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NOTES.

CONTRACTS—RESTRAINT OF TRADE—VALIDITY OF A SYSTEM OF CONTRACTS SEEKING TO CONTROL THE PRICE AT WHICH AN ARTICLE SHALL BE RESOLD.—Contracts seeking to control the price at which an article shall be resold are of two types. In contracts of the first type, the manufacturer undertakes to maintain a uniform price by putting into effect what may be characterized as the "rebate plan" whereby the manufacturer promises to refund to dealers maintaining the selling prices fixed by the producer, a portion of the purchase price paid by them. This, while operating as an inducement to the dealer to resell only at the price named, in no way binds him to do so. And this type of contracts has been uniformly upheld.[1] Of the second type are the various kinds of contracts employed in what may be described as the "contract system." The simplest form of this type is where the maker affixes to every package of his article a notice that the goods may be resold only at certain prices. In another simple form it consists of contracts between

[1] *In re* Greene, 52 Fed. 104 (1894); Clark v. Frank, 17 Mo. App. 602 (1885); Walsh v. Dwight, 58 N. Y. Supp. 91 (1899).

the manufacturer and wholesaler, whereby the latter agrees to supply the trade at a stated price, and to sell only to dealers who will maintain the fixed retail price. In another variant form, which, however, has been held only colorable,[2] the contract with the wholesaler purports to make him a distributing agent for the producer. In the final phase of the evolution of this system the contract with the wholesaler requires him to sell only to dealers approved by the manufacturer, with whom the manufacturer contracts directly, that, in consideration of their being supplied with his product, they will not sell below the fixed retail price. This was the system adopted by the producer of a so-called "patent" medicine, in Dr. Miles Medical Co. v. Park & Sons Co.;[3] and the Supreme Court held the contract void as being an illegal restraint of trade, both at common law and under the Sherman Act.

The true test by which the legality of a contract requiring the purchaser to resell at a fixed price is to be determined is (1) whether the stipulation is of an ancillary nature; (2) whether it affords only a reasonable protection to the business of the covenantee; and (3) whether such a stipulation, considered with reference to the benefit to the public arising from the production of the article, as well as the detriment to the public in being deprived of the benefit of free competition, as to the selling price, is, upon the whole, against public interest.[4] It is not the fact of restraint, but the degree of the restriction which will control; and in the last analysis the question as to the validity of a particular contract will be found largely one of expediency.[5] This comomn law principle is not peculiar to "trade-secret" articles, but is equally applicable to any chattel property. But it must be remembered that the court was not dealing with a single contract, in the principal case, but with a system of contracts covering the entire production of the complainant, and the reason which might uphold covenants restraining the liberty of a single buyer might prove quite inadequate where there are a multitude of similar agreements. The single covenant might in no way affect the public interest, when many such agreements might.[6]

It is well settled that articles covered by patents may be the subject of contracts by which their price in subsale is controlled by the patentee; and that such contracts, if otherwise valid, are not within the rules of the common law against monopolies and re-

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[2] See Dr. Miles Medical Co. v. John D. Park & Sons Co., 164 Fed. 803 (C. C. A., 1908).

[3] 220 U S. 373 (1911).

[4] Edgar Lumber Co. v. Cormie, 130 S. W. 452 (Ark., 1910); Hubbard v. Miller, 27 Mich. 15 (1873); Roberts v. Lamont, 102 N. W. 770 (Neb., 1905); Merriman v. Cover, 51 S. E. 817 (Va., 1905).

[5] Nordenfelt v. Maxim Nordenfelt & Co., 1904 A. C. 565; Gibbs v. Consolidated Gas Co., 130 U. S. 396 (1889).

