be facts sufficient to raise a presumption that the contracting party had been authorized by the producer to dictate the retail price of its product.[20]

The Act provides that it may be enforced at the suit of anyone damaged by the price-cutting therein condemned. Since it affords protection on the basis that a producer has a property right in the good will attached to the trade-name, mark or brand,[21] the plaintiff must have an interest in such good

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[16]Houbigant Sales Corp. v. Woods Cut Rate Store, Ct. of Chancery of N.J., 196 A. 683.
[17]Schenley Products v. Franklin Stores Co., 122 N.J. Eq. 69, 192 A. 375.
[18]Revlon Nail Enamel Corp. v. Charmley Drug Shop, Ct. of Chancery of N.J., 197 A. 661.
[19]Schenley Products Co. v. Franklin Stores Co., 122 N.J. Eq. 69; 192 A. 375.
[20]Ibid. *dicta.* The contract held invalid as a vehicle to use the act was one between a retailer and wholesaler to whom the "sole distributor" suggested retail prices.
[21]Max Factor & Co. v. Kunsman,—Calif.—, 55 Pac. (2nd) 177.

will. Might an intermediate wholesale distributor be permitted to recover on the ground that his interest in this good will is substantial enough to permit him to sue for its impairment? This question has been answered affirmatively by the Illinois Court of Appeals in *Old Dearborn Wine and Liquor Co. v. Old Dearborn Distributing Co.*[22] In that case, the plaintiff was a corporation engaged in business in Chicago, as a wholesale distributor selling to retailers for resale in that city various brands of liquors and alcoholic beverages of standard quality. It purchased products of this class from a New York corporation licensed to do business in Illinois, which was the sole sales and distributing agent of certain affiliated liquor distilleries. The defendant was a retailer, engaged in selling various brands of liquors and alcoholic beverages in which the plaintiff dealt. It sold such products at a price less than that fixed by contracts made pursuant to the Illinois Fair Trade Act. The contention of the defendant was that the plaintiff was not entitled to invoke the statute because it was not a producer or manufacturer. The court pointed to the purpose of the statute and rejected the defendant's argument with a declaration that:

> ". . . the purpose of the defendant was to take advantage of the plaintiff's property right in the good will and trade-marked article."

The doctrine thus enunciated has been extended in New York to permit a retailer who is a party to a price-fixing contract to sue another retailer. The court noted that it is the retailer who bears the brunt of price-cutting evils and held that he obtains *by contract* a property interest which is protected by the statute.[23] The New York decision might be interpreted as judicial recognition of the injustice that results to retailers where the producer ignores price-cutting by some retailers but invokes the statute against others.[24]

A less liberal attitude is exhibited in the New Jersey case of *Schenley Products Co. v. Franklin Stores Co.*[25] In that case, one of the complainants, Schenley Products Co., was the "sole immediate distributor" of Wilken Family blended whisky and other brands of whisky, while the other complainant was a wholesaler to whom the former sold. The label indicated that the whisky was produced by Wilkin Family, Inc. The court said by way of dicta (since it preferred to rest its decision on other grounds):

> "The statute puts price-cutting of branded goods in the same category with the unlawful imitation of the brand or mark. It would seem to follow that the statutory suit can be maintained only by one

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[22]287 Ill. App. 187, 4 N.E. (2nd) 658.

[23]Port Chester Wine & Liquor Shop, Inc. v. Miller Bros. Fruiterers, Inc., 253 App. Div. 188, 1 N.Y. Supp. (2nd) 802.

[24]12 St. John's Law Rev. 304.

[25]122 N.J. Eq. 69, 192 A. 375.

> who could bring an ordinary suit for unfair competition, namely, the owner of the good will which the law aims to protect. Neither complainant appears to have the requisite interest in the name 'Wilkin Family Blended Whisky' or in the good will to which the name is incidental."

The statute may not be invoked against one who has had no notice of the price-fixing contracts. This follows from the provision contained therein which renders it applicable only to persons who wilfully and knowingly sell at less than the fixed price. The Act is construed as applying only to sales of such goods as are *acquired after notice* of the fact that a restriction has been placed on the retail price.[26] This is a reasonable construction, for the purchaser might not have desired to buy and sell the product had he known of the restriction.

