

RESALE PRICE MAINTENANCE: FACT AND FANCY

WALTER ADAMS †

WITH only a few members dissenting, the Attorney General's National Committee to Study the Antitrust Laws has condemned fair trade pricing as "an unwarranted compromise of the basic tenets of National antitrust policy."¹ Although it recommended outright repeal of the Miller-Tydings Act² and

†Associate Professor of Economics, Michigan State College; member, Attorney General's National Committee to Study the Antitrust Laws. Professor James W. Payne, Jr. of the University of Richmond Law School has furnished considerable assistance in legal research, but he is not responsible for the views and recommendations expressed herein.

1. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS 154 (Mar. 31, 1955).

2. The Miller-Tydings Act, 50 STAT. 693 (1937), 15 U.S.C. § 1 (1952), amended § 1 of the Sherman Act as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, that nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of 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 and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under Section 5, as amended and supplemented, of the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

the McGuire Act,³ which define the status of the state fair trade acts under the federal antitrust laws, the Committee made no such recommendation

3. 66 STAT. 631, 15 U.S.C. § 45 (1952), was passed as an amendment to § 5 of the Federal Trade Commission Act after the Supreme Court's decision in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). The act provides:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce.

"Sec. 2. Section 5 (a) of the Federal Trade Commission Act, as amended, is hereby amended to read as follows:

" 'Sec. 5 (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

" '(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of 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 and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

" '(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

" '(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

" '(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

" '(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts

with respect to other forms of resale price maintenance—despite the fact that fair trade accounts for only about ten billion dollars of annual consumer expenditures, while resale price maintenance effectuated without recourse to fair trade accounts for an estimated thirty billion dollars.⁴

In a way, this latest attack on fair trade comes as no surprise. For years it has been fashionable for such diverse groups as the Farm Bureau Federation, the National Grange, the CIO, the General Federation of Women's Clubs, the Consumers Union, the Antitrust Division, and the Federal Trade Commission to single out fair trade as a restraint on competition and a conspiracy against the public. Lawyers and economists, both in and out of the universities, have joined in the crusade, and have assembled a formidable case against fair trade.⁵ Nevertheless, in the heat of controversy, a number of facts have been overlooked: the case against fair trade rests on highly ambivalent evidence; resale price maintenance can frequently be achieved without recourse to fair trade; the methods for maintaining resale prices other than fair trade have a strong legal footing; and therefore a repeal of the Miller-Tydings and McGuire Acts is not an effective way of coping with the alleged vice of resale price maintenance.

The opponents of the Miller-Tydings and McGuire Acts misconceive their target. What should be urged by these critics is vigorous enforcement of the "free and open competition" provisos of the fair trade laws.⁶ This is true for two reasons: (1) If resale price maintenance is practiced in a healthy competitive atmosphere no significant restraint on competition results, yet at the same time, substantial protection is afforded against the evils flowing from loss-leader selling and from the competitive advantages of large chain distributors vis-a-vis small independents. (2) Even if Miller-Tydings and

to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406(b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.' "

4. BUREAU OF EDUCATION ON FAIR TRADE, MEMORANDUM TO THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 4 (1954).

5. See GREYER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION (1939); MUND, GOVERNMENT AND BUSINESS 461-85 (2d ed. 1955); FTC, REPORT ON RESALE PRICE MAINTENANCE (1945); Bowman, *Resale Price Maintenance—A Monopoly Problem*, 25 U. CHI. J. BUS. 141 (1952); H.R. REP. No. 1516, 82d Cong., 2d Sess. 18-52 (1952); S. REP. No. 1741, 82d Cong., 2d Sess. (1952); *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 82d Cong., 2d Sess. (1952).

6. Miller-Tydings Act, *supra* note 2; McGuire Act, § 5(a)(2), *supra* note 3. Only one decision has been found holding that goods retailed under resale price maintenance contracts were not in free and open competition with goods of the same general class. *Eastman Kodak Co. v. FTC*, 158 F.2d 592 (2d Cir. 1946), *cert. denied*, 330 U.S. 823 (1947). And courts have found that resale price fixing of copyrighted books does not violate this requirement, although *The Grapes of Wrath* might well be thought so unique as not to be in "free and open competition" with *Ferdinand the Bull*. Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175, 197-98 (1954).

McGuire were repealed, the non-conspiratorial and non-monopolistic producer could still maintain resale prices through consignment sales or an agency system, or by exercising his right to refuse to deal, or possibly by reliance on the doctrine of equitable servitudes on chattels. It is the purpose of this article to discuss briefly the arguments for and against fair trade, and then to analyze the alternative legal bases for resale price maintenance.

THE FAIR TRADE CONTROVERSY

The most telling argument against fair trade is that in practical effect it nullifies the antitrust prohibitions against horizontal price fixing. If, it is argued, a manufacturer may enter into a fair trade agreement with retailer *A*, and if he may stipulate the minimum price at which *A* can sell the product, and if, under the nonsigner clause of the McGuire Act,⁷ he may impose identical resale prices on retailers *B*, *C*, *D*, and *E*, who have notice of the contract with *A* but who enter no such contract themselves, then the economic effect is the same as if *A*, *B*, *C*, *D*, and *E* had entered into a horizontal price fixing agreement directly. As the Federal Trade Commission points out:

"Nothing is more clearly established in Federal policy than the principle that horizontal price fixing shall not be tolerated. The [McGuire Act] pays lip service to that principle; yet its effect would be that a minimum price fixed by contract with one retail distributor would become the minimum price for all other retail distributors who were placed upon notice of the existence of the contract. The rigidity and uniformity of the price would be exactly that of the most rigid horizontal price-fixing conspiracy; the level of the price would be likely to be at least as high as in a horizontal conspiracy; and the public control of the reasonableness of the arrangement would be as nonexistent as in the case of a horizontal conspiracy. Thenceforward, any group of distributors desiring to fix prices horizontally would be foolish to take the direct road to that end. Instead some one of their number would make a vertical contract with a supplier and then place the other members of the group on notice of the existence of the contract. Through this means, the group could not only negate the objections of the Government, but could actually use the courts as devices to enforce the arrangement."⁸

Aside from its allegedly deleterious effects on competition, fair trade is said to be an instrument for exploiting the consumer. Fortune magazine, for example, in its picturesque way, contrasts the consumer's plight in the fair trade states with the consumer paradise to be found in the "oases of competitive pricing":

"Congressmen and lesser residents of the District of Columbia can lather up with a big tube of Barbasol bought for 29 cents; in fair-trade Maryland, the same tube would cost 39 cents. The Congressmen can regenerate the blood cells with Lilly's Lextron Pulvules (84's) for \$2.29, instead of the fair-trade price of \$3.15. A bottle of Old Granddad is \$5.45 in

7. McGuire Act, § 5(a) (3), *supra* note 3.

8. H.R. REP. NO. 1437, 82d Cong., 2d Sess. 11 (1952).

Washington, \$6.65 (before state tax) across the line. BC headache powders are a dime instead of 19 cents."⁹

This and other surveys¹⁰ are repeatedly cited to demonstrate the prejudicial effect of fair trade on the consuming public.

