

## THE FAIR TRADE ACTS AND THE LAW OF RESTRICTIVE AGREEMENTS AFFECTING CHATTELS

By HARRY SHULMAN†

THE outstanding facts about the Fair Trade Acts are that they were passed in a short period of time in 44 states,<sup>1</sup> that they have been declared

†Lines Professor of Law, Yale Law School.

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1. These Acts, passed in all the states except Delaware, Missouri, Texas and Vermont, are generally of two types, those based on the California statute [CAL. GEN. LAWS (Deering, 1937) Act 8782] enacted in 1931, Cal. Laws 1931, c. 278 as amended in 1933, Cal. Laws 1933, c. 260 and as further amended in 1937, Cal. Laws 1937, c. 843 and those following the model statute prepared by the National Association of Retail Druggists. All the statutes do, however, these two things: (a) They declare that a contract which fixes a minimum (or in some cases a specific) resale price for commodities of the kind described in note 5 *infra*, which are "in free and open competition with commodities of the same general" classes "produced or distributed by others" shall not be illegal because of its price restriction; (b) they provide that "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 the Act, "whether the person so advertising, offering for sale or selling is or is not a party to such a contract, is unfair competition and is actionable at the suit of any person damaged thereby."

Some of the Acts expressly provide that the resale price of a commodity cannot be established thereunder except by "the owner of a trade-mark, brand or name used in connection with such commodity or a distributor specifically authorized to establish said price by the owner of such trade-mark, brand or name." See, *e.g.*, N. C. CODE ANN. (Michie, 1939) § 5126(n). But some of the Acts contain no such limitation and seemingly permit a wholesaler, for example, to establish the resale price for commodities sold by him which bear not his trade-mark but the mark of a producer who has not given the wholesaler authority to establish resale prices. See *Schenley Products Co. v. Franklin Stores Co.*, 124 N. J. Eq. 100, 103, 199 Atl. 402, 404 (1938): "To assert that the contract [establishing the resale price] must be made by or on behalf of the owner of the trade-mark or brand, or by or on behalf of the producer of the commodity bearing the trade-mark or brand, is to import into the statute that which is clearly not within its provisions and that which is unnecessary for its operation."

The Miller-Tydings Act, *infra* note 4, provides that nothing in the Sherman Act, 26 STAT. 209 (1890), 15 U. S. C. § 1 (1934) or the Federal Trade Commission Act, 38 STAT. 717 (1914), 15 U. S. C. § 41 (1934), shall render illegal "contracts or agreements prescribing minimum prices for the resale of a commodity . . . , when contracts

constitutional by the Supreme Court<sup>2</sup> and by state courts following it,<sup>3</sup> that they have been shielded from conflict with the federal anti-trust laws by the Miller-Tydings amendment,<sup>4</sup> and that they permit the person under whose trade-mark<sup>5</sup> goods are sold to establish, by contract with a distributor, the resale price for goods sold under that trade-mark by any distributor who has notice of the contract. These facts create, of course, important and difficult problems of practical adjustment of detail. Apparently they also invite attempts which seek to generalize the effect of the Acts on a variety of situations other than that with which they expressly deal and to place them appropriately in the scheme of general legal doctrine. The committee in charge of the 1939 program of the Round Table on Equity of the Association of American Law Schools had the latter objects in mind when it chose for discussion the topic stated by the title of this Article. It suggested that the discussion be based on the background of the law of covenants or restrictions running with land. It believed that the fundamental questions involved were of property law, and that the discussion should therefore consider the nature of trade-marks and the extent to which they can be regarded as property. And it desired consideration of how the important reversal of policy with respect to resale price maintenance affects the legal doctrine with respect to restrictions in general on the sale or use of chattels.<sup>6</sup>

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or agreements of that description are lawful as applied to intrastate transaction" under the law of the state "in which such resale is to be made, or to which the commodity is to be transported for such resale . . ."

None of the Acts applies to agreements "between or among producers or distributors or between or among wholesalers or between or among retailers as to sale or resale prices."

The Acts are analyzed and compared in OPPENHEIM, RECENT PRICE CONTROL LAWS (1939). They are also summarized in Appendix A of GREYER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION (1939), and are reprinted in WEIGEL, THE FAIR TRADE LAWS (1938).

For interesting discussion of the history and policy of this legislation, see McLaughlin, *Fair Trade Acts* (1938) 86 U. OF PA. L. REV. 803. For reference to the literature, see HANDLER, CASES ON TRADE REGULATION (1937) 1042; OPPENHEIM, CASES ON TRADE REGULATION (1936) 834; OPPENHEIM, RECENT PRICE CONTROL LAWS (1939) 9, 62.

2. See notes 21 and 22 *infra*.

3. *E.g.*, *Bourgeois Sales Corp. v. Dorfman*, 273 N. Y. 167, 7 N. E. (2d) 30 (1937); *Ely Lilly & Co. v. Saunders*, 4 S. E. (2d) 528 (N. C. 1939). But see note 44 *infra*.

4. 50 STAT. 693 (1937), 15 U. S. C. § 1 (Supp. 1938).

5. The Fair Trade Acts permit resale price maintenance on a "commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity." See, *e.g.*, N. Y. Laws 1935, c. 976; N. C. Laws 1937, c. 350, § 10. The word "trade-mark" is used in this Article in a non-technical sense denoting any trade symbol which suffices to qualify a commodity under the above provision. Sometimes the words "brand" or "trade symbol" are also used to convey this meaning.

6. This is substantially and partly verbatim the exegesis which accompanied the proposal of the topic.

This advice is based on a distorted view of the Fair Trade Acts and aims at an impractical goal. The quest for some principle which will unite restrictions of the type provided by the Fair Trade Acts with covenants running with the land, equitable servitudes on land, the nature of trade-marks or even other restrictions affecting chattels will lead us either completely astray or to such abstraction as to advance us no bit from the point of beginning. What is there in the background of the law of covenants and restrictions affecting land?