[6] Park v. Hartman, 153 Fed. 24 (C. C. A., 1907).

straint of trade.[7] Until very recently the doctrine prevailed that the manufacturer of "trade-secret" articles had similar rights.[8] This mistaken conception resulted from an apparent similarity between the conditions surrounding articles manufactured under "trade-secrets" and those manufactured under patents; and from a failure to distinguish between the sale of a secret formula and the sale of the articles manufactured therefrom. Since the decision in the principal case it can no longer be doubted that the exemption extended to patented articles does not apply to "trade-secret" products.[9]

The trading-stamp [10] and railroad ticket [11] cases have frequently been cited in support of a system of contracts like that in the principal case. But these cases rest upon the peculiar character of the property rights involved. Neither concerns the buying and selling of articles of general commerce; and both relate to things in the nature of contracts personal in character, and not to things which can ever become the subject of general trade and traffic. Like all contracts personal in their nature, they can be transferred and assigned only

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[7] Bement v. National Harrow Co., 186 U. S. 70 (1902). It has been suggested that the relation of the patent cases to the general subject may be more clearly understood by saying that the circumstance that the promisee has been granted a legal monopoly does not, in fact, create an exemption from the general operation of the rule, but rather brings them within the exception existing in the case of ancillary stipulation reasonably necessary to the protection of a party to a legitimate business transaction.

[8] Fowle v. Park, 131 U. S. 88 (1889); Dr. Miles Med. Co. v. Platt, 142 Fed. 606 (1906); Miles v. Jayne, 149 Fed. 838 (1906); Garst v. Harris, 177 Mass. 72 (1900); Park v. National Wholesale Druggists' Assn., 175 N. Y. 1 (1903).

[9] In Hartman v. Park, 145 Fed. 358 (1906), Judge Cochran, although he sustained a system of contracts similar to the one in the principal case, concluded that secret process articles were no more exempt from the common law rule against restraints of trade than any other article of manufacture. This case was reversed on appeal, Park v. Hartman, 153 Fed. 24 (C. C. A., 1907), but in his opinion in this case and in Dr. Miles Co. v. Park, 164 Fed. 803 (C. C. A., 1908), Mr. Justice Lurton (then Circuit Judge) states the law in these strong terms: "Any other conclusion would be to sanction a monopoly in that class of goods vastly more far reaching than the monopoly extended upon high grounds of public policy to the inventor. The statutory monopoly has a limitation of a few years. To obtain it the inventor must put on record his invention. At the end of the term the public will be free to employ the discovery without the burden theretofore imposed as a compensation to the inventor. Not so with the monopoly asked for by those who control the enormous proprietary trade of this country. Their monopoly will go on forever, and, if there be merit in the formula, they may not only preserve it thru all time, but continue to restrain prices and prevent competition in the sale of the product." See also Grogan v. Chaffee, 156 Cal. 611 (1909), and W. H. Hill & Co. v. Gray & Worcester, 163 Mich. 12 (1910).

[10] Sperry & Hutchinson Co. v. Mechanics' Clothing Co., 135 Fed. 833 (1904).

[11] Nashville Ry. Co. v. McConnell, 82 Fed. 65 (1897).

with the assent of both contracting parties and only upon the conditions to which the contracting parties assent.[12]

Many of the decisions *contra* to the principal case have treated cases holding that authors have a common law right in their compositions before publication, and cases recognizing a similar property in news or information, as authorities for the proposition that a manufacturer may control the resale price of his product. It is submitted that the principles underlying the cases are not analogous. It is the policy of the law to reward individual thought and research by protecting the enjoyment of their fruits: thus the author,[13] the news gatherer,[14] and the owner of an unpatented invention[15] are protected against the piratical use of their peculiar property. A similar protection is extended to the chemist who has discovered a secret formula.[16] But it does not follow that because a secret process or formula will be protected against betrayal by those to whom it has been communicated in confidence under a contract for a restricted use, that a system of contracts for the control of all sales and subsales of the article when produced will be outside of the rules in restraint of trade, simply because it is the product of such secret formula.