Fair trade is also charged with weakening the competitive position of the independent retailer. Corwin Edwards, for example, suggests that fair trade enables chains, department stores, and mail order houses to organize low-price raids against independent retailers by marketing private brands at prices with which the independent retailer, limited to fair trade items, cannot compete.¹¹ This argument is somewhat paradoxical. Fair trade is condemned for *destroying* price competition and thus harming the consumer. At the same time, it is attacked for *stimulating* price competition and weakening the independent retailer. Thus, fair trade opponents find themselves contending that resale price maintenance is too effective, on the one hand, and not effective enough, on the other.

Finally, it is contended that fair trade pricing inevitably produces a non-competitive atmosphere which fosters violations of the antitrust laws. Boycotts, threats, coercion, favoritism, discrimination, and collusion are said to be the vices that accompany fair trade "no matter how carefully the legislation passed by Congress may be couched in terms of safeguards and protections."¹² It is pointed out that the National Association of Retail Druggists, long a champion of fair trade, was found guilty in 1947 of restraining competition in drugs by fixing retail and wholesale prices, and of eliminating competition among retail druggists.¹³ By threatening to boycott products for which acceptable prices were not established, the NARD had compelled drug manufacturers to establish wholesale and retail prices that would allow a satisfactory margin to retailers.¹⁴ Other prosecutions by the Department of Justice¹⁵ and pro-

9. *The Not-So-Fair-Trade Laws*, Fortune, Jan. 1949, p. 70.

10. See MUND, *op. cit. supra* note 5, at 479-80.

11. "With national brands of drug products price-controlled, the chain can collect substantial margins upon such products while reducing the price of its own private brands whenever it desires to use them as leaders or to make a raid upon the national brand business enjoyed by other stores. Since these other stores are bound not to cut prices upon the national brands which have acquired prestige through extensive advertising, retaliation by the victims is not possible. Thus the most obvious effect of resale price maintenance upon the relations between chain and independent is to deprive the independent of a price-cutting weapon still available to the chain. The complacency with which the chains have accepted the operation of the state laws is no doubt partially due to this fact." Cited in H.R. REP. No. 1516, 82d Cong., 2d Sess. 27 (1952).

12. *Id.* at 38.

13. *United States v. National Ass'n of Retail Druggists*, CCH TRADE REG. REP. § 61026 (D.N.J. 1947).

14. H.R. REP. No. 1516, 82d Cong., 2d Sess. 32 (1952).

15. See *United States v. National Wholesale Druggists' Ass'n.*, 61 F. Supp. 590 (D.N.J. 1945) (upon plea of *nolo contendere* fines totaling \$87,000 imposed); *United States v. New York State Pharmaceutical Ass'n.*, CCH TRADE REG. REP. § 61031 (S.D.N.Y. 1947) (*nolo contendere*, fines of \$17,000); and the following cases cited in H.R. REP. No. 1516,

ceedings by the Federal Trade Commission¹⁶ are cited as evidence that the fair trade laws serve as a cloak for price fixing and similar restraints of trade.

In rebuttal, the fair trade advocates point out that neither the state fair trade statutes nor the federal enabling legislation have protected competing manufacturers, wholesalers, or retailers against antitrust prosecution when they were found to have engaged in any organized, conspiratorial or coercive activity to obtain or enforce a fair trade agreement. Thus, even with fair trade, the public is assured that competing manufacturers, wholesalers or retailers cannot conspire to restrain trade without risking exposure to antitrust prosecution. The very cases cited by opponents of fair trade demonstrate that the antitrust laws can still be enforced where the practitioners of fair trade exceed or abuse their carefully defined statutory rights.

Secondly, it is argued that the Miller-Tydings Act and the McGuire Act permit fair trade pricing only where the goods covered thereby are in free and open competition with goods of the same general class.¹⁷ From the consumer's point of view this is a crucial safeguard against exploitation. So long as there is effective competition between manufacturers, the fact that each of them sees fit to fix minimum resale prices is of secondary importance. Louis D. Brandeis pointed out:

"The position of the independent producer who establishes the price at which his own trade-marked article shall be sold to the consumer must not be confused with that of a combination or trust which, controlling the market, fixes the price of a staple article. The independent producer is engaged in a business open to competition. He establishes his price at his peril—the peril that, if he sets it too high, either the consumer will not buy, or, if the article is nevertheless popular, the high profits will invite even more competition. The consumer who pays the price established by an independent producer in a competitive line of business does so voluntarily; he pays the price asked, because he deems the article worth that price as compared with the cost of other competing articles. But when a trust fixes, through its monopoly power, the price of a staple article in common use, the consumer does not pay the price voluntarily. He pays under compulsion."¹⁸

If, as the fair trade advocates claim, the consumer can choose from 58 brands of sterling silverware, 56 brands of face powder, 76 brands of toilet soap, 31 makes of washing machines, 21 brands of floor wax; if the consumer can choose from 93 brands of dentifrice, ranging in price from 4 to 28 cents per ounce,¹⁹ the fact that the resale price of each brand is set by the manufacturer is of

82d Cong., 2d Sess. 33 (1952): *United States v. Tri-State Retail Record Dealers' Ass'n*; *United States v. Sunbeam Corp.*; *United States v. Allegheny County Retail Druggist Ass'n*, 12 F.R.D. 249 (W.D. Pa. 1952).

16. See cases cited in H.R. REP. No. 1516, 82d Cong., 2d Sess. 33 (1952).

17. See note 6 *supra*.

18. Brandeis, *Competition That Kills*, Harper's Weekly, Nov. 15, 1913, p. 10, reprinted in *BRANDEIS, BUSINESS—A PROFESSION* 256-57 (1933).

19. BUREAU OF EDUCATION ON FAIR TRADE, MEMORANDUM TO THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 5 (1954).

relatively minor significance. In the context of economic reality it would seem wiser to expend the meager antitrust appropriations combating horizontal price fixing at the manufacturing level than to squander them in attacking petty vertical restraints.

Thirdly, it is contended by fair trade advocates that the fair trade laws protect the consumer, the independent retailer and the manufacturer from loss-leader merchandising by chain and department stores. In the absence of fair trade, a department store or chain selling a diversified product line can cut prices on nationally advertised, trade-marked articles to build up store traffic, and hope to make up for its low margin or losses on these items by the sale of other, less attractively priced goods. Any survey, therefore, that contrasts the price of selected items in selected stores at selected times in the fair trade states with the price of the same items in non-fair trade states has little statistical significance.²⁰ Such surveys prove only that loss-leader selling exists. They do not indicate the volume of high-margin merchandise sold in the selected stores. They do not reveal each store's over-all margin for any given year. They do not necessarily reflect the over-all price level in comparable stores in the fair trade and non-fair trade areas. They do not show to what extent the "bargains" purchased by some consumers are subsidized by the "lemons" purchased by other consumers. These "pick-and-choose" surveys, according to the Bureau of Education on Fair Trade, "do not prove that consumers in the non-fair trade areas save a single penny on their yearly shopping bills, nor that any store in the United States charges a penny less, on over-all inventory, where resale price maintenance does not exist."²¹ In fact, the Bureau claims that studies made for it by A. C. Nielsen & Company indicate that on the average the public paid less for a list of leading drug and toilet articles in the fair trade areas than in the non-fair trade areas of the country.²² To the extent that fair trade curbs loss-leader selling, it tends—according to its supporters—to protect the independent retailer from "unfair," "cut-throat" and "predatory" competition. Such competition has been, as Brandeis observed,

"the most potent weapon of monopoly—a means of killing the small rival to which the great trusts have resorted most frequently. It is so simple, so effective. Far-seeing organized capital secures by this means the co-operation of the short-sighted unorganized consumer to his own undoing.

