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UNFAIR COMPETITION—FIXING RESALE PRICE.—With the development of our economic structure new problems have constantly arisen to harass the governmental agencies which have sought to protect the public from being dominated by successful traders. Apprehension of the dangers of monopolistic control have lead both cot ·ts and legislative bodies to place a ban upon attempts to create monopolies by artificial combinations. The purpose was to give the people a market in which prices would be controlled by the relation of supply to demand, by forcing independent tradesmen into competition with each other. The effect of this plan was to delay the coming of a time when a more rigid policy would become necessary, but it did not offer a permanent solution of the problem, for in economic theory even perfect freedom of competition will operate to create a monopoly of his market in the hands of the most efficient person in the field. It is this latter development which has made it necessary to find new means of curbing abuses which full control of any field makes possible. The attempt is made to restrain those who dominate a market from securing an absolute monopoly which cannot be broken by new competitors, from using their powers in unfair ways to exclude competitors, and thus to keep market conditions normal by preserving potential competition. The Federal Trade Commission Act seeks to do this by declaring "unfair methods of competition" to be unlawful, and by creating a Commission empowered to order those guilty of violating the act to desist from their unfair practices.

Certain practices such as ruthless price-cutting and the use of "fighting brands" have been unanimously agreed upon as being unlawful. On other schemes there has been considerable doubt. One of the latter type is the setting of a resale price upon the goods which one sells to his dealers. It was settled by the Supreme Court that a producer could not by contracts with his distributors control the price at which the goods should be sold, when it held that such contracts could not be enforced. *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373; 55 L. ed. 502. See 19 MICH. L. REV. 265 for a general discussion. Later, in a criminal prosecution under the Sherman Act, it was held to be illegal to enter into and act upon such an agreement, unenforceable though it might be. *U. S. v. A. Schrader's Son, Inc.* 252 U. S. 85; 64 L. ed. 471. Beyond this point, however, the law is by no means clear. The economic strength of certain businesses is so great as to enable them successfully to prevent serious price cutting by refusing to fill orders from any firms which have been guilty of selling at prices below those which were suggested by the producer. For a time it seemed this might be the way in which a manufacturer could sustain the market for his commodity. In *U. S. v. Colgate & Co.* 250 U. S. 300; 63 L. ed. 992, it was held that a trader was at liberty to decide who could purchase his property, and that there was no illegality in refusal to sell to certain persons. It was not long, though, before this doc-

trine was subjected to a severe qualification. The Beech-Nut Packing Co. adopted a policy of maintaining uniform prices, and had made it effective solely by refusing to honor the orders of any who had sold at a lower price without assurance that in the future the prices "suggested" would be adhered to. An elaborate system of detecting violations was developed in which loyal customers and the agents of the company reported infractions. Packages were secretly marked so that sales might be traced, and special agents were employed. By a divided court an order of the Federal Trade Commission that the company abandon its plan was sustained. *Federal Trade Commission v. Beech-Nut Packing Co.* 257 U. S. 441; 66 L. ed. 307. The majority opinion recognized that a private individual can sell to whomever he may choose, but found in the organized detection of violations an element which rendered the company's conduct illegal. It was said that the *Colgate* case was not affected, but as has been pointed out, the right to select one's vendees is rather empty if one is not permitted to discover those who are undesirable, and the decision gives an advantage to under-handed business methods. 20 MICH. L. REV. 904.

Two recent cases, one from the second and one from the ninth circuit court of appeals, reflect the confusion which exists upon this point of the law. In the first of these cases the American Tobacco Company was found to be co-operating with local jobbing associations, and was refusing to sell its products to jobbers who allowed discounts which were higher than those set by the associations. Although it did not appear that the company was making any special effort to discover those who were cutting price, it kept lists of jobbers who were reported by its customers. An order to cease was issued by the Commission, but on appeal the court set the order aside on the ground that it infringed the appellant's right to select its customers. *American Tobacco Company v. Trade Commission,* 9 F. (2d) 570. The other case was an appeal by Hills Brothers Coffee Company from an order that it cease and desist from keeping a "Do Not Sell" list containing the names of customers who had sold the company's products at less than a stipulated price. The salesmen of the company had been quite active in uncovering sales at less than the named price, and other dealers had been urged to report unloyal competitors. On the authority of the *Beech-Nut* case this order was sustained. *Hills Bros. v. Trade Commission,* 9 F. (2d) 481.

It is in some ways surprising that two courts which are bound by the same body of precedents should arrive at such diverse conclusions as those found in these two cases. They represent, however, a distinct difference of opinion that has been apparent in the whole course of litigation on this subject. One group takes the position that if the vendor is enjoying an existence that is not violative of the so-called anti-trust laws, he is entitled to sell his property upon any terms he chooses. Its view is that all competition in the commodity which he controls is dependent upon his permitting it, and that the public has no right to insist upon competition among his distributors if the sole proprietor finds their competition to be detrimental to his interests. See the dissenting opinion of Holmes, J., in the *Beech-Nut* case *supra,* and *U. S. v. Colgate & Co. supra.* The other side finds the enforcement of a resale price to be an illegal restraint of trade, regardless of the means by which it is

enforced. It refuses to recognize any legitimate right of an owner who is selling his goods beyond the right to fix the price at which he is willing to dispose of his property absolutely.

It is altogether possible that some of our larger business organizations have attained such importance as would justify treating them as quasi-public by imposing upon them a duty to sell to properly qualified persons. It is thought, though, that as long as they are considered as private enterprises, they should be allowed to fix a resale price for the purpose of preserving their distribution systems from the demoralizing effects of price-cutting, and that any resultant restraint of trade must be tolerated as being an incident of anti-trust laws which permit the existence of such large corporations. In 19 MICH. L. REV. 265 will be found a discussion of the whole class of cases such as *Dr. Miles Medical Co. v. Park & Sons, supra,* and the matter of leaving such questions to be decided upon the doctrines of public policy. Whether there is enough left of the theory expressed in the *Colgate* case to afford a relaxation from what now seems to be the prevailing view must remain a matter of speculation until the Supreme Court is confronted with another case which will compel elucidation of what is still a very doubtful point of the law.

T. C. S.