So the cases analogous to the invention, composition and news cases are those in which a secret process or formula is protected; not cases in which the owner of the secret is attempting to control all resales of the finished article. The principal case recognizes this distinction. Though irreconcilable with some of the earlier cases,[17] it is in accord with the more recent decisions;[18] and certainly appears to be sound.

C. L. M.

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[12] Bitterman v. Railroad Co., 207 U. S. 205 (1907); Park v. Hartman, *supra;* Hill v. Gray & Worcester, *supra.*

[13] Donaldson v. Beckett, 4 Burrows K. B. Rep. (1774); Palmer v. Dewet, 47 N. Y. 532 (1872).

[14] Exchange Tel. Co. v. Gregory (1896) 1 Q. B. 147; Board of Trade v. Christie, 198 U. S. 236 (1905); Dodge v. Information Co, 183 Mass. 62 (1903).

[15] Peabody v. Norfolk, 98 Mass. 452 (1868); Tabor v. Hoffman, 23 N. E. 12 (N. Y., 1889).

[16] Harrison v. Glucose Co., 116 Fed. 304 (C. C. A., 1902); Thum v. Tloczynski, 114 Mich. 149 (1897); Salomon v. Hertz, 40 N. J. Eq. 400 (1885); Tode v. Gross, 127 N. Y. 480 (1891); see also Maxim Nordenfelt v. Nordenfelt (1893) 1 Ch. D. 630, for a review of the English cases.

[17] Ellimon Co. v. Carrington (1901) 2 Ch. D. 275; Grogan v. Chaffee, *supra;* Garst v. Charles, 187 Mass. 144 (1905); Ice Co. v. Park, 21 How. Pr. 302 (N. Y., 1861). See also cases cited under note (8), *supra.*

For the real basis for the decision in Park v. Nat. Wholesale Druggists' Assn., *supra,* see Straus v. American Publishers' Assn., 177 N. Y. 473 (1904), opinion by Parker, C. J., who wrote a concurring opinion in the Park case.

[18] Park v. Hartman, *supra;* Dr. Miles Co. v. Park, *supra;* Hill v. Gray & Worcester, *supra.*

GIFTS—VALIDITY—EXTENT OF GIFT.—The extent of the power of a parent to make gifts to a child was considered in the case of Pearce v. Stines.[1] An old man of more than eighty years, about seven weeks before his death, delivered a deed to the house and lot in which he lived to a daughter. A son of the donor charged that this gift was void as being obtained by undue influence at a time when, by reason of his mental and physical infirmities, the donor did not possess sufficient mind to understand in a reasonable manner the nature and effect of his act. The evidence seemed to show that at the time the gift was made the donor, though ill and physically very weak, thoroughly understood what he was doing. There was no proof that any undue influence had, in fact, been exerted. The house and lot included in the deed were valued at about three thousand dollars, and the rest of the decedent's real estate, all unimproved, at about thirty-seven hundred dollars. He had practically no personal property. As against this he owed debts of almost three thousand dollars to the complainant. On these facts the complainant argued that inasmuch as the property included in the deed was the most valuable part of the donor's property, that on which he depended for shelter and support, the gift was void. The court so held, and set aside the gift.

Where a confidential relation exists between the donor and the donee, the donee being the dominant party in the relation, the law scrutinizes with jealousy a gift from the former to the latter, and such transaction is presumptively void, the burden being on the donee to show its absolute fairness.[2] As between parent and child, the former is presumed to be the dominant party. So a gift from parent to child is not of itself sufficient to raise a presumption of undue influence.[3] A parent who does occupy such dominant position may give away as much of his property as he pleases.[4]

When, however, the parent, through the infirmity of old age or illness, ceases to be the dominant party, the child must remove any doubt as to the existence of undue influence.[5] The extent of the proof required of the donee depends upon the proportion which the subject-matter of the gift bears to the donor's entire estate. If the amount of the gift is not so great as to denude the donor of his means of existence, the donee need show only that the gift was born of the untrammeled will of the donor, and not of the domination of the donee.[6] But when the gift has the effect of stripping the donor of all or practically all of his property, the donee is required to show more than an absence of influence on his own part.