20. *E.g.*, "A recent study of 117 branded drug items showed that thirty-five cost about a third less in Washington than in Maryland, thirty-eight about a quarter less, and twenty-nine about a seventh less. A comparison of free-trade Missouri and fair-trade Illinois turns up much the same story. The St. Louis *Star-Times* figured out that fifty-four fair-trade drug items cost an average of 16.2 per cent more on the east bank of the Mississippi than on the St. Louis side." *The Not-So-Fair-Trade Laws*, *Fortune*, Jan. 1949, p. 70.

21. BUREAU OF EDUCATION ON FAIR TRADE, MEMORANDUM TO THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 7 (1954).

22. *Ibid.*

Thoughtless or weak, he yields to the temptation of trifling immediate gain, and, selling his birthright for a mess of pottage, becomes himself an instrument of monopoly."²³

And by curbing loss-leader selling fair trade also protects the manufacturer's property right in his brand name or trade-mark:

"Laws prohibiting larceny protect the manufacturer against the theft of his physical property. Fair-trade laws protect the manufacturer against the theft of perhaps his most valuable asset—though intangible—his good will."²⁴

For these reasons the fair trade advocates maintain that the independent retailer is protected against the sharpshooting tactics of his chain and department store competitors, the consumer against eventual monopolization of the distribution trade, and the manufacturer against an improper use of his brand name or trade-mark.

Finally, the fair trade proponents point out that regardless of its intrinsic merits, fair trade is not the only, nor even the most common technique for effectuating resale price maintenance. Forward vertical integration, which enables the manufacturer to sell directly to the consumer through his own retail outlets, his own door-to-door sales organization, or his own mail order system, gives the manufacturer the unchallenged legal right to fix resale prices. As an alternative, the manufacturer can market his product through an agency system or on consignment, thus retaining title to his goods until sold to the ultimate consumer. Or the manufacturer can refuse to deal with wholesalers or retailers who do not follow his suggested retail prices. Or—and this has never been fully tested in the courts—he might rely on the doctrine of equitable servitudes on chattels as a justification for resale price maintenance. Whichever technique the manufacturer employs, the economic effect of resale price maintenance is the same. If the principle of resale price maintenance is objectionable on economic grounds, it is objectionable regardless of the legal means used to effectuate it. If, therefore, fair trade is to be condemned because of its special status under the antitrust laws, doctrinal consistency requires that we condemn every other legal sanction for resale price maintenance. Similarly, if fair trade is to be approved as a matter of economic policy because of the "free and open competition" safeguard, we should explicitly impose an identical safeguard in dealing with the alternative legal devices for attaining resale price maintenance. The fact is that the economic consequences of resale price maintenance are not undesirable in all circumstances: they are beneficial to consumer, independent retailer and manufacturer alike so long as the latter is subject to effective price competition.

The time has come then to develop the outlines of the alternatives to fair trade. We begin with the most dubious of them.

23. BRANDEIS, *BUSINESS—A PROFESSION* 261 (1933).

24. H.R. REP. No. 1516, 82d Cong., 2d Sess. 9 (1952).

THE THEORY OF EQUITABLE SERVITUDES

The theory of equitable servitudes, whose main roots go back to the decision in *Tulk v. Moxhay*,²⁵ has been applied almost exclusively to real estate transactions. Under this doctrine a court of equity will, at the instance of a covenantee or his transferee, enforce against the covenantor or his transferee with notice a covenant restricting the use of a servient estate for the benefit of a dominant estate.²⁶ Varying prerequisites for enforceability qualify this generalization. Some, but not all, courts require the existence of a dominant estate to benefit from the covenant.²⁷ Some, but not all, courts require that the covenant be evidenced by a written memorandum, to satisfy the statute of frauds.²⁸ Some, but not all, courts require that the covenant be "negative" and not "affirmative" in its impact, *i.e.*, that it restrict the activities of the covenantor but not require affirmative action of him.²⁹ Some, but not all, courts impose the ambiguous requirement that the covenant "touch and concern the land."³⁰

A particular court's attitude toward these requirements will depend on its view of the theoretical nature of a servitude. Traditionally it is maintained that a covenant amounting to an equitable servitude creates in the owner of the dominant estate an enforceable property right in the servient estate.³¹ But it has been argued with vigor that the true theoretical basis for the doctrine is the principle of *Lumley v. Gye*:³² the covenantee, and his transferees as third party beneficiaries, possess an in personam contract right against the covenantor and an in rem right against his transferees with notice, who labor under an equitable duty of noninterference with the rights flowing from the covenant.³³

The possibility of applying the doctrine of equitable servitudes to the restrictive sale of chattels has been discussed in Professor Zechariah Chafee's

25. 2 Ph. 774, 41 Eng. Rep. 1143 (1848).

26. CLARK, PRINCIPLES OF EQUITY § 94 (1948).

27. *London County Council v. Allen*, [1914] 3 K.B. 642 (C.A.). *Contra*, *VanSant v. Rose*, 260 Ill. 401, 103 N.E. 194 (1913); *Huber v. Guglielmi*, 29 Ohio App. 290, 163 N.E. 571 (1928) (semble).

28. See Reno, *The Enforcement of Equitable Servitudes in Land: Part II*, 23 VA. L. REV. 1067, 1090-1095 (1942).

29. See *Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank*, 278 N.Y. 248, 256, 15 N.E.2d 793, 795-96 (1938).

30. *Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938); *Norcross v. James*, 140 Mass. 188, 2 N.E. 946 (1885). *Contra*, *Hodge v. Sloan*, 107 N.Y. 244, 17 N.E. 335 (1887). *But Cf.* *Tulk v. Moxhay*, 2 Ph. 774, 41 Eng. Rep. 1143 (1848).

31. See *Meagher v. Appalachian Power Co.*, 195 Va. 138, 77 S.E.2d 461 (1953); Scott, *The Nature of the Rights of the Cestui Que Trust*, 17 COLUM. L. REV. 269 (1917); Wade, *Restrictions on User*, 44 L.Q. REV. 51 (1928). *Contra*, Stone, *The Equitable Rights and Liabilities of Strangers to a Contract*, 18 COLUM. L. REV. 291 (1918), 19 COLUM. L. REV. 177 (1919); Stone, *The Nature of the Rights of the Cestui Que Trust*, 17 COLUM. L. REV. 467 (1917).

32. 2 E. & B. 216, 118 Eng. Rep. 1083 (Q.B. 1854).

