FAIR TRADE ACTS

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Fair Trade Acts are new. They arise out of controversies concerning resale price maintenance which have been heated for more than a quarter century, and are to be understood partly as a reaction from a peculiar legal background. This background may be examined as one method of throwing light on the "mischief to be remedied" by the legislation. A consideration of the more important characteristics of the case law will be followed by some suggestions concerning the practical significance of the legislation and its place in our public policy.

Although a case of resale price maintenance in substantially its modern form reached the courts at least as early as 1861, attempts by vendors to control the prices at which their vendees may resell are substantially a concomitant of mass production and manufacturers' brands covering articles sold to the consuming public largely on the strength of advertising campaigns transcending state lines and commonly conducted on a nation-wide basis. Thus, conditions particularly favorable to the development of resale price maintenance programs did not develop until the last quarter of the last century. The year before the Sherman Act of 1890, however, witnessed a decision upholding a resale price contract as a reasonable restraint of trade. Although the Sherman Act has been employed as the authority for

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3. Fowle v. Park, 131 U. S. 88 (1889). In Wampole & Co. v. Karn Co., 11 Ont. L. R. 619, 627, 628 (1906) an action for damages and an injunction brought by the manufacturer of a proprietary medicine to enforce resale price maintenance contracts was dismissed on the ground that the contracts were contrary to the Canadian anti-trust laws. (Crim. Code §§ 516, 803)
outlawing such contracts, substantially undivided credit for discovering their illegality seems due to Judge (later Mr. Justice) Lurton, sitting on the Sixth Circuit Court of Appeals in 1907. 4 Hartman, the proprietor of "Peruna" (a so-called medicine having exhilarating qualities reputed to be not altogether disassociated from alcohol), procured an injunction against Park & Sons, a prominent cut rate drug distributing corporation, upon allegations that the plaintiff distributed Peruna only through dealers who would contract to maintain resale prices and that defendant was procuring Peruna for sale at cut prices by fraud and by inducing some of plaintiff's authorized distributors to break their contracts with plaintiff. Judge Lurton delivered the opinion of an unanimous three judge court ordering the injunction dissolved.

An interesting scent crosses the trail here without requiring a lengthy digression. Eleven years earlier, Judge Lurton had announced from the same bench the doctrine of the famous Button Fastener case, 5 which had

520.) The plaintiffs' manager testified that he was persuaded to establish a system of contracts by a committee of the Retail Druggists Association as a part of a plan to organize the distribution of proprietary medicines in Canada on a basis to eliminate price cutting. The court said:

"This agreement is used not simply in relation to these commodities between the plaintiffs and their various customers but is the form adopted by the committees representing a large part of the wholesale and retail trade of Canada. It means that nearly every commodity in common use is to be subject to a hard and fixed contract which fixes the manufacturer's price, the wholesale price, and the retail price, below which none can sell and no one can purchase who is not a member of the association and agrees to sign the contract in question. It means that competition is not only unduly prevented or lessened in the purchase, barter, and sale of this article but is absolutely destroyed. In the present case the evidence also shewed, I think, that the price was unreasonably enhanced by reason of this agreement.

"A number of American cases were also cited on behalf of the plaintiffs: Garst v. Harris, 177 Mass. 72; Walsh v. Dwight, 92 N. Y. State Rep. 91; Whitwell v. Continental Tobacco Co., 123 Fed. Rep. 454; Hulse v. Bonsack Machine Co., 65 Fed. Rep. 864, 869; Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., (1894) A. C. 535. These cases are decisions where there is no law corresponding to our statute, and therefore can aid very little in a decision of the present case.

"I think the statute was intended to provide against agreements similar to the one in question.

"I find as a fact from the evidence that the agreements in question and each of them were procured by an unlawful conspiracy between the plaintiffs, defendants and other manufacturing chemists and the Association of Wholesale and Retail Druggists, and that the conspiracy was entered into for the purpose of unduly preventing or lessening competition in the purchase, barter and sale of the articles in question being articles of trade and commerce and for the purpose of unreasonably enhancing the prices of said commodities and are contrary to the provisions of the Criminal Code and are null and void."


Suggestions of the illegality of resale price maintenance elsewhere have been attributed only to Norway and the Argentine. Copeland, Resale Price Maintenance (1934) 13 Encyc. Soc. Sci. 326, 327. But the Norwegian doctrine seems directed at the maintenance of unreasonable prices in general rather than specifically at resale price maintenance, and, while the practice is said to be unlawful in the Argentine, it is prevalent there. See Kosicki, Exclusive Sales Agreements in Foreign Trade, U. S. Bur. of For. & Dom. Com., Trade Promotion Ser. No. 45 (1927) 47.


the effect of permitting a patentee to exercise monopolistic influence on the markets for unpatented supplies used in connection with his invention. The commercial possibilities of this doctrine were developed with increasing assiduity and with increasing lack of restraint in restraining trade. (The greatest exploitation awaited the Supreme Court's blessing on the doctrine in 1912. This in turn led to such intolerable ingenuity and greed on the part of patentees that the doctrine was abolished by a frank volte face in 1917.) Returning to the intersection of this byway with our main trail in Judge Lurton's court in 1907, we can understand why we find counsel much concerned with the question whether the proprietor of a medicine made by secret process may stand on the same ground as a patentee with reference to monopoly or restraint of trade. The judge became so interested in developing a distinction to the detriment of the proprietor of the secret process that his much more significant discovery of the illegality of resale price maintenance programs was reduced to the proportions of an epilogue. In transition he cited Coke to the effect that a condition in restraint of alienation could not be made to run with a chattel. He did not stop to analyze the difference between a condition, which would disenable the vendee from selling as a matter of property law, and a contract, which the vendee would have legal power to break. Nor did he pause to remark that Lord Coke hardly fancied himself as a chancellor. Long before any comprehensive theory of equitable servitudes on chattels had been developed, the doctrines flowing from Judge Lurton's opinion had rendered the discussion academic with reference to resale price maintenance, at least in the federal courts.