[1] 80 Atl. 941 (N. J. 1911).

[2] Hasel v. Beilstein, 179 Pa. 560 (1897).

[3] Sanders v. Gurley, 44 So. 1022 (Ala. 1907).

[4] James v. Aller, N. J. Eq. 666 (1904).

[5] Le Gendre v. Goodridge, 46 N. J. Eq. 419 (1889).

[6] Haydock v. Haydock, 34 N. J. Eq. 570 (1881), as interpreted by Post v. Hagen, 71 N. J. Eq. 234 (1906).

He must prove, in addition, that the donor had competent and independent advice as to the effect of his act.[7]

In Post v. Hagan,[8] the court said: "Proper independent advice in this connection means that the donor had the preliminary benefit of conferring fully and privately upon the subject of his intended gift with a person who was not only competent to inform him correctly as to its legal effect, but who was furthermore so dissociated from the interests of the donee as to be in a position to advise with the donor impartially and confidently as to the consequences to himself of his proposed benefaction."

Applying this rule to our principal case, the decision was inevitable. For there was here no form or semblance of such advice, and the subject-matter of the gift represented about all the property that the donor owned over and above his debts.

The public policy upon which such a rule is founded is apparent. It is just and reasonable that it should not be possible for those who, by old age or illness, may be deprived of their mental vigor, to deprive themselves of their means of support, even in the absence of irresistible importunities, unless advised so to do by disinterested and competent parties. It is, therefore, not surprising to find the authorities outside of New Jersey agreeing with such a rule.[8] It is submitted that what few cases hold that the receipt of such advice is not necessary, are really cases in which the donor and donee did not stand in a confidental relation at all.

The interesting question which arises is as to how much a donor may give, without bringing himself within this rule. The court in our principal case wisely remarks that the question is not so much one of definite fractions, as of practical results. Judge Stephens goes on to say: "I think the practical rule . . . is, that a donor, having barely sufficient property to sustain himself for the rest of his life, shall not irrevocably and without advice, give away so much of it as to leave himself an object of charity." This seems eminently reasonable.

P. V. R. M.

NEGLIGENCE—LIABILITY OF A RAILROAD COMPANY, AND OF THE CONSIGNEE TO WHOM IT HAS DELIVERED A DEFECTIVE CAR, FOR INJURY TO THE CONSIGNEE'S SERVANT.—In the recent Massachusetts case of D'Almeida v. Boston & M. R. R.,[1] a railroad delivered a number of cars loaded with coal to a milling company upon a side-track. In pursuance of an arrangement with the railroad, certain

[7] Coffey v. Sullivan, 49 Atl. 420 (N. J. 1901). Slack v. Rees, 66 N. J. Eq. 447 (1903), as interpreted by Post v. Hagen, *supra*.

[8] Caspari v. The First German Church of the New Jerusalem, 82 Mo. 649 (1884); Gibson v. Hammaug, 63 Neb. 349 (1901).

[9] Soberaues v. Soberaues, 97 Cal. 140 (1893); Couchman's Adm. v. Couchman, 98 Ky. 109 (1895).

[1] 95 N. E. Rep. 398 (Mass. 1911).

employees of the milling company went upon the side-track and moved the cars over a spur of track leading to the mill, where the coal was to be unloaded. While the cars were thus in transit one of the cars upset because it was out of repair, and an employee of the milling company was killed. Both the railroad and the milling company were held liable to the administrator of the deceased.