33. See Chafee, *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945, 969-77 (1928).

monumental article, *Equitable Servitudes on Chattels*.³⁴ Professor Chafee concludes that there is no theoretical difficulty inherent in the doctrine itself that would of necessity prevent its application to a contract between a manufacturer and a distributor obligating the latter to market the former's products at stipulated prices.³⁵ Such an application would, of course, convert the contract into a restriction on the disposition of the chattel, so that a sale in disregard of the contract by a person acquiring the chattel with notice of the terms of the covenant could be enjoined. Such a sale would also subject the distributor to liability in an action at law for damages.³⁶

Whether or not this doctrine can be extended to the disposition of chattels so as to effectuate a resale price agreement is less a question of theoretical feasibility than a matter of public policy. Yet the Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*³⁷ declared resale price maintenance contracts between manufacturer and distributor unlawful, but did not even approach an adequate consideration of the economic factors involved, except in a dissenting opinion by Justice Holmes. Moreover, the decision failed to consider the possible justifications for resale price maintenance contracts under the doctrine of *Tulk v. Moxhay*, since this suggestion was not made to the Court. The Court touched on the equitable servitude only in its quotation from *Coke on Littleton*:

"If a man be possessed . . . of a horse or of any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because the whole interest and property is out of him, so as he hath no possibility of a reverter; and it is against trade and traffic and bargaining and contracting between man and man."³⁸

The same language, which had also been quoted in the lower court opinion, evoked the following comment by Professor Chafee:

"The very passage from Coke on which the two judges relied is preceded by an equally strong condemnation of similar conditions for the reverter of real estate. Coke says nothing to indicate that land may

34. 41 HARV. L. REV. 945, 969-977 (1928).

35. *Id.* at 968-69. Professor Chafee suggests that the question is one that must be resolved on considerations of policy. He summarizes:

"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. . . . Yet the complexities and variety of modern business may eventually present opportunities for restrictions on personalty which are free from the disadvantages of restraint of trade, and when that time comes the appropriate equitable machinery is ready for use. Servitudes on chattels still seem possible and reasonable, although my long investigation has not disclosed a single square decision establishing such a conception in a court of last resort."

Id. at 1013.

36. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 172, 176 (2d ed. 1947).

37. 220 U.S. 373 (1911).

38. *Id.* at 404.

be restricted and chattels may not, or that there is any distinction for this purpose between them. He died two centuries before *Tulk v. Moxhay*, which has fettered land far more than he . . . would have permitted The truth is that Coke was talking about conditions which totally restrain alienation by enabling the seller to recover the sold property, while we are concerned with provisions which merely give the seller some measure of equitable control over its disposition in the hands of later owners, who never cease to retain the property."³⁹

The Supreme Court has recently refused to review several state court decisions sustaining the constitutionality of the nonsigner provisions of the New Jersey and New York Fair Trade Acts and the McGuire Act on reasoning which would also support application of the doctrine of equitable servitudes to resale price maintenance.⁴⁰ It was contended that the state nonsigner provisions violate the commerce clause and the due process clause of the fourteenth amendment and constitute an unlawful delegation of legislative power. The McGuire Act was alleged to violate the commerce clause in authorizing the states to enforce resale price maintenance of goods distributed in interstate commerce. The New York and New Jersey state courts rejected these arguments, and the action of the United States Supreme Court has in effect sustained these decisions. All of these decisions placed reliance on the decision of the Supreme Court in *Old Dearborn Distributing Co. v. Scagram-Distillers Corp.*,⁴¹ which upheld the constitutionality of the nonsigner provisions of the Illinois Fair Trade Act. The Court there stated that fair trade was an appropriate means to the legitimate end of protecting the manufacturer's property right in the good will represented by his trade-mark, and that purchasers who had notice of the price restriction in effect assented to the protection of the manufacturer's property right. The nonsigner provisions of state and federal fair trade acts were thus said to impose what amounts to an equitable duty of noninterference with property or contractual rights that is at least analogous to the duty of noninterference entailed in an equitable servitude. The interference with contractual rights that would result from the sale of the manufacturer's product by a nonsigner below the price stipulated by the manufacturer would, of course, be the economic pressure on the signing retailer to reduce his price in violation of his contract with the manufacturer.

Strictly speaking, the duty created by the fair trade laws is probably broader than the duty of noninterference that would result from an orthodox application of the equitable servitude doctrine. The latter doctrine would impose an equitable restriction on the disposition of chattels sold by a distributor who had covenanted with the manufacturer to maintain resale prices, and it would impose a duty on third persons to refrain from interfering with this

39. Chafee, *supra* note 33, at 982-83.

40. *Grayson-Robinson Stores, Inc. v. Lionel Corp.*, 15 N.J. 191, 104 A.2d 304, *appeal dismissed*, 348 U.S. 859 (1954); *Goody v. Raxor Corp., S. Klein on the Square, Inc. v. Lionel Corp.*, 307 N.Y. 229, 120 N.E.2d 802, *appeal dismissed*, 348 U.S. 863 (1954).

41. 299 U.S. 183 (1936).

contract by selling goods distributed under the contract at less than the established price. But the duty would not seem to extend to articles that a retailer obtained from a distributor not a party to a price maintenance contract with the manufacturer. The retailer's pursuit of his economic self-interest in pricing these goods would not seem to amount to actionable interference with a resale price agreement between the manufacturer and some other distributor selling the same kind of articles. On the other hand, under the fair trade statutes a distributor can be enjoined from selling below the resale price stipulated in an agreement between the manufacturer and some other distributor in the same state if he has notice of such agreement, even though his goods were acquired through channels not covered by a similar contract.⁴² It must be emphasized, however, that the usual situation covered by the nonsigner provisions of the state and federal statutes would also be covered by the doctrine of equitable servitudes. Thus, under the servitude doctrine a resale price maintenance agreement between a manufacturer and a wholesaler would be binding on a retailer who purchased from the wholesaler with notice of the restriction, and the retailer could be enjoined from selling below the price stipulated in the agreement. This was the situation in the *Old Dearborn* case.

The equity doctrine, then, although probably not yet available as a device for maintaining resale prices, is valuable in pointing to considerations of sound economic policy and legal principle in favor of the crucial nonsigner clause in the McGuire Act.⁴³

THE REFUSAL TO DEAL

Faced with the *Dr. Miles* holding that contracts for the maintenance of resale prices are forbidden by the Sherman Act, the manufacturer still may turn to his right to select his customers as a means of accomplishing resale price maintenance. This right was given definitive statement by the Supreme Court in *United States v. Colgate & Co.*⁴⁴ In that case the indictment charged the defendant with unlawfully engaging in a combination with wholesale and retail dealers for the purpose of procuring the dealers' adherence to resale prices fixed by the defendant. The combination was effectuated by:

"Distribution among dealers of letters, telegrams, circulars and lists showing uniform prices to be charged; urging them to adhere to such prices and notices, stating that no sales would be made to those who did not; requests, often complied with, for information concerning dealers who had departed from specified prices; investigation and discovery of those not adhering thereto and placing their names upon 'suspended lists'; requests to offending dealers for assurances and promises of future adherence to prices, which were often given; uniform refusals to sell to

42. McGuire Act, § 5 (a) (3) (nonsigner clause), *supra* note 3.

43. This clause would seem to be vitally important to the policy behind the fair trade laws. The distributors willing to engage in predatory price cutting would be those who would refuse to sign resale price maintenance contracts. Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175-76 (1954).