Upon the central question he said in part:

"The plain effect of the 'systems of contracts', the purposed relation of each to every other being confessed by the very description of the method of carrying on business stated in the bill, is, first, to destroy all competition between jobbers or wholesale dealers in selling complainant's preparations. . . . Next, all competition between retailers is destroyed. . . . Thus a combination between the manufacturer, the wholesalers, and the retailers to maintain prices and stifle competition has been brought about. It is true that the complainant is not in competition with other makers of 'Peruna'. There are no others. If there were, there would not be a complete or general restraint."

He then suggested the illegality of a monopolization of lumber, furniture or stoves. Counsel for plaintiff apparently did not impress upon him

10. See Chafee, Equitable Servitudes on Chattels (1928) 41 Harv. L. Rev. 945.
the argument, not perhaps acceptable to their client, that there was really nothing generically distinctive about Peruna and that it was in adequate competition with other means of exhilaration; for the judge instead returns to strike one more blow at the argument that articles made under a secret process are favored wards of the law. He was doubtless aided in reaching his conclusion by the fact that he had, within the year, decided against the wall paper trust a case in which resale price maintenance was a minor incident of a comprehensive combination between manufacturers, reinforced by exclusive dealing contracts with all jobbers exacted under threat of boycott. As the judge said:

“A more complete monopoly in an article of universal use has probably never been brought about. . . . None of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details.”

Such a sweeping condemnation naturally did not induce a separate consideration of resale price incidents. The bad company in which the judge had last seen a resale price system, however, may have been influential in forming his estimate of its character when it was haled separately before his court in its own proper person.

The leading Supreme Court case of Dr. Miles Medical Co. v. Park & Sons Co. adds little but authority and prestige to the doctrine of the Hartman case. Another patent medicine proprietor sued the same defendant upon a similar theory and was confounded with similar reasoning. The case was complicated by the fact that the plaintiff was making his authorized wholesalers agents and not purchasers. As a much later decision of the Supreme Court unequivocally established, no problem of resale price maintenance is involved unless there is a resale; and if a manufacturer makes his distributors real agents, he may with impunity fix the prices at which they sell on his behalf. The court avoided this difficulty by a very strict construction of the bill of complaint, which was open to the argument that the plaintiff was endeavoring to control goods in the hands of his wholesale distributors, including goods which had arrived there through indirect channels so as to be free from the restraint of the plaintiff's contracts. This judicial manoeuvre evoked some rather cutting language from Mr. Justice Holmes, whose objections were not confined to that point. Returning from this last digression to the main stream of doctrine, we find Mr. Justice Hughes following the pattern already outlined in the Hartman case, with

13. 220 U. S. 373 (1911).
15. 220 U. S. 373, 397-98 (1911).
16. Id. at 397-98.
a somewhat more balanced treatment of the points involved. He had much less difficulty in establishing the elementary proposition that the proprietor of a "patent" medicine does not have the powers of a patentee. But the concept of restraint of trade is again introduced through a quotation from Coke, assigning it as a reason for the invalidity of conditions annexed to the title of chattels.17 The similar failure of this court to differentiate clearly between conditions and contracts has led some students to think that confusion on that point is an important element in explaining the decision. A less stultifying construction of the opinion is to be preferred, however. Systems of resale price maintenance contracts are void as in restraint of trade because they eliminate competition between distributors. The Supreme Court, which had affirmed Judge Lurton in the Wall Paper case in 1909,18 was probably also influenced in 1911 by similar associations with that case. The systematic element in the resale price maintenance programs may have been important in both cases. As recently as 1908, the Supreme Court had occasion to explain that a system of contracts throughout a line of commerce might constitute an unlawful restraint of trade19 in situations where a single such contract would be lawful.20

The decision of the Supreme Court upholding a resale price maintenance contract as a reasonable restraint of trade in 188921 might be explained by the intervention of the Sherman Act upon the theory that the statute departed from the common-law standard of reasonable restraint of trade. But the Standard Oil opinion22 repudiating that theory was handed down only six weeks after the Miles case. The primary distinction which Judge Lurton had so painstakingly developed as the basis for his decision in the Hartman case was also shortly swept away. In Bauer & Cie. v. O'Donnell,23 the Supreme Court decided that even a patentee could not control resale prices. Thus, technically, nearly everything about the Hartman case was wrong, but the result stood reënforced. The Button Fastener case turned out ultimately to be wrong, the distinction between patented articles and proprietary medicines turned out to be misleading, and the basic theory of construction of the Sherman Act on which the Hartman case might have rested was renounced by the court that had proclaimed it with vehemence; but nothing impaired the conclusion (1) that a resale price maintenance program was a violation of the Sherman Act when it eliminated competition

17. Id. at 404.
between distributors in interstate trade or (2) that it was unenforceable at common law when it achieved a like result in local trade.