The basis of the liability of the milling company was held to be the duty which an employer owes his servants to provide safe instrumentalities with which to work. Having adopted these cars as part of its works for the time being, the milling company was liable for injuries caused by defects discoverable by reasonable diligence.[2] In thus deciding, the court is clearly right in principle, but in precedent the authorities are divided. Cases in the courts of Massachusetts,[3] Illinois,[4] and Virginia [5] support the principal case. On the other hand the courts of Pennsylvania [6] and Indiana [7] impose no duty upon the consignor or consignee of a car delivered into his possession. The opinions in these latter cases are brief and it is submitted that they are hard to justify. Had the master bought or hired the cars which he had temporarily taken over from the railroad and made part of his own plant, he would most certainly be liable to his servants for obvious defects. Manifestly no distinction can be based upon the mere circumstance of his limited right of property in the cars. So far as his duty to his employees is concerned, he should be regarded as the owner *pro tempore*.

The railroad was held liable because it had selected and forwarded the cars, the defects in which had caused the death of the plaintiff's intestate. It was held to owe a duty to the intestate to use ordinary care in the selection of the car. No fundamental reason is assigned for the existence of this obligation. It is submitted that the true basis of the duty is to be found in the benefit accruing to the railroad from its traffic arrangement with the intestate's employer.[9] It is not meant that the right of action is based solely upon the agreement; for obviously the intestate was not a party to the contract, and cannot derive benefit therefrom.[8] Since the railroad receives a benefit, perhaps directly in the shape of mileage or demurrage charges, and certainly indirectly in the shape of increased business because of the convenience to the shipper in being permitted to unload directly upon his own premises, the railroad, in

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[2] Labatt on Master and Servant, Vol. 1, p. 372.

[3] Spaulding v. Flynt Granite Co., 159 Mass. 587 (1893); followed in Foster v. N. Y. N. H. & H. R. R., 187 Mass. 21 (1904).

[4] Sack v. Dolese, 137 Ill. 129 (1891); New Ohio Co. v. Hendman, 119 Ill. App. 287 (1905).

[5] Risque v. C. & O. R. R., 104 Va. 476 (1905).

[6] Anderson v. Oliver, 138 Pa. 156 (1890); McMullen v. Carnegie Bros. & Co., 158 Pa. 518 (1893); McGinley v. L. C. & N. Co., 224 Pa. 408 (1909).

[7] H. & B. Car Co. v. Przezdzsankowski, 170 Ind. 5 (1908); following dictum in Neutz v. Coal & Coke Co., 139 Ind. 411 (1894).

[8] Winterbottom v. Wright, 10 M. & W. 109 (1842).

return for this benefit owes a duty to all those who work with, or upon, the cars under this mutually beneficial arrangement, to use ordinary care to see that the cars are reasonably safe for the contemplated uses.

The celebrated case of Heaven v. Pender,[10] declares a broader rule, but the element of benefit to the person who supplied the dock furnishings is remarked upon in the case. The suggested test of liability has been consciously applied by the courts in but few cases which deal with the liability of a railroad to the servant of a shipper or consignee, who was injured by reason of a defect in the car delivered by the railroad; but an examination of the facts of each case shows that the element of benefit to the railroad was always considered in the case. In Elliott v. Hall,[11] it was held that owners of a colliery had such direct beneficial interest in the receipt and unloading of the coal by the consignee that they were liable to his servant who was injured by a defective car. In Roddy v. Mo. Pac. R. R.[12] the interest of the railroad in carrying large shipments from a quarry was held to raise a duty to furnish safe cars. The same idea, more or less prominently and clearly expressed, runs through all the cases. A railroad supplying cars "with the intention that people *with whom it has business* and their help shall work with, about or in the cars"[13] must use ordinary care to avoid injury to the persons so using the cars. "The contract between the defendant company and the plaintiff's employer created the duty out of which the duty of the defendant to the plaintiff arose."[14] "The revenue of the railroad is dependent upon the patronage of those who have merchandise to transport, and any arrangement between the shipper and the railroad to their mutual benefit" gives rise to the duty above mentioned.[15] Similar expressions are to be found in the opinions of nearly every case[16] where the railroad has been held to owe the duty of exercising reasonable care.[17] Other elements such as the selection of the car[18] and the retention of partial control by the railroad,[19] have in many cases been given prominent consideration,

[9] See article by Professor F. H. Bohlen, on Basis of Affirmative Obligation in the Law of Torts, 44 Amer. Law Reg. 209, *et seq.*

[10] L. R. 11 Q. B. D. 503 (1883).