## I

For a great many years courts of law have been permitting some covenants to run with the land for the benefit or to the prejudice of third persons not parties to the covenants and have denied this privilege to other covenants. The touchstone for differentiation was and is, presumably, public policy — public policy against the private imposition of unduly prejudicial restraints on land utilization and in favor of restrictions which are not so prejudicial and are desired by landowners. But the detailed rules for applying the test were only in part related to this policy; in part they were the product of habits and institutional attitudes in the conveying of land. The idea of multiplicity of interests in land was ancient and quite familiar. The problem was to bring these interests into some sort of order, to prevent the creation of too strange and unusual interests, to preserve the alienability of land and not to complicate further the already very complex task of conveying real property, that is, not to permit land titles to become unduly clogged. So the rules as to the form in which the restriction is couched, the particular expression of intention to bind or benefit assigns, the privity between the parties involved, the existence and nature of the dominant tenement, and the character of the restriction as touching or concerning the land or otherwise. Even now men of property are still debating the meaning, significance and suitability of these rules. Is any particular form of expression of intent really necessary or desirable? What kind of privity is required and when does it exist? May the dominant estate be something other than an estate in land and how closely juxtaposed, in space or in legal contemplation, must the dominant and servient tenements be? When does the restriction touch or concern the land and when is it collateral and hence alien?

Again, while covenants were thus racing under rather stringent rules on one of the law's tracks, the same or different courts in another chamber, sometimes actually and sometimes only figuratively separate, began to permit the running of restrictions under a competing trade-mark, namely, equitable servitudes. The rules on this track are much less stringent and formalized. Many restrictions which can not run under the covenant colors are welcome under the colors of equitable servitudes. But even here there are limitations. Not all restrictions are allowed. Here, too,

public policy as to land alienation and utilization is the ultimate test of eligibility. But here, too, that policy guides decision only more or less. General habits in equity administration and institutional attitudes toward equity, good conscience, honesty, unjust enrichment, good or bad faith and the conveyancing of land are factors contributing to actual decisions. Men of equity have debated the nature and principles of equitable servitudes with enthusiasm and varying degrees of brilliance. Is the equitable servitude a right *in rem* or a right *in personam*?<sup>7</sup> Is its enforcement for and against third persons an incident of specific performance of contracts or is it based on a different theory, so as to be permissible when specific performance is either unavailable or not contemplated? When is a finding of notice justified and how far is it proper to bind persons with the ties of notice when actual knowledge is lacking but possible or impossible investigation would have created at least suspicion? Should differentiation be made between negative and affirmative servitudes, and if so, what are the proper criteria for differentiation? If a suitable negative injunction can be framed may it be used to enforce a seemingly affirmative servitude? Indeed, it has been urged that we should stop thinking of these restrictions as equitable servitudes and regard them rather as easements or quasi-easements enforceable by whatever remedy in the law's cabinet is appropriate under the circumstances, by injunction perhaps usually, by damages when harm is recognized but the injunction would be too severe.<sup>8</sup> Have we, it is asked, been so captured by the trade-mark as to overlook the quality and function of the product?

The point is, however, that if satisfactory answers are made to all the questions about real covenants and equitable servitudes on land, what is their significance in a consideration of restrictions in the commerce in goods? For the answer it is appropriate to refer first to impeccable authority.

In 1928, Professor Chafee wrote a tremendous and monumental article entitled *Equitable Servitudes on Chattels*.<sup>9</sup> Whatever job was to be done in that direction he did. He began with the statement of fact that: "Just as sellers of land desired to limit its use by remote owners, sellers of chattels and other kinds of personal property wished to impose restrictions on these while in the hands of subsequent purchasers."<sup>10</sup> Then he proceeded to inquire whether there was any power in a "doctrine of equitable servitudes on chattels" to afford realization of that business desire. His introductory resumé of the cases dealing with resale price mainten-

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7. See Chafee, *Equitable Servitudes on Chattels* (1928) 41 HARV. L. REV. 945, 957, n. 30.

8. See CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND (1929) 153 *et passim*.

9. (1928) 41 HARV. L. REV. 945.

10. *Id.* at 946.

ance, territorial restrictions and tying clauses suggested "that the doctrine of equitable servitudes on chattels [had] been effectually killed by the courts."<sup>11</sup> But he was not discouraged; because "the issue of the extension" to chattels of the principle of *Tulk v. Moxhay*,<sup>12</sup> the fountain head of equitable servitudes on land, had "not been squarely treated in the cases." Rather, the decisions were largely based on issues of "restraint of trade" and the scope of the patent or copyright monopoly.<sup>13</sup> Consequently he proceeded with his inquiry and looked everywhere, with telescope and microscope. He considered the "general equitable principles," "analogous equitable interests in personalty," "the analogy of *Lumley v. Gye*"<sup>14</sup> and the possible "reasons against the existence of equitable servitudes on chattels" which would apply to all chattels as distinguished from land and to all restrictions thereon as distinguished from particular restrictions. After forty-one pages of skillful distillation of the essence from a mass of apparently unrelated theories, principles and cases, he concluded — how? — "the doctrine of equitable servitudes [on chattels] is a legitimate tool in the judicial equipment, *ready for use when desirable*."<sup>15</sup> He did not mean, of course, that the enforcement of restrictions on chattels is required by the general principles which he discussed or by doctrines as to equitable servitudes on land, or covenants running with the land or inducement of breach of contract. He meant merely that *if their enforcement is deemed desirable*, appropriate and more or less familiar means for accomplishing that end can be developed in the law, just as they were developed with reference to restrictions on land or unfair competition. Now that is of course important, — even though the nature of the proof might be mistaken to assume that equity courts have an exclusive monopoly in the field and that equitable servitudes on chattels would be unthinkable if we did not have equitable servitudes on land. It should serve to remind courts that the development of law (law in its entirety, including equity rather than as distinguished from it) has not stopped. It should apprise them that it is not a sufficient reason for the denial of enforcement to a restriction affecting personal property that the restriction does not fall within the detailed rules for the enforcement of restrictions on land. But granting that a "vindication of the obvious" is sometimes as important as an investigation of the uncertain, it certainly is not necessary, after Professor Chafee's effort, to seek again to establish that restrictions may legally be imposed on the sale or

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11. *Id.* at 955.