Biological experience would indicate that any doctrine surviving amid such destruction would have an opportunity to thrive. Indeed, a large part of the uprooting had taken place only with reference to doctrines tending to limit the growth of the Hartman case. In the early 1920's, a new process of elimination tended further to increase government activity with reference to resale price maintenance. The activities of the Federal Trade Commission, formed in 1914, met sweeping challenges in court after the War. A series of decisions, commencing with Federal Trade Commission v. Gratz in 1920, restricted the activities of the Commission, with reference both to substantive law and to procedure. Of the first nine cases involving the Commission that were reviewed by the Supreme Court, seven were decided against the Commission, leaving only two branches of its work comparatively unchallenged: first, the pursuit of false advertising and misbranding; and second, the campaign against resale price maintenance.

Before reviewing the Commission's activities in this last respect, however, it is necessary to examine a legal curiosity. United States v. Colgate & Co. is a caricature illustrating the unreality that can be achieved through an accumulation of procedural technicalities. In the first place, the case arose upon indictments. Indictments, as is well known, are subject to strict construction out of consideration for the accused—a consideration which may be said to be frequently misplaced or at least fostered with unnecessary solicitude. In any event, not facts but allegations count in an indictment. The greatest artificiality in the Colgate case arose, however, by reason of a point of appellate procedure. The case went direct from a district court to the Supreme Court under a statute authorizing such direct appellate jurisdiction upon writs of error "from a decision . . . sustaining a demurrer.

29. 250 U. S. 300 (1919).
to any indictment... where such decision... is based upon the... construction of the statute upon which the indictment is founded.19,20 The Supreme Court had previously held that the sole question for its consideration upon such a writ of error was the construction of the statute. It was an established corollary to this proposition that the court might not construe the indictment. Accordingly, it was bound to accept the construction put upon the indictment by the district court. An almost unavoidable inference in the Colgate case is that the district judge was unsympathetic to the application of the Sherman Act there proposed. There is further reason to suppose that he was no master of English and was careless in his treatment of the particular case. He first overruled the original indictment, assigning, among other reasons, that it did not allege resale price maintenance contracts. An amended indictment specifically setting up certain such contracts was overruled "for the same reasons."31 His "construction" of the indictment thus flatly contradicted the face of the indictment; but under the rules which the Supreme Court had laid out for itself, the Supreme Court was not permitted to look at the indictment to see what it did actually say. The district judge's opinion was, furthermore, largely self-contradictory. The Supreme Court then addressed itself to the task of determining which of the district court's conflicting statements it would accept as the district court's construction of the indictment. Mr. Justice McReynolds (whose exceptional zeal to enforce the Sherman Act has been conspicuously inoperative in resale price maintenance cases), after one of his rare expressions of doubt, elected to stand on a passage in the district judge's opinion which stated that the indictment alleged only that Colgate & Company was refusing to sell its goods to price cutters and, consequently, upheld the decision that the indictment was insufficient. He, apparently, also took a leaf from Mr. Justice Holmes' book. The senior justice had consistently stood out for the privilege of the owner of property to dispose of it on his own terms, whether the effect be to eliminate competition between distributors or to give a patentee monopolistic powers over unpatented materials. Thus, he consistently voted in favor of the legality of resale price maintenance programs32 and in favor of the doctrine of the Button Fastener case.33 Apart from assertions that he simply could not see the opposing point of view, his chief argument was that what one


may refuse to do absolutely he may refuse to do conditionally. This argument is submitted to be transparently unsound. I may refuse absolutely to give $5$ five dollars; but if I gave him five dollars as an inducement to murder $X$, I may get into trouble. As the vice of price maintenance is elimination of competition between dealers, the choice of the sanction of refusal to sell should not be conclusive of immunity. In any event, out of the strange procedural wilderness in the Colgate case emerged the uncouth doctrine of a supposed unqualified privilege of refusal to sell.

The case inevitably caused trouble to the district courts. Apparently no judge and no counsel having occasion to litigate resale price maintenance cases realized how remote the Supreme Court's decision was from the facts of the Colgate Company's program. The decision merely stood for an unsound abstraction based upon the Supreme Court's questionable construction of the district court's ambiguous misconstruction of the district attorney's technical reconstruction of the facts. One district judge thought the Dr. Miles case was overruled; and another court, while confessing inability to make any rational reconciliation, hazarded a decision that a tacit understanding to maintain prices could be upheld as an exercise of a manufacturer's privilege of refusal to sell, while a written agreement to like effect would be unlawful. Three cases were decided in the lower federal courts after the Colgate case and before the Beech-Nut case reached the Supreme Court, and three times the Supreme Court had occasion to announce that the Colgate case had been "misapprehended".

The Beech-Nut case upheld a Federal Trade Commission order against a resale price maintenance program substantially similar to that followed by Colgate & Co., holding it to be a violation of section 5 of the Federal Trade Commission Act concerning unfair methods of competition. Mr. Justice Holmes, continuing to support price maintenance, dissented with the remark that he did not see what could be possibly unfair in the program. But the Supreme Court had already indicated that unfair methods of competition included those "heretofore regarded as against public

policy because of their dangerous tendency unduly to hinder competition".\textsuperscript{42} A resale price maintenance program unquestionably hinders competition. The announced doctrine of the \textit{Miles} case indicates that such hindrance may easily be legally undue. Moreover there is no merit in the suggestion that the Commission has no mandate to enforce the Sherman Act, for a violation may be regarded as an unfair method of competition against others who observe the law.