44. 250 U.S. 300 (1919).

any who failed to give the same; sales to those who did; similar assurances and promises required of, and given by, other dealers followed by sales to them; unrestricted sales to dealers with established accounts who had observed specified prices, etc."⁴⁵

The trial court quashed the indictment, reasoning that there was no allegation of any *contract* or *agreement* whereby the parties bound themselves to maintain stipulated prices "further than is involved in the circumstances that the manufacturer, the defendant here, refused to sell to persons who would not resell at indicated prices, and that certain retailers made purchases on this condition, whereas, inferentially, others declined so to do."⁴⁶ The lower court further stated that the retailer, having bought from the manufacturer, was free to price the goods on resale as he saw fit, subject only to incurring the displeasure of the manufacturer.⁴⁷ The Supreme Court accepted the district court's interpretation of the indictment, and held that so construed, it charged no violation of the Sherman Act:

"In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell."⁴⁸

The *Colgate* doctrine was limited in two subsequent Supreme Court decisions. In *United States v. Schrader's Son, Inc.*,⁴⁹ a manufacturer was charged with selling goods under agreements that bound the vendees to comply with resale prices fixed by the vendor. The practice was held to be a violation of the Sherman Act. Referring to the *Colgate* case, the Court stated:

"The court below misapprehended the meaning and effect of the opinion and judgment in that cause. We had no intention to overrule or modify the doctrine of *Dr. Miles Medical Co. v. Park & Sons Co.*, where the effort was to destroy the dealer's independent discretion through restrictive agreements. Under the interpretation adopted by the trial court and necessarily accepted by us, the indictment failed to charge that Colgate & Co. made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices; and it was treated 'as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same.'⁵⁰

And in *Frey & Son, Inc. v. Cudahy Packing Co.*⁵¹ the Court again considered its decisions in *Colgate* and *Schrader*, stating: "Apparently the former case

45. *Id.* at 303.

46. *Id.* at 305.

47. *Id.* at 305-06.

48. *Id.* at 307.

49. 252 U.S. 85 (1920).

50. *Id.* at 99.

51. 256 U.S. 208 (1921).

was misapprehended. The latter opinion distinctly stated that the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances."⁵²

It requires Herculean efforts to square these pronouncements of the Supreme Court, and the *Dr. Miles* decision, with the right to select customers, recognized by *Colgate* and carefully preserved in subsequent decisions. The *Colgate* case means at the very least that the manufacturer can establish resale prices; that he can sell to his dealer with the understanding that future sales are contingent upon the dealer's maintaining such prices; that the dealer can purchase the goods manifesting his intention to abide by the condition; and that the manufacturer can stop selling to a dealer who fails to maintain prices, or refuse to sell to a dealer who manifests his intention to disregard the condition. If the manufacturer makes the maintenance of resale prices a condition of future sales, and the dealer in purchasing from him consents to that condition, it would seem that an *agreement* to maintain the stipulated price has been entered into by the two parties;⁵³ such an agreement would not, however, amount to a *contract* contemplating judicial enforcement, nor would it, under *Dr. Miles*, be judicially enforceable.

Mr. Charles Wesley Dunn has found a "clear" legal distinction drawn between *Dr. Miles* and *Colgate* in the *Schrader* decision:

"The Colgate plan presents the simple exercise of the right of freedom of alienation of movables owned, whereas the Miles plan involves a restraint by contract upon that right. The Colgate plan amounts to but the assertion of the right of ownership before sale, whereas the Miles plan is an attempt to sell moveables and yet by contract to keep them under a restriction hostile to the title conveyed and the right of freedom of alienation incident to it. . . .

"But it cannot be denied that, from a practical standpoint, the two plans are precisely the same in purpose, economic consequence and effect upon the buying public, [and] are distinguished in method alone. . . . Hence the reality of the situation is that the *Colgate* case essentially legalizes what the *Miles* case outlaws."⁵⁴

In *Federal Trade Commission v. Beech-Nut Packing Co.*⁵⁵ the Supreme Court further limited but still preserved the *Colgate* doctrine. Beech-Nut marketed its products principally through grocery, drug, candy and tobacco jobbers and wholesalers. These wholesale and retail dealers were selected partly on the basis of their willingness to resell at prices suggested by the company and to refuse to sell to dealers who did not resell at the suggested prices. The dealers handling Beech-Nut products comprised the greater portion of the jobbers, wholesalers, and retailers in the grocery trades, and a large proportion of those in the drug, candy and tobacco trades.

52. *Id.* at 210.

53. RESTATEMENT, CONTRACTS § 3 (1932): "An agreement is a manifestation of mutual assent by two or more persons to one another."

54. Dunn, *Resale Price Maintenance*, 32 YALE L. J. 676, 692-93 (1923).

55. 257 U.S. 441 (1922).

The control of resale prices was accomplished through the so-called "Beech-Nut policy." The company circularized the trade generally with lists of suggested wholesale and resale prices and refused to sell to jobbers, wholesalers and retailers who sold below those prices or who sold to price cutters. It established a card index of distributors classifying those who adhered to the "Beech-Nut policy" as "selected dealers" and marking those who cut prices or supplied price cutters "Do Not Sell," "D.N.S." or "Undesirable—Price Cutter." It solicited orders from retailers directly through its own "specialty salesmen," and refused to permit orders so obtained to be filled by wholesalers and jobbers who cut prices or who supplied price cutters. It marked cases of goods with key symbols by which it identified price cutters and their suppliers. It refused to sell to practically all mail order houses and suppliers of mail order houses on the ground that they frequently cut prices. It notified specialty salesmen and suppliers when a dealer had been removed from the selected list, and it reinstated dealers to the selected list if they gave assurance that they would resell only at suggested prices and refuse to sell to price cutters.

The Federal Trade Commission condemned the "Beech-Nut policy" as an unfair method of competition under section 5 of the Federal Trade Commission Act.⁵⁶ On appeal, the Second Circuit regarded the case as governed by the *Colgate* decision and accordingly held that the Commission had exceeded its power in issuing a cease and desist order.⁵⁷

The Supreme Court restored the Commission's order with what may fairly be described as a major modification. The Court once again affirmed that *Colgate* had not overruled *Dr. Miles*, but pointed out that unlike the case in *Dr. Miles*, "the Sherman Act is not involved here except in so far as it shows a declaration of public policy to be considered in determining what are unfair methods of competition. . . ."⁵⁸ The Court found that the "Beech-Nut policy" went far beyond the simple refusal to deal with those who sell below established prices, which had been permitted in *Colgate*: even though the system did not utilize price maintenance contracts, it resulted in "suppression of the freedom of competition by methods in which the company secures the co-operation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose."⁵⁹ Such cooperative devices, the Court held, were unfair methods of competition properly subject to the Commission's cease and desist order. But the order was too broad. It should have prohibited *only* these cooperative devices, which the Court listed as follows: reporting the names of dealers who cut prices, maintaining a list of blackballed dealers, employing specialty salesmen to police the system and channel business to cooperative dealers, and marking cases as a means of tracing price cutters.

56. 38 STAT. 717 (1914), 15 U.S.C. § 41 (1952).

57. *Beech-Nut Packing Co. v. FTC*, 264 Fed. 885 (2d Cir. 1920).

58. *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 453 (1922).

59. *Id.* at 455 (emphasis added).

The effect of the *Beech-Nut* case on refusal to deal is problematical. It is open to several possible interpretations: (1) The decision effectively overrules the *Colgate* case, and refusal to deal is no longer an available device for effectuating resale price maintenance. (2) The decision permits a manufacturer to select his customers for the purpose of resale price maintenance so long as only ineffectual means are used to carry out his selection policies. (3) The decision condemns a method of effectuating the right of refusal to deal that places reliance on the active assistance of dealers, but it does not make a blanket condemnation of other methods of exercising the right to select customers in such a way as to enforce resale maintenance.

