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Re-Sale Price Maintenance

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As a means of stimulating trade and mitigating the throes of a depression several states enacted statutes legalizing contracts for the maintenance of a specified resale price of an article in free and open competition with other articles of the same general class. For enforcement these statutes provide that "Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into... whether the person so advertising, offering for sale or selling is or is not a party to such agreement, is unfair competition and is actionable at the suit of any person damaged thereby." Attacked on constitutional grounds, these statutes received the approval of the United States Supreme Court, which previously had declared resale price restriction, as a matter of general law, contrary to public policy.

whose negligence the master is attempted to be held liable, has not been negligent, as was true in the case at hand, there should be no judgment against the master." McGinnis v. Chicago, R. I. & P. Ry. Co., et al., supra at 594.


2 Ky. Stat. (Carroll's 1937 Supp.), Section 4748i-1, et seq.

3 Old Dearborn Distributing Corp. v. Seagram Distilleries, 299 U. S. 183 (1936). Accord: The Pep Boys v. Py Wil Sales Co., 299 U. S. 188 (1936); Bourjols Sales v. Darfman, 273 N. Y. 167, 7 N. E. (2d) 30 (1937). The United States Supreme Court found that the state's exercise of the police power was reasonably necessary and appropriately applied for the primary purpose of protecting trade marks, and that there was no subtle attempt to fix prices [Tyson & Bro. v. Banton, 273 U. S. 418 (1927)], or to delegate that power to individuals [Eubank v. Richmond, 226 U. S. 137 (1912)]. "Here the restriction already imposed with the knowledge of the appellants ran with the acquisition and conditioned it."

4 Dr. Miles Medical Co. v. Park & Sons, 220 U. S. 373 (1911); Bower v. O'Donnell, 229 U. S. 1 (1913); Straus v. Victor Talking Machine Co., 243 U. S. 490 (1917); Boston Store v. American Graphophone, 246 U. S. 8 (1918); Freh & Son v. Cudahy Packing Co., 256 U. S. 203 (1921); Federal Trade Commission v. Beechnut Packing Co., 267 U. S. 441 (1922). Contra: Ware & De Treville v. Motor Trade Assn., 3 K. B. 40 (1920), 19 A. L. R. 595 (1922). In the decisions of the United States Supreme Court it is not always clear whether the resale contracts involved articles in free and open competition with other articles of the same general class.

One may refuse to sell to those who persist in selling below a specified price. United States v. Colgate, 250 U. S. 300 (1919); State v. Scollard, 128 Wash. 536, 218 Pac. 224 (1923).

After a manufacturer has sold an article he has no right to have secret marks preserved on the enclosing cartons, which he placed there to enable him to identify jobbers who refused to comply with restrictions under which the goods were sold. B. V. D. Co. v. Isaac, 267 Fed. 709, 168 C. C. A. 653, (1919).
Proponents of such contracts argue that they avert the enormous overhead expense of exclusive agencies and extravagant advertising by middlemen. The latter argument seems especially forceful today when the manufacturer can appeal to the millions of people by nationwide radio programs. Competition can be concentrated among the manufacturers and the public will come to rely upon their assertions and demand the highest quality of merchandise. Moreover, the proponents argue that with respect to trade-marked merchandise the reason for striking down restraints on alienation is inapplicable today when huge department stores engage in the reprehensible practice of palming off a "loss leader" to attract the public to buy other articles from which a large profit comes. As much as a vendor is entitled to make covenants to protect his adjoining land, the owner of a trade-marked article ought to be entitled to insure its protection from public obloquy that will come to it eventually because of its low resale price and produce disruption of the industry.

The opponents denounce, as an obnoxious restraint on alienation, any attempt of a manufacturer to control the resale of an article after he has passed title and received all that he intended to charge for the article. With respect to the social and economic problems of resale contracts, their opponents have found their strongest arguments in a report of the Federal Trade Commission for the year ending June 30, 1918. The report stated that power to fix prices will usually be abused by the allowance of too large profits. It protects and encourages inefficient jobbers. It prevents elimination in the overcrowded field of middlemen and tends to secure cooperation of dealers and to prejudice them against brands whose prices are not fixed. It forces other dealers to attempt the control of prices and encourages general standardization of prices and the elimination of normal competition among dealers. Finally, it forces the ultimate consumer to pay higher prices and leaves him no bargaining power with respect to the article concerned.