Not only did resale price maintenance afford the occasion for one of the Federal Trade Commission's few successes. It also proved to be a stumbling block for the Department of Justice. Four proceedings commenced after the decision of the \textit{Beech-Nut} case in the Supreme Court were dismissed.\textsuperscript{43} With the exception of one consent decree where the practice was only incidentally involved,\textsuperscript{44} the only success of the Department was a consent decree against Schrader's Son, Inc., obtained while the Government was prosecuting criminal proceedings in the district court subsequent to the Supreme Court's sustaining an indictment against that concern.\textsuperscript{45} With the exception of one very successful damage suit by the arch enemy of resale price maintenance,\textsuperscript{46} the law gave rise to no bounteous harvest through triple damage suits. The mild and tardy preventative process of the Federal Trade Commission was, however, invoked with a frequency and with a degree of success which constituted a constant source of irritation to those who think of price cutters as anti-social characters.

As the foregoing discussion may suggest, there is still some difficulty in determining the bounds of the \textit{Colgate} case. The Beech-Nut system involved active circularization of the trade, requesting members to report price cutters and giving assurance of protection against them. This circularization was supplemented by personal activity on the part of missionary men, whose mission was to promote the company's sales and its incidental policies such as price maintenance. The only action taken against price cutters was an exercise of the supposed right of refusal to sell, supplemented, of course, by threats to exercise the right, and qualified by resupply of offenders who gave suitable assurances of future compliance. The company employed such obvious incidents of modern efficient practice as serial numbers on its products and a card catalogue of price cutters. Some opinion was inclined to the view that the \textit{Beech-Nut} case prohibited the incidents of

business efficiency while leaving the substance of control of supply intact if the privilege of refusal to sell were exercised with sufficient lack of system. A less stultifying interpretation has basis in the Beech-Nut opinion itself, as well as in the subsequent orders of the Federal Trade Commission, and subsequent opinions of circuit courts of appeals which kept the orders in bounds. The vice of the Beech-Nut system was a combination or a conspiracy between the manufacturer and his distributors to keep up distributors' prices in violation of the Sherman Act. A combination or conspiracy is more readily to be inferred in cases of active "cooperation" between the manufacturer and the distributors. As long as the questionable doctrine stands that one may exercise his privilege of refusal to sell in order to promote the anti-social practice of eliminating competition between distributors, a manufacturer may unquestionably so act upon such information as comes to him in the ordinary course of business. If he takes active steps and goes out of his way to procure information, he begins to approach the orbit of the Beech-Nut case. Particularly if he stimulates distributor action to this end, he is likely to find that his supposedly unqualified privilege is no answer to a charge of combination and conspiracy predicated upon the quest for information to make the privilege effectual.47

The foregoing analysis is not set forth as the clearest and most persuasive exposition of the federal law antedating the Miller-Tydings Act. It is designed rather to show the peculiarities, uncertainties and exasperating aspects of that law as constituting a material part of the background of the so-called Fair Trade Acts. Business fact and economic theory have so far been ignored except where some minimal references to them have been unavoidable. The economic issues, many times mooted, remain most interesting. A primary source of heated discussion has been the dual character of price cutting; for even though most wise men find the world composed of more blended grays than blacks and whites, two kinds of price cutting emerge with a degree of clarity. They may be described with some plausibility in simplest terms as good price cutting and bad. Price cutting based upon superior efficiency is essential to the ideal of our economic system. Business may not approximate the ideal, but a very large portion of our distribution is conducted on a competitive price basis. Claims that our economic system is defunct and must be superseded by something radically different, such as planned economy or regulated monopoly, present more plausibility in certain fields of production. The monster of oligopoly does not stand in the center of the picture for those who promote the Fair Trade Acts. The small distributor interests complain of the economic power of the chain distributors, but they do not complain of lack of competition.

47. Federal Trade Commission cases to 1933 are classified in McLaughlin, Cases on the Federal Anti-Trust Laws (1933) 487-504, especially n. 141.
The complaint is of excessive competition or of unfair competition. Sherman Act theory, as well as much contemporary activity, consists with the classical idea of the survival of the fit. The business man is to be encouraged to attract trade by economies of operation and by passing on his economies to the consumer. The consumer is entitled to object when those who ought to be competing for his favor by endeavoring to give him more for his money divert their energies into "cooperation" with a view to furthering group distributor interests at the expense of others. Even the distributor should recognize that he, himself, is a consumer, and that in the long run the net result of such cooperative effort must be wasteful. Aggressive cooperation in one stage of economy raises pressure for defensive combinations in other stages. Ultimately too much energy is lost in conflicting schemes, and too few people are concentrating upon the job of improving economic efficiency.

The rugged individualism of the "independent" retailer is, in some aspects, a rather pitiful joke. He wishes to hide in the pack and be protected by "cooperation" from bearing the risks which would afford any economic justification for profits. Any scheme which would effectually prevent the cash and carry consumer from buying at a cheaper price than the consumer who gets elaborate delivery and other service plus costly credit is a vicious scheme. Any program which endeavors to use group action to restrain price competition based upon efficiency requires a showing of exceptional circumstances to warrant a hearing.