12. 2 Ph. 774, 41 Eng. Rep. 1143 (Ch. 1848).

13. Chafee, *Equitable Servitudes on Chattels* (1928) 41 HARV. L. REV. 945, 956-957.

14. 2 Ell. & Bl. 216, 118 Eng. Rep. 749 (Q. B. 1853) (liability for inducing breach of contract by peaceful persuasion).

15. Chafee, *Equitable Servitudes on Chattels* (1928) 41 HARV. L. REV. 945, 937. Italics supplied.

use of chattels by third persons if the enforcement of such restrictions is deemed desirable.<sup>16</sup>

Whether their enforcement is desirable is a wholly different question from that as to the enforceability of servitudes on land. The latter deal with the use of land by its occupants; the restriction is imposed on a specific parcel of land and limits its use. The former deal with commerce, the marketing of goods; the restriction imposed in a sale of one parcel affects all other parcels marketed under the same trade symbol. Simplicity of titles, freedom of alienation, availability for proper use, and zoning of neighborhoods, the important aims of policy in the case of land, are seldom involved in the case of goods. What are involved are the public advantages sought to be derived from the maintenance of effective competition and avoidance of monopolistic control—a policy which, conversely, is rarely affected by equitable servitudes on land. There is, of course, the formal similarity stated by Professor Chafee, that sellers of chattels wish to impose restrictions on them while in the hands of subsequent purchasers just as sellers of land desire to limit its use by remote owners.<sup>17</sup> But surely there is greater significance in the differences between the reasons for these desires and between the likely consequences of their realization. This was apparently Professor Chafee's experience. Having devoted forty-one pages to a demonstration on legalistic grounds "that the doctrine of equitable servitudes [on chattels] is a legitimate tool in the judicial equipment, ready for use when desirable," he gave only twenty-six pages to his stimulating discussion of specific types of restrictions on goods and the social and economic policies relevant to their enforceability. But the smaller concrete discussion seems to have been the more effective. For in the end he concluded: "At the close of my inquiry it must be admitted that I am much less convinced of the desirability of equitable servitudes on chattels than when I began."<sup>18</sup>

Likewise, assuming enforceability of both types of restrictions, the detailed rules of administration evolved in the land cases have little utility in the goods cases. They cannot be transferred bodily, because they are couched in language which has no meaning with reference to chattels.

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16. It is still urged by some that there is a general principle coming from the days of Lord Coke and applicable to the sale of all property, whether real or personal, that a seller may not on the one hand sell and on the other withhold from the purchaser some of the normal incidents of ownership. The principle is asserted, apparently, as a matter of impossibility in nature and logic, although it is conceded that a legislature may do the impossible. Easements are said not to be exceptions to the rule because they constitute interests in land. Equitable servitudes, it is urged, are really easements and thus explain themselves as not being exceptions. Therefore, the universal rule is still, as paraphrased by a colleague, a sale is a sale is a sale . . . My remarks are addressed, of course, to human, not divine, law.

17. See note 10 *supra*.

18. Chafee, *Equitable Servitudes on Chattels* (1928) 41 HARV. L. REV. 945, 1013.

Nor can they generally afford valuable analogy. Since they deal with different physical situations, implement different policies and are conditioned by different institutions, their use as analogies requires translation into more abstract form and produces unending argument as to the propriety of the translation and the significance of conceded similarities and differences in the problems. The exciting debate may then entice attention away from the needs of the case in hand.

The nature of trade-marks may indeed seem more relevant, since the Fair Trade Acts deal only with branded goods. I, too, have been a participant in the debate as to whether the basis of relief against trade-mark infringement is the exclusive ownership of the trade-mark as an object of property or rather the protection against tortious interference with trade expectancies by confusion of purchasers; and I have enthusiastically argued the Hand-Holmes view that the latter is the "true basis."<sup>19</sup> However, I think it will soon become apparent that the "nature" of trade-marks and the "true basis" of their protection has practically nothing to do with the problems of the Fair Trade Acts.

## II

Speaking broadly and so to some extent inaccurately, the Fair Trade Acts legitimize resale price maintenance on trade-marked, or otherwise branded goods. Now resale price maintenance is neither a new phrase nor a new idea. It behooves lawyers, therefore, as perhaps the original legitimate semanticists, to look carefully to the meaning of the symbol in its context, not merely its language context but its context in the life of which it is part. Resale price maintenance under the Fair Trade Acts is not the resale price maintenance condemned in the *Dr. Miles Medical Company* case.<sup>20</sup> And even resale price maintenance under the Fair Trade Acts may have different functions.

One strong impulse to the enactment of these statutes was the Supreme Court's decisions in the *Seagram*<sup>21</sup> and *Pep Boys*<sup>22</sup> cases, holding the Illinois and California Acts not vulnerable to the constitutional attack there made. The Supreme Court thought it was dealing with the resale price maintenance that was more than 50 years old, the resale price maintenance which was the subject of conflicting common law decisions and which was described in Professor Chafee's article; that is, a device of

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19. See *Beech-Nut Packing Co. v. Lorillard Co.*, 273 U. S. 629 (1927); *Bayer Co. v. United Drug Co.*, 272 Fed. 505 (S. D. N. Y. 1921); DERENBERG, *TRADE-MARK PROTECTION AND UNFAIR TRADING* (1936) 47 *et seq.*; 3 *RESTATEMENT, TORTS* (1933) §715, comment *b*.

20. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373 (1911).

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

22. *The Pep Boys, Manny, Moe & Jack of Cal., Inc. v. Pyroil Sales Co., Inc.*, 299 U. S. 198 (1936).

which "the primary aim . . . was to protect the property — namely, the good will—of the producer" of the trade-marked goods.<sup>23</sup> Consequently, the rule permitting such standardization of prices "was based upon the distinction found to exist between articles of trade put out by the manufacturer or producer under, and identified by, patent, copyright, trade-mark, brand, or similar device, and articles of like character put out by others and not so identified."<sup>24</sup> In the case of the former, that is, the branded product, the "good will created or enlarged by the identifying mark or brand" is necessarily involved in the sales all along the line of marketing to the ultimate consumer.<sup>25</sup> If prospective purchasers find that product on sale at different prices in different stores, particularly if they find it frequently sold at low "reduced" prices in one store while it is selling at higher "regular" prices in other stores, their faith in the value of the product will be destroyed and the loss of prestige of the product will soon be reflected in loss of sales by the producer. Similar loss is expected also from the unorganized hostility to the product thereby engendered among retailers. Merchants will not carry or will not push such products when they must sell them either at higher prices than their price-cutting competitors or at similarly reduced prices which yield little or no profit.

In this view of the Fair Trade Acts, then, the principal *bête noire* is the "loss leader" practice, that is, the sale of well-known branded goods below their equally well-known regular prices, with resulting loss thereon to the seller, in order to advertise the seller and increase his volume of sales of other goods to his greater over-all profit. The person seeking protection against its depredations is the producer or other person identified by the trade symbol under which the goods are sold and which is the catalytic agent in creating, enlarging or holding the goodwill of the product, and hence of the producer, in the market. The weapon of defense is a contract between the producer or other trade-mark owner and the purchaser from him whereby the purchaser undertakes not to resell the goods at a price lower than that stipulated in the contract and not to resell to a merchant without exacting a similar contract from him. Strangers to the contract are not bound by it, except to the extent that they are subject to liability under general tort law for inducing or participating in a breach by a contracting party. Whatever restraint of competition is thus affected "is strictly limited to that portion of the entire product put out and plainly identified by a particular manufacturer or producer," "leaving competition between articles so identified by a given manufacturer and all other articles of like kind to have full play."<sup>26</sup>

23. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 193 (1936).

24. *Id.* at 188.

25. *Id.* at 194-195.

26. *Id.* at 190.



"These statutes," wrote Mr. Edward S. Rogers, "are based upon goodwill as a property right and recognize its value."<sup>27</sup> "The first thing to consider in thinking of [them] is that there is nothing compulsory or regulatory about them. Their operation is limited to trade-marked goods which are in competition with other goods of the same class [using the word trade-mark in a colloquial sense] . . . In an effort to put a curse on them, these acts are sometimes called price-fixing statutes, but they are not. They do not fix prices or require that prices be fixed. They do not regulate anything or anybody. They are permissive only. They allow a single producer, if he chooses to do so, to make contracts with distributors of goods identified as coming from him (if they wish to enter into such a contract with him) establishing the prices to [sic] which the producer's identified merchandise shall be resold."<sup>28</sup>

Now I have no purpose to put a curse on the Fair Trade Acts. Like Mr. Rogers, "I am neither an economist nor a prophet. What the effect of these statutes is going to be in the long run, I do not know."<sup>29</sup> Again, the name attached to these Acts should hardly be of controlling importance. They are not bad merely because they are price-fixing statutes or good merely because they are not. But it is important that we keep straight in our thinking and look behind the face or name to recognize the real matters involved. The view of the Fair Trade Acts which the courts found not constitutionally ugly<sup>30</sup> and which Mr. Rogers describes is *one* view, the view seen not so much by the eye looking out now and here, but by the brain reminiscing about resale price maintenance when it was young, fresh and fair. But there is another view which shows resale price maintenance in its present background. It may still be fair; but the picture is entirely different.

In this view, the Fair Trade Acts are concerned not with the protection of the producer or the owner of the trade-mark, but with the protection of certain types of wholesale and retail distributors. Their function and object is not to protect the goodwill symbolized by the trade-mark, but to alleviate the rigors of price competition between distributors. The device of voluntary contract is a transparent mask borrowed from history to conceal the substance of prohibition of price competition in the distribution of trade-marked goods. And the concern of the Acts with trade-marked goods is accidental and incidental and similar regulation with

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27. Foreword in WEIGEL, *THE FAIR TRADE ACTS* (1938) iv. Mr. Rogers argued the *Pep Boys* case, *supra* note 22, on behalf of the trade-mark owner.

28. *Id.* at iii.

29. *Id.* at v. For careful forecast partly on the basis of experience and partly on the basis of economic theorizing and analysis, see GREYER, *PRICE CONTROL UNDER FAIR TRADE LEGISLATION* (1939).

30. Other courts have followed the Supreme Court's lead and have stressed the producer's good will. See, *e.g.*, *Ely Lilly & Co. v. Saunders*, 4 S. E. (2d) 523 (N. C. 1939).

respect to non-trade marked goods is sought to be achieved through other means by the same interests which are behind the Fair Trade Acts. All this seems quite obvious. Yet, I, too, feel impelled at this point to vindicate the obvious.