In 1937 Congress enacted a statute\(^*\) which, amending the Sherman Anti-Trust Act, purports to delimit the extent of those United States Supreme Court decisions deprecating resale contracts. Even with this


\(^*\) 15 U. S. C. A., section 1 (Pocket Part, 1938), 50 Stat. 693 (Aug., 1937): "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 45, of this title, as amended and supplemented."
amendment, federal courts may not enforce resale contracts void in the state where the articles are to be resold, notwithstanding the fact the articles may have been a part of interstate commerce. Apparently from the context of the amendment resale price maintenance contracts concerning goods made in or transported into the District of Columbia for the purpose of resale will be still invalid by virtue of the old statute.

The common law approving contracts between producers and retailers for the maintenance of resale prices has been recently adopted by a Kentucky Fair Trade Act.

Also in 1936 the legislature enacted a fair trade statute. The first section, forbidding discrimination in prices between different communities, is similar to a Missouri statute which was long ago held constitutional.

A facsimile of the section disapproving any selling below "cost" for the purpose of injuring a competitor and providing instructions for ascertaining "cost" was recently declared unconstitutional by a California Appellate Court because the prescription for ascertaining "cost" was too indefinite and uncertain to meet the requirements of due process of law.

After reflection, we think that in view of our complex economic system, varying economic conditions and not misunderstood principles of restraints on alienation ought to guide the courts in passing upon resale price maintenance contracts. "Just as modern needs have brought equitable restrictions on land, of which the old common law knew nothing, into existence, they may also call for a limited departure from the free transfer of chattels for the sake of promoting desirable business practices wholly strange to Coke's day. . . . why should not the doctrine of Tulk v. Moxhay be extended to chattels."

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quently, in view of the varying economic conditions in the divers parts
of the United States one must expect a conflict of authorities in the
absence of statutory declaration of policy. And even state legislatures
may favor different policies.

E. GARLAND RAY.

THE STANDARD OF CARE IN CRIMINAL NEGLIGENCE;
MANSLAUGHTER

It will be the purpose of this paper in general to define the standard
of care in criminal negligence cases resulting in manslaughter, and to
set up as a suggestion to the courts such a definition as will enable
them to discover, without wading through a sea of phrases and gen-
eralities, when the defendant is guilty of negligent manslaughter.

The writer will make no attempt to classify manslaughter cases
according to the instrumentality used. It is his belief that the main
test of criminal negligence is not the instrumentality, but rather the
state of mind of the actor. And thus the instrumentality is important
only as it furnishes evidence of this state of mind.

A few jurisdictions hold to the torts standard as the one for crim-
inal liability also. This, however, makes one liable criminally every
time he would be liable in tort, and ordinary negligence alone would
result in sentences of imprisonment or perhaps death. The writer
urges that this is too strict a standard for human beings who are
normally prone to make many mistakes negligently in their course of
life.

Most jurisdictions, as a result, realize that mere ordinary negli-
gence is not enough to sustain criminal liability. As Bishop puts it,
"there may be a degree of carelessness so inconsiderable as not to be
taken into account as criminal by the law." And one court said:
"Criminality can not be affirmed of every lawful act carelessly per-
fomed. . . . The carelessness . . . must be gross." Again, in People v.
Barnes, the court said "to render the . . . (defendant) . . . criminally
liable, his carelessness . . . must be gross."

So one limiting part to our standard of care has been pointed out.
Mere ordinary negligence is not enough. To hold one liable criminally
for manslaughter as a result of negligence we must look for more than

1 Missouri: State v. Emery, 78 Mo. 77 (1883); State v. Arm-
bruster, 228 Mo. 187, 63 S. W. (2d) 144 (1933). South Carolina:
State v. Gilliam, 66 S. C. 419, 45 S. E. 6 (1903); State v. McCalla,
101 S. C. 303, 55 S. E. 720 (1915); State v. Quick, 167 S. E. 191 (1932).
Wisconsin: Clemens v. State, 176 Wis. 239, 185 N. W. 209 (1921);
Njeciek v. State, 178 Wis. 34, 189 N. W. 147 (1922).

2 Clark and Marshall, Crimes (3rd ed., 1927), Sec. 254a.
3 1 Bishop, Criminal Law (9th ed., 1923), Sec. 216.
4 Fitzgerald v. State, 112 Ala. 34, 20 So. 966 (1896).
5 182 Mich. 179, 148 N. W. 400 (1914).