But even as price cutting based on efficiency may be clad in effulgent white and extolled as the fairest handmaiden of our economic system, so may "loss leader" price cutting be clothed in somberest sable and condemned as among the most evil of ogres. A manufacturer, at great expense and by patiently pursuing a consistent policy over a period of years, develops a widely known product under a distinctive name or trade-mark. He promotes the demand for his product by a costly advertising campaign directed toward a cumulative "build-up" of associations in the minds of ultimate consumers. Uniform name, uniform appearance, uniform quality and uniform price, under ideal conditions, can produce a single complex in the consumer's mind which is most advantageous. If he likes a product, he buys it when he will and can, and doesn't think of questioning the price.

At one time a "dollar watch" definitely indicated the watch of a single manufacturer in the minds of so many people that the price became the most important part of the complex. Any ignorant or unthinking person could assure you with confidence that it was a contradiction in terms and, hence, an absurdity to think that a dollar watch was only worth ninety-five cents. In such a case, if some retailer, acquiring such watches at the established trade price of seventy-five cents, honestly believes that he can make
more money be selling some at eighty-nine cents, it is possible to understand how the manufacturer may get excited. The magic combination is broken. Furthermore, the dealer is really not selling watches chiefly on the strength of his own efficiency. The watches are sold on the strength of years of the manufacturer's advertising. The mere shock of having a dollar watch offered for eighty-nine cents would be sufficient to tempt bargain hunters suddenly to discover that they needed a watch after all. But the worst is yet to come. Another retailer, seeing the rush for the eighty-nine cent watches, sees a chance to show up the other price cutter as a mere "piker". He buys watches for seventy-five cents and sells them for sixty-nine cents, announcing that he is able to do so by reason of his shrewd buying and by reason of the extraordinary merchandising efficiency which pervades his entire establishment. The loss of six cents plus handling costs is cheap advertising for him as long as the game works. Some of his competitors may try taking six-cent losses for a while until everybody gets tired; and then, for some reason, a customer with a dollar in his hand may have hard work finding one of those watches for sale in the neighborhood at any price. The price cutter has been guilty of fraud, deception, theft of goodwill, sabotage and general "ornerness", resulting in the destruction of an immeasurable amount of goodwill for the product. It would appear that there is a net social loss, but the price cutter doesn't worry. If there is any gain, he has obtained it; the losses have been suffered by others. The manufacturer said the watch was worth a dollar, and he cannot bear to see the truth he has spoken twisted by knaves to make a trap for fools.48

The foregoing is, of course, oversimplified as well as overdramatized. The picture is both incomplete and insufficiently qualified. The price cutting is likely to grow through more stages. Even if the manufacturer is not so directly concerned with the consumer's complex, he often finds that increasing price cutting by retailers gives rise to pressure by reluctant retailers upon wholesalers to lower wholesale prices to enable retailers to meet the cuts of competitors. The wholesalers then come back upon the manufacturer for greater quantity or functional discounts to enable them to continue handling the goods. In any event, "loss leader" selling is hard to justify in theory. Defense of a legal system which would leave the proprietor of a brand helpless to oppose it may follow the line of minimizing the extent of such abuses in fact, or it may accept such abuses as inevitable inci-

48. Messrs. Holmes, Ingersoll and Kipling have all contributed to this suggestion. "I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get." Per Holmes, J., in Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 412 (1911). Cf. Ingersoll v. Goldstein, 84 N. J. Eq. 445, 93 Atl. 193 (1915); Ingersoll & Bro. v. Hahne & Co., 88 N. J. Eq. 222, 101 Atl. 1039 (1917), 89 N. J. Eq. 333, 108 Atl. 128 (1918); N. J. Laws 1916, c. 107, amending; N. J. Laws 1913, c. 210, as amended by, N. J. Laws 1915, c. 376; Kipling, If.
dents to the establishment and promotion of the paramount public policy in favor of desirable price cutting.

The very first step to take toward the formulation of a sound public policy seems obvious: explore the possibilities of differentiating between good price cutting and bad. The astonishing part of the whole spectacle is that, practically speaking, the obvious beginning has never been made.

The reaction from the strict anti-trust law against resale price maintenance was unceasing agitation by distributor groups for statutory change in the law. One of the ablest early economic studies of resale price maintenance discussed public policy upon the assumption that manufacturers were endeavoring to impose their will upon the distributing trade, and the same assumption has underlain a large part of the discussion of judges and lawyers. The most distinctive feature of the price maintenance movement of the 1930's, however, has been distributor initiative. It now appears that most manufacturers are comparatively inert. Many of them may, better than most independent distributors, realize how complex the problem is even when reduced to its simplest terms. The manufacturer may have diverse channels of distribution, and he is not clear with whom his interest lies. For reasons which it is manifestly beyond the scope of this paper adequately to explore, organizations of "independent" distributors have had increasing voice in government in recent years. The rise of the chains and mass distribution, in general, has aroused defensive aggressiveness on their part. New Deal disparagement of "big business" has been a favorable factor. While the N. R. A. fiasco to some extent discredited business "cooperation", some organizations had their eyes opened to the commercial possibilities of regimented business promoting its interests at the expense of the consumer. At all events, with the exception of the ex-soldiers, "independent" distributor groups seem to have more political potency to procure an overvaluation of their supposed interests than any other contemporary group.