It is common knowledge that the pressure for the passage of these Acts, insofar as it was publicly disclosed, came not from manufacturers or other trade-mark owners but from distributors — first and foremost the retail druggists associations and then other retail and wholesale distributors.<sup>31</sup> It is doubtless true that many distributors wanted resale price maintenance at the time of the *Dr. Miles* case.<sup>32</sup> And doubtless true also that some manufacturers want resale price maintenance now for the reasons stated by the Supreme Court, Professor Chafee and Mr. Rogers. But the organized pressure for the Fair Trade Acts, however subsidized privately, came from distributor groups; and the legislative response was response to distributor groups. Distributors organized in Code Authorities under the NRA sought to deal with the problems of loss leaders, price cutting and so-called predatory or cut-throat price competition.<sup>33</sup> Upon the demise of the NRA, they turned to the Fair Trade Acts as a partial substitute. The concern of the distributors was not for the goodwill symbolized by the trade-mark, but for their own welfare. They sought an adequate mark-up, and adequate profit on the goods which they marketed, — not protection of the manufacturer's trade expectancies. They sought to protect themselves against old and new methods of merchandising which threatened their positions whether or not the producer or his goodwill were similarly threatened. If the producer were also to profit from the scheme, that was an accidental incident.

This concern of the distributors is not limited, of course, to trade-marked goods. It extends to all goods which they handle. Under the NRA, they sought to deal with the problem in respect of all goods. After the NRA, they continued the effort. But there was the problem of appropriate means. How control price competition so as to eliminate cut-throat competition, the "competition that kills?" New devices might be sought. But there was an old device at hand — resale price maintenance. True that was intended originally for the protection of the producer's goodwill. But all the better. It can achieve the standardization of resale prices for branded goods at least — which would accomplish part of the total desired result. And it can incidentally enlist the support for this purpose of an irrelevant and even misleading, though nevertheless powerful and effective, theory.

That left the problem in respect to goods not identified by trade symbol. This couldn't be solved by the same device of resale price maintenance,

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31. See GREYER, *op. cit. supra* note 29, at 83 *et passim*.

32. See note 20 *supra*.

33. See MACK, *CONTROLLING RETAILERS* (1936) 188, 261.

not because the interests or desires were different, but merely because practical and historical differences in the make-up and marketing of the goods made that device administratively unavailable. Consequently resort was had to what are called Anti-Discrimination Statutes<sup>34</sup> and Unfair Practices Acts.<sup>35</sup> These could not effect price standardization in the same way as the Fair Trade Acts. But, by prohibiting unjustifiable discrimination and sales below cost, and prescribing how cost is to be computed, they were intended to hit at substantially the same evil and alleviate the hardships of "cut-throat" competition. Other devices have been enacted for particular types of products and the search for more effective controls is still on.<sup>36</sup>

Experience under the Fair Trade Acts emphasizes their function to protect distributors against what is deemed undesirable price competition. Some producers have indeed availed themselves voluntarily of the power granted by the Acts; but many have been unwilling or reluctant to do so.<sup>37</sup> Organizations of distributors have been very active in efforts to bring the recalcitrant producers into the fold. They have predicted or threatened distributor boycotts of products not brought under the Acts by their producers.<sup>38</sup> Some wholesalers have even endeavored themselves to fix retail prices for branded goods sold by them when the producers have failed to do so.<sup>39</sup> A rather peculiar effort to protect the producers' goodwill! And organizations of distributors have been most active in efforts to enforce the Acts.

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34. See OPPENHEIM, RECENT PRICE CONTROL LAWS (1939) 105, for a summary and comparison of the provisions of the various state statutes. Many statutes of this kind are aimed at monopolization and have been on the books for some time; some were passed after the NRA, *e.g.*, the Robinson-Patman Act [49 STAT. 1526 (1936), 15 U. S. C. § 13 (Supp. 1938)] and the state acts following it as well as those following the California model, CAL. GEN. LAWS (Deering, 1937) Act 8781.

35. Prohibiting sales below cost. See OPPENHEIM, RECENT PRICE CONTROL LAWS (1939) 63.

36. Recent Connecticut legislation prohibits retailers of gasoline from posting their prices at their stations on signs exceeding 126 square inches. CONN. GEN. STAT. § 554e (Supp. 1939). Prior to the 1939 Act, the statutes required retailers to post their prices in figures at least five inches high and four inches wide. CONN. GEN. STAT. § 649c (Supp. 1935). The 1939 legislation reduces the minimum size of the figures to two and a half inches in height and a proportional width and adds the above maximum limit.

37. This is commonly rumored in the liquor trade. One argument used for resale price maintenance in liquor is that it reduces sales stimulation and, consequently, liquor consumption. This may explain the reluctance of some distillers and points to still another function of the Fair Trade Acts.

38. See GREYER, *op. cit. supra* note 29, at 92 *et seq.*

39. Schenley Products Co. v. Franklin Stores Co., 124 N. J. Eq. 100, 199 Atl. 402 (1938). See note 1 *supra* and also the omnibus contract once recommended by the National Wholesale Druggists Association reprinted in ZORN AND FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS (1937) 437.

The problem of enforcement is complicated by the fact that the resale prices fixed under the Acts are binding not only on those who agree to maintain them but also on those who do not agree but who have knowledge of them. This presents another veil to be pierced if one is to see the reality.