[11] L. R. 15 Q. B. D. 315 (1885).

[12] 104 Mo. 234 (1891).

[13] Sykes v. R. R., 88 Mo. App. 193 (1904).

[14] Hummel v. R. R., 167 Fed. 89 (1909).

[15] R. R. v. Booth, 98 Ga. 20 (1895).

[16] Olson v. P. & O. Fuel Co., 77 Minn. 528 (1899); R. R. v. Pritchard, 168 Ind. 398 (1907).

[17] As to the standard of care required see White v. R. R., 25 R. I. 19 (1903); and Rehm v. R. R., 164 Pa. 91 (1894), a case which should be limited strictly to its facts since the principles upon which the decision is based are clearly fallacious.

[18] Hale v. R. R., 190 Mass. 84 (1906).

[19] Ladd v. R. R., 193 Mass. 359 (1907).

but the element of mutuality of benefit under the traffic agreements is always present.

The negative aspect of the rule placing an obligation upon the railroad in return for the benefit accruing to it, may be seen in two cases. In Sawyer v. R. R.[20] the car in question which was defectively constructed originally, was being used by the plaintiff's employer after it should have been returned to the defendant railroad. The beneficial interest of the defendant in the use of the car had ceased and the defendant was held not liable. In Caledonian Ry. Co. v. Mulholland,[21] a coal car was delivered upon a siding. The consignees engaged another railroad to move the car some distance further and a servant of the latter was injured by a defective brake. It was held that the first railroad had no interest in the contract between the consignee and the plaintiff's employer and so owed no duty to the plaintiff. On its facts, it seems as if the court might have found a beneficial interest in the defendant but the principle is clear.

Recovery has been denied in this class of cases upon another ground, namely, that there is a duty of inspection and repair incumbent upon the plaintiff's employer whether he is a shipper[22] or a receiving railroad,[23] and that the omission or negligent discharge of this duty intervenes between the negligence of the defendant and the injury to the plaintiff, and severs the causal connection between the two. Other cases[24] support the principal case and declare that the causal connection is not broken if the intervening negligence might have been anticipated as following the original act of negligence in the natural and ordinary sequence of affairs. The latter view prevails in other classes of torts of negligence and would seem to be correct.[25] The principal case is therefore amply supported upon principle and by authority.[26]

L. P. S.

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[20] 38 Minn. 103 (1888).

[21] 1898 A. C. 216.

[22] Risque v. R. R., *supra;* McCullion v. R. R., 88 Pac. Rep. 50 (Kas. 1906).

[23] Sellis v. R. R., 124 Mich. 37 (1900); Glynn v. R. R., 175 Mass. 510 (1900), in effect overruled by the principal case; R. R. v. Merrill, 65 Kas. 436 (1902), strong dissenting opinion.

[24] Moon v. R. R., 46 Minn. 106 (1891; R. R. v. Snyder, 55 Ohio St. 342 (1896).

[25] Shearman & Redfield on Negligence (5th ed.) § 34.

[26] A recent Pennsylvania case, Rick v. R. R., 232 Pa. 553 (Dec., 1911), held that a railroad which issued to the shipper a bill of lading for a car of bar iron was liable in damages for an injury to a servant of the consignee caused during the unloading on a private siding of the consignee by a discoverable defect in the floor of the car. The basis of the duty of inspection and repair declared to be owed to the plaintiff is not definitely stated, but it seems to be the contract of shipment whereby the railroad received the benefit of the payment of freight charges. See also McConnell v. R. R., 223 Pa. 442 (1909).