The federal law against resale price maintenance was not doomed to be demolished by a frontal attack, however. A flanking movement through the state legislatures proved to be much more effective. A California Statute of 1931, with extended sanctions added by amendment in 1933, was made the basis of a rapid and sweeping campaign through the states. Several states enacted it with the reproduction of a typographical error which rendered one passage altogether unintelligible. Early in 1937, the

49. "Think of the country's million or more retailers, together with all its wholesalers and jobbers, bound up by such adamantine requirements, free to do nothing but act as puppets to the infallible oligarchy above them!" See Murchison, Resale Price Maintenance (1919) 126.


Druggists’ Association presented an improved and elaborate draft, which was thenceforth faithfully followed, some legislatures going to the trouble promptly thus to bring their 1935 service up to date. This movement encountered no serious opposition or detailed theoretical criticism. Litigation and theoretical discussions in legal periodicals centered around its constitutionality, particularly after different state courts of appeal took conflicting views. When the United States Supreme Court upheld the Illinois and California Acts, the rout of the previous policy was virtually complete. The laggard legislatures climbed on the band wagon until forty-three acceded, and Congress adopted and the President (reluctantly, it is said) signed the Miller Tydings Act, exempting from the Sherman Act resale price maintenance contracts lawful in the state where the resale is to be made.

In no event does resale price maintenance threaten to assume a major place with reference to the entire volume of retail trade in this country. In the first place it applies only to branded articles and, while legal encouragement of price maintenance movements may tend toward promoting manufacturers’ brands to some extent, a large portion of merchandise may be safely excluded at the threshold. Direct distribution from producer to consumer is not involved, the bulk of the mail order business being thus excluded. Price maintenance affords excellent sales arguments for private brands, such as those so vigorously developed by Macy and Co. Since


55. Judicial acquiescence in a broad legislative discretion to foster one economic group as against another is clearly portrayed in Legis. (1937) 22 Iowa L. Rev. 736, 758.


58. See Walker, Expose of Fair Trade Laws, an Address before Nat. Ass’n of Marketing Teachers, Dec. 1936.
distributing chains are usually hostile to price maintenance, insuperable obstacles are likely to be encountered in establishing the practice in lines where chains are strongest. Private brands are, of course, one of the main weapons of the chains in promoting their merchandising policies. The fields where the manufacturers have arranged to retain title to the goods through distribution completed by their legal agents represent areas presently outside the scope of the Fair Trade Acts. Such a method of distribution seems to have shown its practicability with reference to automobiles and electrical equipment. In addition to the elementary limits of resale price maintenance doctrines and in addition to the difficulties of initiating programs in various lines, much importance must be attached to difficulties of enforcing compliance. In spite of the high degree of control exercised by manufacturers of the distribution of automobiles, it is common knowledge that active price competition is maintained by retailers through the device of making liberal to extravagant allowances for the “trade-in” value of used cars. A similar situation is said to exist with reference to radios, vacuum cleaners and like equipment. A legal periodical is not the most obvious place to attempt a discussion in detail of the practical characteristics of various lines of business. That has been well done elsewhere. Business school periodicals and trade journals will doubtless develop information much more complete than any now available. An estimate that Fair Trade Acts will not effect more than ten per cent of retail trade and perhaps not more than five per cent seems consistent with the information presently available.

The generally accepted facts that the Fair Trade Acts have been largely promoted by associations of druggists and that the drug trade has been exceptionally successful in availing itself of the Acts may well invite speculation concerning the causes for this exceptional success. It is sometimes suggested that the druggists are more readily organized than dis-

59. See infra note 69.
60. SELIGMAN AND LOVE, PRICE MAINTENANCE AND PRICE CUTTING (1932) App. II; Grether, Resale Price Maintenance in Great Britain (1935) 2 UNIV. CALIF. PUB. IN ECON. 332; Wolff (1937) 5 TRADE REG. REV. 2-3; 6 id. 2-19; 7 id. 2-14.
62. Walker, supra note 58, at 2-9; Grether, Legislation Restricting Price Cutting (1936) 24 CALIF. L. REV. 640, 666 et seq.; Nelson, Fixed Prices and the Consumer (1937) 175 HARPER'S MAG. 318, 321; Wolff (1937) 4 TRADE REG. REV. 5. One of the most interesting documents is the questionnaire the National Association of Retail Druggists sent to its State Fair Trade Committees to ascertain, among other things, what cooperation was obtained from other sources in promoting the legislation. See Nat. Ass'n of Retail Druggists Fair Trade Man. (1937) 33. Local trade advice in Boston is to the effect that within fifty days after the Massachusetts Act went into effect about 200 of the approximately 680 nationally advertised products carried by a well stocked drug store were under price maintenance contracts. At a like date Macy's stated that the price fixing in New York State was fairly complete in the cosmetic field and over 60% complete in the drug field. Retail druggists still favor the law. See Salisbury, Survey of Retail Druggists in Six States (1938) 42 SALES MANAGEMENT No. 5, 28.
tributors in some other lines because the association of the business with pharmaceutical work requiring intellectual minima is a guarantee of some intelligence. The intellectual element in the mob psychology of trade associations operates at such a low level that this suggestion may be admitted without prejudice for what it may be worth. Drugs have naturally tended to be branded products. Several simple chemicals, such as carbon tetrachloride, are sold at extravagant prices under trade names by reason of the natural ignorance of the consuming public in matters of chemistry. The drug business, whether operating as an aid to the physician or as the mere distributor of quack potions, has always partaken heavily of the mumbo jumbo of the “medicine-man”. There are few lines in which the customer has less idea of what he is getting and less means of knowing whether he has had his money’s worth when all is said and done. It is a serious question whether all branded drug products taken en masse do not net the public more harm than good. We have the Supreme Court’s authority for the proposition that false advertising of an obesity cure gives rise to no inference of unfair competition because there is no reason to assume that any obesity cures are honestly advertised. Respectable medical authority has recently deprecated the popular notion that constipation is per se a serious menace to health; and, in any event, it has long been an open question whether proprietary drugs sold in the name of that ailment have not in the aggregate produced more harm than the ailment itself. A decreasing percentage of dentists seems ready to support the myth that there is substantial virtue in tooth pastes, powders, or mouthwashes. The action of most proprietary disinfectants tends to be either harmful to human tissues or harmless to germs. Physiologists have not known whether to be more amused than disgusted by the claims of advertisers with reference to the effects of medicine upon the acid-alkaline balance of the body. Furthermore, the in-