The old resale price maintenance rested entirely on contract and the producer's power to refuse to sell to those who would not comply.<sup>40</sup> The Fair Trade Acts pretend to be also based on contract. So the Supreme Court and Mr. Rogers point out that the Acts merely permit the parties to a sale to make a voluntary agreement as to resale prices, if they so desire. But isn't that completely fanciful? A single contract between the manufacturer and a single retailer, if brought to the attention of the entire trade, is sufficient to bind the entire trade!<sup>41</sup> Even technically the "contract" is rather strange.<sup>42</sup> The manufacturer and retailer, between whom there may be no other direct dealing, sign a document in which the retailer makes the promises. He agrees to sell the named products on the stated price terms. The manufacturer reserves the right to change those terms merely by notice to the retailer. And he reserves the right in the same manner to add other goods to the contract. In the longer form of contract, effort is made to comply more fully with the legal requirement of consideration for the promises by the retailer. They are said to be in consideration of similar contracts between the producer and other retailers, although that may seem supererogatory since other retailers are bound by notice even in absence of contract. The producer also agrees to make best efforts to fill or have filled the retailer's orders at the producer's current prices so long as the retailer maintains proper credit standing. This is doubtless valuable because, otherwise, perchance the producer would not be anxious to sell his products. And provision is made for cancellation of the contract by either party. But the retailer

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40. See McLaughlin, *supra* note 1.

41. *Houbrigant Sales Corp. v. Woods Drug Store*, 123 N. J. Eq. 40, 196 Atl. 686 (1939). The Supreme Court did not consider this to be an unconstitutional invasion of the liberty of non-agreeing traders to fix their own prices. "Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price . . . and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under § 2 of the law by which such acquisition was conditioned." *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 193 (1936). This much can, of course, equally be said about any compulsory prices legislatively fixed.

The Wisconsin statute provides for a governmental review of the fairness of the prices established. See *Weco Products Co. v. Reed Drug Co.*, 225 Wis. 474, 274 N. W. 426 (1937).

42. For forms of contracts, see Prentice-Hall 1935 Trade and Ind. Serv. ¶¶ 95,151-95,153; WEIGEL, *THE FAIR TRADE ACTS* (1938) 219.

states his understanding that cancellation does not give him freedom to sell the goods on price terms other than those stipulated. *Notice* of the fixed price, not contract, is then the heart of the Fair Trade Acts. When the historical vestiges and the legalistic frills are pressed aside, the Acts provide for fixing resale prices by notice to prospective sellers. This may be significant in a consideration of the Miller-Tydings amendment to the Sherman Act, providing that nothing therein "shall render illegal, *contracts or agreements* prescribing minimum prices for the resale of a commodity . . ., when contracts or agreements of that description are lawful as applied to intrastate transactions" under state law.<sup>43</sup>

What happens, then, when we see the Fair Trade Acts not as the Supreme Court saw them but as they appeared to the legislatures and the trade? By merely knocking the props of theory from under the Court's decision do we topple the structure of constitutionality built on those props?<sup>44</sup> Probably not. We are impelled, however, to face the real foundations and consider their sufficiency.<sup>45</sup>

If the Acts, in design and operation, be deemed to protect and advance a selfish pressure group at the expense of the public interest, the structure may indeed topple despite the respect for legislative determinations. But retailers and wholesalers constitute a large enough class of the population to warrant consideration of their welfare as part of the public interest. Few would object to legislation designed to relieve them of the alleged evil of "loss leaders," if only the practice could be properly identified and appropriate means for its confinement devised. But the Fair Trade Acts attempt much more. They permit elimination of price competition in the distribution of goods, even when differences in price reflect only differences in efficiency. They permit competition between producers,

43. See note 4 *supra*. Italics supplied.

44. A South Dakota court declared a Fair Trade Act violative of the South Dakota constitution providing that "No incorporated company, co-partnership, or association of persons in this state . . . shall directly or indirectly combine or make any contract in any manner whatever to fix prices . . . so as to prevent competition in such prices . . ." *Dargen v. Townsend*, Prentice-Hall, Trade and Ind. Serv. ¶97,016 (S. D. 2d Jud. Circ. 1939). See the constitutional provisions cited in OPPENHEIM, *RECENT PRICE CONTROL LAWS* (1939) 31-32, n. 67.

45. If the Supreme Court's theory is accepted, it is important to point out that resale price maintenance may be used not only to protect an existing good will, but also to create a good will, that price maintenance, like a trade-mark, may begin simultaneously with a business. The device of standardized prices, like that of an attractive trade-mark or slogan, may be adopted with the hope that it will create good will and for that very purpose. The good will may be based on the merit of the product or merely on the stupidity, vanity, or deception of consumers and may be the result of the legal protection rather than the thing protected. Again, a comprehensive discussion of resale price maintenance should include consideration of its relation to large-scale, national advertising and of the economic effects of the latter and of trade-mark differentiation generally. See CHASE AND SCHLINK, *YOUR MONEY'S WORTH* (1927); CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (1935) Appendix E.

between commodities, but restrain competition between distributors, between different methods of distribution. They permit the fixing of prices in what may be the worst way, — not by a public body, not in accordance with even vague, prescribed standards, not for named commodities or classes of goods, but by the unilateral action of any private trade-mark owner for any goods marketed under his trade-mark. Is that bad? Judgment would, of course, be relatively easy if knowledge of the facts and the consequences were present. But the facts are still in dispute and the consequences speculative.

We do know that the Acts can be applied to only a limited fraction of all goods, probably a relatively small fraction, but that fraction in which competition is already limited by brand differentiation. We know that there are strong forces to counteract the effects of the Acts: the competition of unbranded and private brand goods, the hostility of certain types of distributors, the reluctance of some producers to adopt the plan and the difficulties of enforcement. There is evidence that while the Acts result in increase of prices to some consumers, those who hunt for bargains and who buy at establishments operating at minimum cost and with minimum service and display, they also result in reduction of prices to other consumers, those who do not shop around and, to whom, perhaps, price is not so important. There is evidence also that while the Acts have increased the margins of some distributors they have decreased the margins of others and have not completely fulfilled the expectations of their supporters. The relative strength of these tendencies and their net effects are, however, still unknown.<sup>46</sup>