The third interpretation seems to be the correct one. In the first place, the *Beech-Nut* opinion several times, in unequivocal language, rejects the first alternative.⁶⁰ Indeed, the suggestion that refusal to deal is in itself impermissible raises a serious due process question, for the right to select customers is a fundamental one.⁶¹ The Second Circuit recently affirmed the continuing vitality of this right in an action by a liquor wholesaler to rescind his purchase from an importer on the ground that the importer violated the purchase agreement by selling to other wholesalers who cut prices.⁶² The court held that the restrictive agreement was valid and its breach a valid ground for rescission, since a "refusal to sell in the future to those who had not maintained a suggested price" is lawful under the *Colgate* case.⁶³ In the second place, this interpretation of *Beech-Nut* is more consistent with the language in that opinion. All of the items of conduct proscribed were "co-operative methods in which the respondent and its distributors, customers and agents undertake to prevent others from obtaining the company's products at less than the prices designated by it. . . ."⁶⁴ The evidence in the case amply supported the conclusion that co-operative methods were resorted to. And presumably, the absence of the qualification "co-operative" was the defect that rendered the Commission's order too broad. Finally, it is easier to believe that the Supreme Court would have overruled *Colgate* directly if it wished to reach that result.

The Court's condemnation of *Beech-Nut's* use of "co-operative" methods to police its resale price policy seems to rest on two related considerations. The first of these is the coercive effect of the system on the retail dealer: the Court emphasized that the system "constrains the trader, if he would have the products of the *Beech-Nut* Company, to maintain the prices 'suggested' by it."⁶⁵ This same judicial reaction to dealer coercion has found expression in more recent decisions.⁶⁶ The second consideration underlying the con-

60. *Id.* at 452-53, 454.

61. See *United States v. Colgate & Co.*, 250 U.S. 300, 306-07 (1919); *Dunn, Resale Price Maintenance*, 32 *YALE L. J.* 676, 705 (1923).

62. *Adams-Mitchell Co. v. Cambridge Distributing Co.*, 189 F.2d 913 (2d Cir. 1951).

63. *Id.* at 916.

64. *FTC v. Beech-Nut Packing Co.* 257 U.S. 441, 455 (1922) (emphasis added).

65. *Id.* at 454.

66. See, *e.g.*, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.* 340 U.S. 211, 213-14 (1951), where the Court, in speaking of an agreement between affiliated companies

demnation of cooperative methods would seem to be their widespread economic impact: the Court found that the Beech-Nut policy necessarily "restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the Antitrust Acts to maintain."⁶⁷

Although at first blush the *Beech-Nut* case appears to preserve the legality of all "noncooperative" systems of refusal to deal, the Court's consideration of the economic impact of the "Beech-Nut policy" and the development of market power, rather than legal form, as the standard of legality in recent antitrust cases,⁶⁸ indicate that a further limitation has been placed on the *Colgate* doctrine. The form that resale price maintenance takes may not be controlling if the economic effect of the price maintenance system is in derogation of the policy of the Sherman Act. Setting resale prices is an insignificant restraint on trade so long as the producer is subject to competitive pressures to keep his price low. But if competitive pressure is lacking, so that the manufacturer can set arbitrary prices and thereby impose a significant restraint of trade, his ability to effectuate resale price maintenance by a refusal to deal or any other device is undesirable.⁶⁹

to fix maximum resale prices for their products, stated: "For such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." This statement is weakened by the Court's subsequent suggestion that "Seagram and Calvert acting individually perhaps might have refused to deal with petitioner or with any or all of the Indiana wholesalers." *Id.* at 214. Again in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), the Court stated:

"Elimination of price competition at the retail level may, of course, lawfully result if a distributor successfully negotiates individual 'vertical' agreements with all his retailers. But when retailers are *forced* to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids 'horizontal' price fixing. . . . Contracts or agreements convey the idea of a cooperative arrangement, not a program whereby recalcitrants are dragged in by the heels and compelled to submit to price fixing."

Id. at 389-90.

67. *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 454 (1922).

68. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) (division of world markets); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951) (maximum price fixing agreement); *United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir. 1941) (tying arrangement).

69. A manufacturer operating in a noncompetitive market is in a position to whip his retailers into line if the elasticity of demand for his product is slight—as it is apt to be when the manufacturer's market position is substantial and relatively free from price pressure. The dealer who refuses to sell at the manufacturer's price and is denied the manufacturer's products will find his customers leaving him to purchase those products—and inevitably substantial quantities of other goods—from more compliant retailers. As a matter of economic policy, therefore, the refusal to deal, like fair trade, should be available only in a market characterized by free and open competition. Similarly, resale price maintenance by refusal to deal or by any other device should be questioned in industries with a high degree of price parallelism, where identical resale price arrangements are used by competitors to achieve price leadership or to reap the benefits of the forbid-

Thus, the refusal to deal remains an abstract, general right—exempt from express antitrust prohibition, but carefully circumscribed by the courts. They have distinguished between individual and concerted action to implement the right.⁷⁰ They have frowned on joint or conspiratorial refusals to deal when used as coercive weapons against outsiders.⁷¹ They have condemned such conspiratorial action as an unreasonable restraint of trade under section 1 of the Sherman Act,⁷² and as an unfair method of competition under section 5 of the Federal Trade Commission Act.⁷³ They have barred a unilateral refusal to deal where used as part of an attempt to monopolize within the meaning of section 2 of the Sherman Act.⁷⁴ Nonetheless, the refusal to deal remains factually equivocal and legally neutral, relying for its validity on the business context in which it is used. Standing alone, the naked refusal to deal is neither intrinsically suspect nor wholly immune from antitrust controls. Where carried out through noncooperative methods by a company that is subject to effective price competition, in furtherance of non-conspiratorial, non-monopolistic ends, it remains a lawful method for achieving, preserving and extending business advantage.

den horizontal price fixing agreement: "Because a single price fixed commodity is subject to the inroads of competitors fixing lower prices, a manufacturer seldom will establish and enforce a system of vertical prices unless he knows that competing manufacturers are likewise fixing and enforcing prices at known levels. Although competing manufacturers cannot lawfully agree with each other respecting prices, they can accomplish the same result through resale price maintenance by making identical resale agreements." FTC, REPORT ON RESALE PRICE MAINTENANCE lxii (1945). See *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); Note, *Use of Resale Price Maintenance By Integrated Manufacturers: A New Loophole for Abuse of Monopoly Power*, 64 YALE L.J. 426, 431-32 (1954.)

70. See *Montague v. Lowry*, 193 U.S. 38, 45 (1904).

71. *Sugar Institute v. United States*, 297 U.S. 553, 597-98 (1936); *United States v. American Livestock Comm'n Co.*, 279 U.S. 435, 438 (1929); *Cement Manufacturers' Protective Ass'n v. United States*, 268 U.S. 588, 604 (1925). In these earlier cases, the Supreme Court indicated it would allow some latitude to group-organized refusals to deal, when used as a means of curbing abusive or fraudulent business conduct.

72. *United States v. Frankfort Distillers, Inc.*, 324 U.S. 293 (1945); *United States v. First Nat'l Pictures, Inc.*, 282 U.S. 44 (1930); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930); cf. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Associated Press v. United States*, 326 U.S. 1 (1945). See also, dicta in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 625 (1953); *United States v. Columbia Steel Co.*, 334 U.S. 495, 522 (1948). A program of collaboration and mutual aid in enforcing resale price maintenance may involve enough conspiratorial elements to result in violation of § 1 of the Sherman Act. See *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 723 (1944); *Connecticut Importing Co. v. Continental Distilling Corp.*, 129 F.2d 651 (2d Cir. 1942).