64. Harold Aaron, M. D., in 1937 wrote eloquently to this effect in a consumer’s service magazine widely distributed on a “confidential” basis.
fluence of self-hypnosis upon health is such that it is frequently impossible to say whether the addict of advertised drugs who considers himself benefited, has not actually offset physiological damage by psychological regeneration. Probably enough has been said to emphasize that consumer ignorance tends to render the drug field the happy hunting ground of the "fair trade" propagandist. An additional circumstance favorable to price maintenance is the small cost of the majority of the items branded. A consumer will be moved to chisel his best in connection with the purchase of an automobile or a radio. He hardly finds it worth while to shop around for a good ten cent toothbrush, even though he may be inclined to patronize a store having the reputation of being "cut price". In any event, unless he is unusually gullible, his annual expenditures for branded drugs will hardly amount to two per cent of his expenditures for food. The consumer has been referred to in masculine terms. Regard for the proprieties of the printed page precludes discussion of the more deadly sex and its abortive quest for synthetic beauty.

The outstanding fact about "fair trade" legislation is that it swings the law from one extreme to another. There is no attempt to discriminate between good price cutting and bad. There is no attempt to start by mitigating the consequences of violation of the preexisting law. No intermediate step is taken whereby the rigors of the anti-trust laws are relaxed with reference to the manufacturer or distributor who endeavors merely to protect himself against "loss leader" distribution. The Acts do not even stop at turning what were previously criminal contracts, combinations and conspiracies into valid contracts entitled to ordinary legal sanctions. They proceed to make price maintenance contracts enforceable against persons who are not parties to them directly or indirectly. The Illinois Act, upheld in the Seagram case, one of the more moderate Acts, provides that "willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated" in a resale price maintenance contract within the terms of the statute whether the person so-doing "is or is not a party to such a contract, is hereby declared to constitute unfair competition and to be actionable at the suit of any person damaged thereby". Con-

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"XXXII. I know no well-informed person who, unless he is amused by the human comedy, is not disgusted by the stupidity, the deception, and the misrepresentation that are manifest in the current advertising of alkalies. And in spite of the dictates of caution I do think that this disgust, at least, is socially useful."

66. At the same time high-priced merchandise is sometimes better controlled than cheap lines, through a limited number of distribution outlets. See Wolff (1937) 5 Trade Reg. Rev. 3.

tracts commonly provide for liquidated damages and injunctions. Injunctive relief has been already liberally allowed.

The desirability of exploring the "middle ground" was first well developed by Professor Murchison of the Columbia Faculty of Political Science in 1919. His theory was that the concepts of cost and of fair profit should be used as the controlling criteria to differentiate between good price cutting and bad. Recognizing the practical difficulty of applying such tests, he suggested thoroughgoing governmental administrative control of the field. Subsequent experience and subsequent study, notably that of Professor Grether of the University of California have served to emphasize that trade cooperation is so essential to compliance that N. R. A. analogies would have to be followed if prices are to be maintained. It is a grave question whether any net public gain in prospect is worth the costs of


The steam roller has shown signs of bogging down in New York, however, in the demoralized fields of razors, radios and liquors. Defendants have shown that complainants were price cutting and that injunctions would have only capricious operation. Gillette Safety Razor Co. v. Green, 99 N. Y. L. J. 1559, 106 C. C. H. Trade Reg. Serv. ¶ 25,117 (N. Y. Sup. Ct. Mar. 30, 1938); Cooper v. Davega-City Radio Corp., N. Y. Times, Apr. 19, 1938, p. 23, col. 1 (N. Y. Sup. Ct. 1938). A preliminary injunction was denied in the Nussbaum case, supra. See 106 C. C. H. Trade Reg. Serv. ¶ 25,087 (N. Y. Sup. Ct. 1937). See also Schenley Distributors v. Nussbaum Liquor Store, 106 C. C. H. Trade Reg. Serv. ¶ 25,086 (N. Y. Sup. Ct. 1937). And a New Jersey Chancellor has exercised his discretion to refuse an injunction where the complainant had refused to sell to defendants on the theory that such refusal was a failure to "do equity". Lenteric, Inc. v. Weissbard, 122 N. J. Eq. 573, 195 Atl. 818 (Ch. 1937).