Again, we know and can sympathize with the plight of some interests sponsoring the Acts. The corner tobacconist or druggist who sees his income dwindling because, as he thinks, the large department store or chain grocery sells tobacco products at reduced prices merely as a service or attraction for customers without any effort to realize a profit from this business. Even if he recognizes that he must take the risks of superior efficiency, he is sure that it is unfair for his competitor not to allocate to the competing business its proper share of the cost of doing business and thus receive aid from non-competing lines. Similarly, the small distributor who is ready enough to concede defeat by superior efficiency is understandably enraged when he is defeated by discriminatory prices and other advantages granted to his competitor merely because of the competitor's superior financial and bargaining power. And, in any event, such distributors have the human desire not to be killed so soon. If modern changes in marketing spell their doom in this business, they wish the sentence to be executed mercifully; they desire postponement or time for adjustment and for alleviation of the shock of transi-

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46. See GREYER, *op. cit. supra* note 29.

tion. They feel that they should not be required to pay, alone and at once, the cost of general economic betterment. Perhaps this is mere euphemism for plain selfishness. But it evokes sympathy for such measures as the anti-discrimination laws, the statutes prohibiting sales below cost, the chain store taxes, — and the Fair Trade Acts, even though they seem rather inappropriate for the purpose involved.

The legislative enactment of these Acts relieves the courts of a very hard choice of fundamental policy and imposes on them the difficult task of detailed administration and the responsibility of scrutinizing the schemes in particular circumstances to see that they are not used to achieve the illegal aim of restricting competition between producers. These are no light jobs. Consider for a moment some of the problems.

The Acts are applicable by their terms only to branded goods which are "in free and open competition with commodities of the same general class produced or distributed by others."<sup>47</sup> Now a trade-mark, by the very fact that it seeks to differentiate commodities and attribute uniqueness to them, necessarily limits the competition between them to some extent. Surely the Acts cannot be construed to exclude such limitation. But general classes of commodities are not ordained; and there are varying degrees of competition. One brand of tooth paste may compete with other brands, but not in the way in which one book competes with another.<sup>48</sup> Is *Law and Politics*,<sup>49</sup> the collection of the writings of Mr. Justice Frankfurter, in free and open competition with other books? Do people buy reading matter or specific writings? Is the "free and open competition" requirement satisfied by the existence of *some* competition even when, for example, a product is patented or one producer has dominant control?

Again, the Acts renounce any purpose to legitimize so-called "horizontal" agreements, concerted action by producers or by distributors. Mr. Justice Sutherland pointed out in the *Seagram* case that the Acts permit restraint of competition only in the distribution of the branded product leaving free and open the competition between products, whether branded or otherwise.<sup>50</sup> Nevertheless, the Acts may be useful precisely in the latter connection, when the small number of producers involved or other circumstances facilitate concert of action. Price competition in the retailing of gasoline, for example, is quite different from that in patent medicines. The retail price of standard gasoline in any community

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47. See note 1 *supra*.

48. And consumer loyalty to a brand of tooth-paste may be quite different from that to a brand of perfume. This affects the advisability of a manufacturer's adoption of resale price maintenance when competitors do not adopt it and the price which can be established.

49. FRANKFURTER, *LAW AND POLITICS* (1939).

50. See note 26 *supra*.

is the same for all brands, or at least for all major brands. A drop in the price of one is almost immediately followed by an equal drop in the prices of the others. The reduction is usually absorbed not by the retailer but by the "producer," the company under whose trade-mark the gasoline is marketed. Stabilization of retail prices of gasoline may thus mean restriction of price competition between its producers rather than its retailers; and that was well recognized in the days of the Petroleum Code. In gasoline, because of more or less peculiar marketing characteristics, the talk about protection of prestige and goodwill symbolized by trade-mark is particularly false and misleading. Are the courts to take such variations into account in administering the Acts? Further, is concerted action by distributors to coerce a reluctant manufacturer to "protect his goodwill" by resort to the Acts a violation of the anti-trust acts?<sup>51</sup> Is there such a violation when manufacturers agree to avail themselves of the Acts without, however, agreeing on the prices to be fixed? And are the restrictions on price thus procured enforceable?

There are other issues no less difficult. What defenses are available to a distributor who knowingly sells below the fixed price? A price war is started by a retailer who claims to avail himself of the privilege granted by the Acts to reduce his prices in a closing-out sale. May his competitors meet his prices? May an alleged violator defend on the ground that the market is demoralized and price cutting rampant? Or that the producer is not diligent or successful in prosecuting or ending violations, or discriminates in the institution of prosecutions or in his prices to retailers?<sup>52</sup> And what is to be the effect of the Acts on established practices entirely unrelated to the evils of price-cutting against which they are directed? For example, employers commonly give discounts on purchases from them by their employees. A New Jersey court has held, to my mind indefensibly, that this practice may not be continued with respect to goods price-fixed under a Fair Trade Act.<sup>53</sup> Similar questions are raised in respect to cooperatives<sup>54</sup> and the giving of trading stamps.<sup>55</sup> Again, there is an established business in repacking or rebottling trade-marked goods into small packages and selling them to consumers who cannot, or for other reasons do not, buy in the larger quantities. Several

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51. The answer to this question may well depend upon what is regarded as a proper purpose of the legislation, protection of distributors or of producers' good will. A similar question may be raised with respect to concerted action by distributors to police the system.

52. See the cases collected in OPPENHEIM, *RECENT PRICE CONTROL LAWS* (1939) 60-62.

53. *Bristol-Myers Co. v. L. Bamberger & Co.*, 122 N. J. Eq. 559, 195 Atl. 625 (1937), 124 N. J. Eq. 235, 1 A. (2d) 332 (1938).

54. *Weco Products Co. v. Reed Drug Co.*, 225 Wis. 474, 274 N. W. 426 (1937).