73. See, e.g., *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *Shakespeare Co. v. FTC*, 50 F.2d 758 (6th Cir. 1931); *J. W. Kobi Co. v. FTC*, 23 F.2d 41 (2d Cir. 1927); *Moir v. FTC*, 12 F.2d 22 (1st Cir. 1926); *Q.R.S. Music Co. v. FTC*, 12 F.2d 730 (7th Cir. 1926); *Hills Bros. v. FTC*, 9 F.2d 481 (9th Cir. 1926). See also *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 395 (1953); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941).

74. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

THE AGENCY DEVICE

We come now to the third device by which the manufacturer might, in the absence of fair trade legislation, effectuate resale price maintenance: the agency plan or the *del credere* agency system.⁷⁵ Although the agreements in the *Dr. Miles* case were labeled "Consignment Contract-Wholesale" and "Retail Agency Contract," the Court decided that no genuine agency existed.⁷⁶ Accordingly, its holding that the restrictive agreements before it were unlawful restraints of trade both at common law and under the Sherman Act left undetermined the permissibility of maintaining resale prices by retailing goods through sales agencies.

The question left open in *Dr. Miles* was settled temporarily by *United States v. General Electric Co.*⁷⁷ There the Government challenged General Electric's system of distributing lamps as "merely a device to enable the Electric Company to fix the resale price of lamps in the hands of purchasers,"⁷⁸ and consequently as illegal under the Sherman Act. The company's defense was that its distributors were bona fide agents who never had title to the lamps, that no restraints on resale price were imposed on purchasers from these agents, and that the company was merely asserting its right to sell goods owned by it at the prices it chose.⁷⁹

General Electric sold its lamps either directly to customers or else through dealers whom it described as agents: large dealers, so-called "B agents," of whom there were about 400; and about 21,000 local electrical retailers, whom it called "A agents." These agents entered into contracts with GE, elaborately regulating the manner of handling, selling and paying for GE lamps. The lamps were sent to the agents on consignment, and remained the property of the company, subject to return upon demand. Sales could be made only to designated classes of ultimate consumers and only at prices established by the company. Proceeds from sales were held in trust for the company, for a monthly accounting, the agents being compensated by fixed commissions upon the lamps sold. Expenses of storage, sale and distribution were borne by the agents, as were losses from uncollectible accounts. GE paid insurance and taxes on the lamps, and the freight on its consignments to the agents, and assumed the risk of fire, flood, obsolescence and price decline.

The Court noted that General Electric's distribution plan was devised to allow the company to deal directly with its consumers, avoiding the possibility of price competition among middlemen. But it found that the distributors were genuine agents of the company, and asserted that "there is nothing as a matter of principle or in the authorities which requires us to hold that genuine contracts

75. "Not infrequently, in consideration of an increased commission, the factor guarantees the payment of debts arising through his agency, in which case he is said to sell upon a *del credere* commission." 1 MECHAM, AGENCY § 74 (2d ed. 1914).

76. 220 U.S. 373, 476 (1911).

77. 272 U.S. 476 (1926).

78. *United States v. General Elec. Co.*, 272 U.S. 476, 479 (1926).

79. *Id.* at 479.

of agency like those before us, however comprehensive as a mass or whole in their effect, are violations of the Anti-Trust Act."⁸⁰ In 1949, in another antitrust proceeding, a federal district court upheld the same agency arrangements even though GE's patents had since expired.⁸¹ This decision points up the fact that the earlier *General Electric* case rested not on the special antitrust exemption afforded to patents but solely on the legality of the agency relationship between manufacturer and distributor.

The decision in the *General Electric* case is significant in two respects: it affirms the legality of resale price maintenance by means of a distributor-agency system, even when the agents are otherwise independent dealers; and it indicates how closely a permissible agency system may resemble distribution through outright sales to independent wholesalers and retailers. With regard to the legality of the agency system, it should be noted that the *General Electric* decision also affirmed the right of a patentee, as a normal incident of his patent privilege, to fix the prices at which his licensee will sell goods manufactured under the patent.⁸² Since a manufacturer has as legitimate a proprietary interest in his own goods as a patentee has over the subject matter of the patent, there is no good reason on principle why the manufacturer of the goods should not be able, like the patentee, to control the price at which his property is sold. Indeed, where an agency system is employed no property interest in the goods passes to the agent; whereas a patent licensee may have title to the goods manufactured by him under the license. It is reasonable enough that a producer should have the right to market his own products on any terms he deems fit, so long as he is subject to effective competitive pressure and his pricing decisions are made unilaterally. The *General Electric* decision simply sanctions a practicable method of giving effect to this right.

General Electric does not delimit the sales arrangements that the Court is willing to recognize as falling within the category of bona fide "agency,"⁸³ but it does suggest that the term is broadly inclusive. It should, for instance, include an ordinary consignment sale. The GE arrangement verged on outright dealer ownership of the manufacturer's products, for although GE retained technical title to the lamps, the dealers were allotted many of the incidents of ownership. Thus they bore the risk of loss on delinquent accounts—a standard feature of the so-called del credere agency⁸⁴—and on lamps lost, missing or damaged while in their custody. The agents also bore the expenses of storage, transportation, distribution and sale: again indicia of purchase rather than bailment.

It remains to consider the impact of *United States v. Masonite Corp.*⁸⁵ on the *General Electric* doctrine. In this case the Government sought an injunc-

80. *Id.* at 488.

81. *United States v. General Elec. Co.*, 82 F. Supp. 753, 824-26 (D.N.J. 1949), *final judgment*, 115 F. Supp. 835 (D.N.J. 1953).

82. *United States v. General Elec. Co.*, 272 U.S. 476, 490 (1926).

83. See Note, 27 COLUM. L. REV. 567 (1927).

84. See note 75 *supra*.

85. 316 U.S. 265 (1942).

tion under the Sherman Act, alleging a combination in restraint of trade. Masonite was a manufacturer and distributor of hardboard. Partly by threats of patent infringement suits, it persuaded other manufacturers and distributors who had been marketing hardboard under competing patents, to enter into so-called del credere agency relationships with Masonite. Masonite designated each of these competitors its "agent" and "del credere factor" to sell its products. The agents acknowledged the validity of Masonite's patents, and agreed to sell and promote its products through their own sales organizations. Masonite set the selling prices and the terms of sale, and both Masonite and the "agents" bound themselves to observe them. The Court observed that in the absence of Masonite's patents and the del credere agency agreements, the arrangement would amount to a price fixing combination and hence a per se violation of the Sherman Act.⁸⁶ It conceded that the agreements made the distributors del credere agents of Masonite, and that "there is a proper area for utilization by a patentee of a del credere agent in the sale or disposition of the patented article"—where "distribution is part of the patentee's own business."⁸⁷ But Masonite's distributors were also competitors, and the Court held that where a patentee

"utilizes the sales organization of another business—a business with which he has no intimate relationship—quite different problems are posed since such a regimentation of a marketing system is peculiarly susceptible to the restraints of trade which the Sherman Act condemns. And when it is clear, as it is in this case, that the marketing systems utilized by means of the *del credere* agency agreements are those of competitors of the patentee, and that the purpose is to fix prices at which the competitors may market the product, the device is, without more, an enlargement of the limited patent privilege and a violation of the Sherman Act."⁸⁸

The Court distinguished *General Electric* on the ground that GE's purpose had been only to secure a patentee's proper reward for his invention, while Masonite sought to destroy competition among competing patentees.⁸⁹

The *Masonite* case imposes no fatal restriction on the use of the agency device as approved in *General Electric*. The Court not only distinguished *General Electric* but expressly recognized the legality of the agency device in appropriate situations.⁹⁰ Sales agencies might well be, in some situations, the only practicable way for a manufacturer to give effect to his right to market his product on his own terms. This right was accorded recognition by *Colgate* and it survived *Beech-Nut*; and there is no reason to believe that the Court in *Masonite* intended to extinguish it.⁹¹

86. *Id.* at 274.