The remedy sought is invariably that afforded by equity; namely, injunction. Damages to the plaintiff's business and good will would be conjectural and too difficult to estimate. The remedy at law being, therefore, inadequate, equity takes jurisdiction. The authority of the court to issue a preliminary injunction on a verified bill of complaint has been questioned on the basis that to do so is to grant the plaintiff all the relief prayed for before a full hearing upon the merits of the controversy. The issuance of such injunction has been upheld in order that the *status quo* be maintained between the parties until the final hearing has taken place.[27]

It is incumbent upon the plaintiff who seeks equity to do equity under a maxim of that court. Accordingly, where the plaintiff refused to sell its products to the defendant, a chain store owner, at the same rates, terms, and prices as were made available to other chain stores, the maxim was applied as one of the grounds for refusing an injunction.[28] But, it does not follow that refusal to sell to the defendant will in every case bar recovery. Where such defendant is a member of *a class* with whom the plaintiff believes it is poor policy to deal, and who it hopes will not handle its product, the plaintiff's conduct is sustained as the exercise of its right to adopt such general policies consistent with sound business ethics as it believes will protect its trade.[29]

The Fair Trade Acts effectively dispose of the evils that they were intended to remedy. In the course of so doing, however, they are bound to restrain activity which gives rise to none of these evils. The exceptions contained in section one are evidence of an attempt to avoid such injustice, but it is not to

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[26]Lentheric, Inc. v. Weissband, Ct. of Chancery, N.J., 195 A. 818.

[27]Old Fort Dearborn Wine & Liquor Co. v. Old Dearborn Distributing Co., 287 Ill. App. 187, 4 N.E. (2nd) 658.

[28]Lentheric, Inc. v. Weissband, Ct. of Chancery, N.J., 195 A. 818.

[29]Revlon Nail Enamel Corp. v. Charmley Drug Shop, Ct. of Chancery, N.J., 197 A. 661.

be expected that they will prove adequate. To illustrate, exemption from the statutes may not be claimed on the basis that sales made at prices below those fixed by contract are restricted by the guilty retail firm to transactions with its employees. A department store, for example, which allows a discount to its employees on goods sold to them is bound by the act, although this may have been its long established policy.[30]

Perhaps the widespread public benefit which these acts purport to confer will far outweigh the apparent injustice they may unavoidably cause in some instances. At least, the legislatures have decided that the policy of the Fair Trade laws is economically sound, and the Supreme Court of the United States has sustained their decision.

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PAROLE RELEASE OF A MORTGAGE

A recent opinion of the Court of Errors and Appeals of New Jersey[1] raises the question whether a mortgage can be released by parole or whether it is such an interest in land that the statute of frauds requires the release of it to be in writing. A survey of the cases reveals that there has been a divergence of opinion. Those courts which state that the release may be by parole regard the debt as carrying with it the mortgage and since the debt can be extinguished by parole, the parole release of the debt releases the mortgage. Other courts regard the mortgage as giving the creditor a security which he would not have otherwise and that if by parole this security be taken from him, it would affect an interest in land because the released security would be the right of foreclosure. The statute of frauds requires an agreement concerning lands to be in writing. Therefore, these courts require the release of the mortgage to be in writing.[2]

The purpose of this note is to discuss the validity of a parole release of a mortgage. Whether an oral promise to *extend* the time for payment is valid is a question not to be confused with the question here set out which is whether

[30]Bristol-Myers Co. v. L. Bamberger & Co., 122 N.J. Eq. 559, 195 A. 625.

[1]George v. Meinersmann, 197 A. 1 (N.J., Jan. 26, 1938).

[2]Williston discusses the problem in Contracts, Section 492, page 1420 in Volume 2 of the Revised Edition and Section 493, page 952, Volume 1 of the 1st. Edition. He says, "A contract to pay a debt or to accept payment by way of accord and satisfaction, or otherwise, is not within the statute, although the effect of such payment may be to discharge a mortgage, and thereby retransfer an interest in land to the mortgagor. On the other hand, an express promise by the mortgagee to surrender or discharge his mortgage, in so far as this involves anything more than accepting payment of the debt, is within the statute."