55. *Bristol-Myers Co. v. Lit Bros., Inc.*, 6 A. (2d) 843 (Pa. 1939).



recent cases involved this situation.<sup>56</sup> Plaintiff is the producer of perfume which it markets under the trade-mark, say "Charvard." It fixes a retail price for this product of \$1.60 for one dram or less. Actually it does not market the product in smaller quantities. Nips, Inc., buys this genuine perfume, rebottles it into small ampules containing about one drop each and supplies them to five and ten cent stores where each ampule is sold for ten cents, with the complete disclosure that the perfume is Charvard's rebottled by Nips which is wholly independent of Charvard.<sup>57</sup> A dram selling at \$1.60 is enough to fill some 70 ampules which return a total of \$7.00. Injunctions have been issued against the sale of the ampules at less than \$1.60. Yet the objection here is not to price cutting and the loss of goodwill that it might entail, but rather to the market in which the perfume was sold, to the diminution in quantity which made the perfume available at a relatively high price to a class of purchasers for whom the product would otherwise be out of reach. To be sure, the plaintiff's goodwill may be prejudiced by both practices. But does the protection of the Fair Trade Acts extend beyond prejudice from a particular type of practice? Such are the problems of detail in the administration of these Acts.

### III

The change of policy with reference to resale price maintenance was not due to the pressure of analogies from the law of real property or to the discovery or better understanding of any doctrine of equitable servitudes or of any general principles of equity jurisprudence, fundamental or otherwise. It was rather the response to a cry of distress from groups of people who have found their voices and who have learned, particularly during the days of the NRA, how to use them in unison and effectively. Whatever "law of restrictive agreements affecting chattels" there is, then, outside of resale price maintenance, is entirely unaffected by the Fair Trade Acts. For even a four-word generic name cannot create unity for the variety of arrangements that might be denominated by it. Each such arrangement, or at least each type, must be investigated separately and its validity judged by its own functions and consequences.

Once certain phonograph records carried a notice that they were to be used only with named phonographs or only with sound reproducing machines.<sup>58</sup> These restrictions are certainly different in their functions and criteria of validity from a barely conceivable one declaring that the

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56. They are discussed in (1939) 49 *YALE L. J.* 145.

57. This practice does not constitute trade-mark infringement. *Prestonettes, Inc. v. Coty*, 264 U. S. 359 (1924); 3 *RESTATEMENT, TORTS* (1938) §§ 736, 737; or passing off: 3 *RESTATEMENT, TORTS* (1938) § 714.

58. See *Leeds & Catlin Co. v. Victor Talking Machine Co.*, 213 U. S. 325 (1909); *Fonotipia, Ltd. v. Bradley*, 171 Fed. 951 (C. C. N. Y. 1909).

records are not to be eaten with goldfish by college sophomores. And they differ no less clearly from the notices now found on records that they are not to be used for broadcasting by radio<sup>59</sup> — restrictions that raise novel conflicts of interests between the performing artist, the recorder, the composer, the publisher, the broadcaster and the advertiser<sup>60</sup> which cannot be referred for solution even to the vague standards of public interest in the maintenance of effective competition or the alienability of property.

Still different from these restrictions is the negative pledge clause in the indentures involved in *Kelly v. Central Hanover Bank*,<sup>61</sup> providing that the debtor would not pledge any of its property without assuring to the indenture holders equal participation in the security. The issue in the case was whether the debenture holders could at least share in the pledge equally with the pledgee who, it was alleged, took the pledge as security for a loan with notice of the restriction but without compliance with it. Immediately, the issue related not to the regulation of future business conduct but to the distribution of losses from a past transaction more or less in accordance with the legitimate expectations of the parties. In its implications as to the future, the issue required determination of the effectiveness with which this security device was to be endowed. There was no objection in policy to the debtor's giving his creditors the most assured type of security. The objection to the particular device used, passing all questions of interpretation, was that it provided such ineffective security. The debtor retained such comprehensive control that the creditor was at best left with very little protection. There might have been the question first, then, whether it was worth while continuing a device which was so misleading to investors, which might appear to them to secure much when in fact it gave little beyond the word of the debtor. The device at best would work only against subsequent pledgees with notice; it would not work against purchasers at all and against pledgees without notice. What would constitute notice would depend upon the uncertainties of litigation. Its operation would thus be largely accidental, sporadic and unpredictable. There might have been, then, the second question whether it was desirable to permit a device which subjected prospective lenders in good faith to such hazards and which excluded some persons from honest business transactions which as a practical matter were open to many others. The court may have decided that it would be better policy to discourage the use of this security device.

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59. *Waring v. W A D S*, 327 Pa. 433, 194 Atl. 631 (1937).

60. See Comment (1939) 49 YALE L. J. 559.

61. 11 F. (2d) 497 (S. D. N. Y. 1935), discussed in Comment (1936) 46 YALE L. J. 97; Note (1936) 49 HARV. L. REV. 620; Posner, *The Trustee and the Trust Indenture* (1937) 46 YALE L. J. 737, 757; Jacob, *The Effect of Provisions for Ratable Protection of Debenture Holders in Case of Subsequent Mortgage* (1938) 52 HARV. L. REV. 77.

But its opinion concerns itself largely with a learned discussion of the "overlapping" and "interrelated" doctrines of equitable servitudes on land, equitable liens, trusts and specific performance. It demonstrates that none of the cases dealt with a situation like the one before the court, and that they did not require enforcement of the clause against pledgees. But the demonstration was equally effective to show that they did not require its non-enforcement. Thus the difficult questions of law and policy were still open for decision.

Now, of course, general ideas, in law as elsewhere, have a power to transcend differences in specific situations. But before we enjoy the peace of generalizing and systematizing legal theory about the Fair Trade Acts and restrictive agreements affecting chattels, it is of first importance to pierce the screen of largely fictitious description and theory with which judicial and other literature have surrounded the Acts and to seek a fuller particular understanding of the various specific restrictions involved.