87. *Id.* at 279.

88. *Ibid.*

89. *Id.* at 280-81.

90. *Id.* at 279.

91. It might be asked whether, as a matter of economic policy, the manufacturer should be able to impose price restrictions on otherwise independent dealers through the use of the traditional rules of agency. It may be that the independent merchant should be left free

The *Masonite* opinion emphasizes that the evil of the agency device, as it operated in that case, was the elimination of price competition and competition in innovation among competing producers—a factor totally absent in *General Electric*. Professor Chafee has suggested that the whole process of marketing goods, from producer through distributor to ultimate consumer, is a unified operation, in the control of which the manufacturer might well have a legitimate interest.⁹² General Electric's economic control of its goods was of this vertical variety and was implicitly approved by the Court. But such control is a far cry from the horizontal pricing agreement between competing producers that was struck down in *Masonite* and other cases. Such horizontal control inevitably restricts competition and in so doing contravenes the policy of the Sherman Act.

to exercise his own judgment in pricing his wares—such freedom being the essence of retail competition. This reasoning suggests what might be termed a "capital-dependency" test, for determining whether a contract purporting to make an independent retailer into a manufacturer's sales agent should be recognized as a legitimate agency. If the independent distributor bears the financial risk of mistaken judgment in his retailing activities, a wise competitive policy would by this logic permit him to reap the rewards of a sound exercise of judgment, including his decisions relative to pricing policies. On the other hand, if the distributor is heavily dependent financially on the manufacturer, so that a substantial portion of the financial risk of bad judgment is borne by the latter, the manufacturer, under the capital-dependency test, would be allowed to impose his judgment, in regard to resale pricing policies, on the distributor.

From an economic point of view, however, it seems more important to determine the extent of competition on the manufacturing level than to inquire into the capital dependency of the distributor-agents. As long as the manufacturer operates in an atmosphere of "free and open competition," there is little danger of arbitrary pricing or significant dealer coercion. Moreover, in effectively competitive markets the desirability of affording the manufacturer protection for his good will, and the independent retailer a safeguard against loss-leader selling should counter-balance whatever element of coercion is involved in the agency relationship.

92. Chafee, *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945, at 946-47 (1928): "The same development in standardized products which has led to equitable protection against unauthorized imitations of trade names or the physical appearance of articles has also made it desirable to producers that these standardized goods should pass to the ultimate consumers through well regulated channels, and oftentimes that they should be used by the consumers in such a manner as to aid in the maintenance of a complex marketing system. . . . Each ambitious seller by expensive advertising and a vast network of dealers creates in the public the habit of expecting a well remembered product of supposedly high uniform quality in a uniform guise at a uniform price for a uniform quantity. Irregular and unauthorized departures from uniformity in any respect tear this pattern of thought and emotion which has been woven with so much trouble and cost, and tend to reduce the minds of the public to the confusion which preceded the marketing campaign. The same irrational causes which lead a consumer to select a given article may as easily divert him away from it to a competitor. . . . [The manufacturer wants] to make the intermediary transfers of title legally immaterial to the extent that they are in fact immaterial to his scheme, and to be able to treat the entire process of marketing his goods from the factory to the consumer as a unified transaction, in which successive sales are merely incidental breaks serving only a limited purpose which does not affect the reputation of his goods."

There is no reason why agency arrangements lacking such restrictive economic effects should not be permitted.

Thus it is that the agency distribution system remains an alternative device for effectuating resale price maintenance. The broad utilization of this device in *General Electric* survives *Masonite*, with the limitation that the system be vertical only and not eliminate horizontal competition. A likely further limitation is that the manufacturer establishing an agency system be subject to effective price competition, for a producer with substantial market power could, by virtue of his ability to establish arbitrary resale prices, cause a restraint of trade.

CONCLUSION

Masonite clearly demonstrates the willingness of the Court to disregard legal form in condemning restraints of trade that constitute significant deviations from Sherman Act policy:

“So far as the Sherman Act is concerned, the result must turn not on the skill with which counsel has manipulated the concepts of ‘sale’ and ‘agency’ but on the significance of the business practices in terms of restraint of trade.”⁹³

Nor is this subordination of legal form to economic effect confined to an agency context. In the light of recent decisions any resale price maintenance device might be condemned where it is used to achieve the regimentation of competing marketing systems, where it is used to achieve uniformity of price among competing producers, or where the manufacturer is not subject to significant competitive pressure on his pricing policies. As a consequence, a producer with dominant or even substantial market power might be unable, absent fair trade, to maintain resale prices by any means.

On the other hand, unless repeal of the Miller-Tydings and McGuire Acts is taken by the courts to mean congressional condemnation of *all* forms of resale price maintenance—an unlikely prospect—the refusal to deal and the agency system, and possibly the equitable servitudes doctrine, would remain alternative devices for resale price maintenance. In that eventuality the demise of the fair trade laws with their “free and open competition” proviso would result in a net loss to price competition. Although the judicial emphasis on economic effect may be enough to prevent a producer with substantial market power from employing the alternative devices, no decision has expressly set out the requirement that a manufacturer establishing resale prices via a unilateral refusal to deal or an agency system be subject to effective price competition. *Beech-Nut* might be construed to prohibit only the manufacturer’s solicitation of active assistance by his dealers in policing a price maintenance system; and *Masonite* might be restricted to situations where there is a patent monopoly or a horizontal price agreement.⁹⁴ Consequently, it is possible that

93. *United States v. Masonite Corp.*, 316 U.S. 265, 280 (1942).

94. See *United States v. McKesson & Robbins, Inc.*, 122 F. Supp. 333, 339 (S.D.N.Y. 1954), criticized in Note, 64 *YALE L.J.* 426 (1954).

the alternative devices are available even to a producer with substantial market power. But fair trade, with effective enforcement of the "free and open competition" proviso, would not be available to such a producer. And it is likely that the existence of "free and open competition" as an explicit condition of fair trade would serve as helpful precedent for limiting the alternative devices to situations where the producer is subject to effective price competition.

At any rate, if more price competition is the goal, it appears wiser to insist on vigorous enforcement of the statutory requirement that price fixed commodities be in "free and open competition with goods of the same general class produced or distributed by others"⁹⁵ rather than to advocate outright repeal of the fair trade laws. It seems wiser—and politically more realistic—to demand extension of the "free and open competition" proviso to other forms of resale price maintenance rather than to urge the repeal of the only laws of which it is now an explicit part.

95. McGuire Act, 66 STAT. 632, 15 U.S.C. § 45(5)(a)(2) (1952); Miller-Tydings Act, 50 STAT. 693 (1937), 15 U.S.C. § 1 (1952). The history of the enforcement of these provisos has been discouraging. See note 6 *supra*.