70. Murchison, op. cit. supra note 49, at 129-140.

71. Grether, supra note 60, at 332-34.
administering any elaborate scheme.\textsuperscript{72} Elimination of clear cut cases of "loss leader" selling might be attempted by less extravagant means.

Murchison's balance of interests assumed that resale price maintenance is definitely superimposed from above by the manufacturer.\textsuperscript{73} As we have seen, recent political history confirms earlier trade advice to the effect that the greatest pressure for resale price maintenance systems comes not from the manufacturer, but from the distributors. It is possible to overemphasize this distinction.\textsuperscript{74} The proprietor of a trademark may or may not be interested in building a definite, specific price element into the consumer idea of his product. So far as he is so interested, he will incline to price maintenance directly on his own account. Private advices from the drug trade, however, long before the current decade, have portrayed the independent druggists' associations as pressure groups seeking to induce manufacturers to promulgate resale price maintenance programs. It is by no means fantastic to postulate the case of a manufacturer driven into "cooperation" and resale price maintenance by aggressive action of distributors encompassing mass diversion of patronage suggestive of the boycott.\textsuperscript{75} The truth concerning many resale price maintenance programs doubtless lies somewhere between such an extreme case and the opposite extreme of the manufacturer insisting upon resale price maintenance in his own interests against the objections of the preponderant opinion of a distributing trade. Most distributors like the idea of price maintenance. Most of them are not very learned in theoretical economics nor even particularly astute in gauging the long time practical effects of a course of conduct.\textsuperscript{76} The limit of their vision is that price cutting doesn't get one anywhere because it invites reprisals with loss to the trade all around. This point of view is particularly fostered under aggressive trade association leadership that "educates" them in the virtues of "cooperation" and develops the idea that price cutting in general is "unethical". A manufacturer naturally wishes to enlist the interest and loyalty of his distributors or at least to minimize friction with them. If he believes they will appreciate a resale price maintenance program, he is likely to consider it good policy to inaugurate one even when they do not take the initiative in urging such a course.


73. See supra note 49.

74. Indeed, the perils of overemphasis are prominent in the discussion of the chief controversies here in view. Cf. Grether, supra note 60, at 331.

75. It was no improbable accident that the Hartman and Miles cases both involved proprietary medicines. Drug cases were the most fruitful source of such litigation. See McLoughlin, \emph{op. cit. supra} note 47, at 469, 470, n. 130, I, B. The aggressiveness of the Canadian druggists evoked an application of anti-trust laws in Canada even before the Hartman case. See Wampole & Co. v. Karn Co., 11 Ont. L. R. 619 (1906).

76. The inability of business men to learn comparatively simple lessons about the limits on the effectiveness of combinations in restraint of competition has been forcefully portrayed by Professor Watkins with particular reference to the paper and corn products industries. See Watkins, \emph{Industrial Combinations and Public Policy} (1927) 183, 210.
The relationship between the doctrine of the federal cases on resale price maintenance and similar cases which hold horizontal price fixing agreements to be a violation of the Sherman Act is thus much more intimate than might be supposed upon the assumption that resale price programs are imposed from above. Perhaps the most natural of all associated distributors' activities is the attempt at horizontal price control. With the strong human pressure in this direction, the impulse finds manifold forms of expression. Nothing can be more simple than the idea of conscripting the manufacturers as agents to promulgate and enforce the policies of trade conspirators.

Furthermore, as N. R. A. experience might suggest and as English experience virtually demonstrates, strong concerted action by distributors is a potent and frequently an indispensable element in the enforcement of price maintenance programs. A legitimate conclusion seems to be (notwithstanding the fact that the Hartman and the Miles' cases could have been otherwise decided) that Fair Trade laws are definitely inconsistent with the theory and spirit of the anti-trust laws. Legislatures may perhaps be persuaded that, in view of increased concentration in the control of the methods of production in this country, in view of the growth of mass distribution, and in view of the concessions made to monopolistic combinations by farmers and laborers in recent years, the "independent" distributors should be allowed to equalize their position with that of the others by combining to eliminate competition. The consumer answers that all these combinations seem to be at his expense. An economist may well answer that, subject to some qualifications which he is ready to discuss in proper case, the effect of combination is to produce not only imperfections in the market but lethargy which retards industrial and commercial progress. Writers believing that free competition is as doomed as laissez-faire generally insist upon governmental responsibility for the establishment of alternative mechanism for the control of economic activities. The Fair Trade Acts offer no such control. Viewed in their most obvious light as a direct product of high pressure political lobbying by groups asserting narrow and unenlightened interests, they present a definite challenge. The imperfections of a branch of the legal system have been exploited to afford an occasion for another blow at one of the few traditional safeguards of the public interest remaining in our present economic society. As a challenge, they call for an awakened public consciousness and an awakened public interest.

77. Grether, supra note 60, at 292-300.
78. WATKINS, op. cit. supra note 76, at 139. Cf. "A huge organization is too clumsy to take up the development of an original idea." BRANDENIS, THE CURSE OF BIGNESS (1934) 118.