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THE McGUIRE FAIR TRADE BILL

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The decision of the Supreme Court of the United States in *Schwegmann Bros. v. Calvert Distillers Corp.*[1] was a severe blow to Fair Trade. In considering the effect of the Louisiana Act[2] which was involved in that case, upon the Miller-Tydings Act,[3] the Court held that fair trade contracts in interstate commerce are unenforceable against the so-called nonsigners.

In reality the provision concerning those who are not parties to a fair trade contract but are aware of its existence, represents the gist of all fair trade law. The legislatures of forty-five states[4] have enacted laws in the field, almost all of which contain provisions relating to dealers who "willfully and knowingly" sell below the existent fair trade contract price, and they regard these practices as "injurious" not only to commerce, but also to "the public."[5] This makes it clear that here lies the essence of fair trade legislation. It may be important for the manufacturer of a trademarked specialty product to get a written pledge from his loyal customers that they themselves will observe the established price. However, he derives little benefit from such pledge if others, with whom he has no contract, can undersell and thereby render valueless his policy of an established price. Thus the provision of the law permitting contracts containing a promise not to resell to other dealers who should refuse to observe the established minimum price is obviously one of the important points of fair trade law. The essence of the contract as contemplated by the law is the limitation of the group of distributors to those who are willing to observe the established price and to exclude all other dealers.

To think that the legislature is powerless against people who know how to obtain goods by underhand means, by concealment of their true intentions, or by inducement to breach of contract, is to underestimate the force of the law which characterizes their conduct as *unfair competition* and makes them responsible for the injury inflicted thereby on

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[1]341 U. S. 384, 71 S. Ct. 745, 95 L. ed. 684 (1951).

[2]La. Rev. Stat. (1950) title 51, part VIII, sub-part c.

[3]50 Stat. 693 (1937), 15 U. S. C. A. §1 (1951).

[4]Fair Trade Acts have been enacted in all states except Texas, Missouri and Vermont.

[5]In almost all Fair Trade Acts it is expressly declared that the purpose of the act is to protect "the public" against injurious practices.

any person.[6] "Every man has a right, *under the law* ... to full freedom in disposing of his labor and capital ... and anybody who invades that right without lawful cause or jurisdiction commits a legal wrong."[7] In *Lamb v. Cheney*[8] the New York Court of Appeals emphasizes that interference with contractual rights of others is actionable, "under the laws laid down in the federal courts, the other states and in England." It is neither strange nor even anomalous that the different law makers in formulating the fair trade acts and thereby legalizing fair trade contracts unanimously underlined the warning that deliberate interference with such contracts would be regarded as a tort and prosecuted at the request of any person damaged thereby. In *Max Factor & Co. v. Kunsman,* the Supreme Court of California, referring to the so-called nonsigner provision, declared: "The common law, without statutory authorization, long recognized that unjustifiable interference with contract rights of others constituted a tort. *Lumley v. Gye,* 2 El. & Bl. 216."[9]

A tort liability having thus been created by all the fair trade acts, the frequent references to the rule as a "nonsigner" provision is therefore both inaccurate and misleading. It is not the contract on which this obligation is based, but the fact that price cutting of fair traded goods has been found detrimental to commerce and "the public"[10] and therefore, if deliberate, is characterized as unfair competition. It is obvious that the Miller-Tydings Act could not, in interstate matters, take over any contractual obligation of innocent outsiders, since such an obligation does not exist anywhere. However, to interpret the Miller-Tydings Act as eliminating the prohibition of interference only in that

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[6]The California Fair Trade Act contains the following provision: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to this chapter, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

This provision, almost literally, has been taken over by the Fair Trade Acts of all the other states. Rhode Island, it is true, has a somewhat different formulation. But, in its essence, the legal situation is the same.

[7]Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924 (1898) [italics supplied]; cf. Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946, 947 (1909): "... Men cannot always ... be allowed to use their own property as their interests or desires may dictate without reference to the fact that they have neighbors whose rights are as sacred as their own ..."

[8]227 N. Y. 418, 125 N. E. 817 (1920).

[9]5Cal. (2d) 446, 55 P. (2d) 177, 185 (1936), aff'd 299 U. S. 198, 57 S. Ct. 147, 81 L. ed. 122 (1936).

[10]See note 5, supra.

the Act would follow state laws to the extent to which they sanction fair trade contracts requiring the parties to keep price cutters out of business, while, on the other hand, giving the protection of the Sherman Act to those who deliberately interfere with such contracts, sounds somewhat paradoxical.[11] Under the circumstances, fair trade as approved by nearly all the states has become difficult, if not impossible, to administer. The McGuire Bill,[12] now pending in the House, is attempting to overcome this difficulty. The Bill does not seek to create a fair trade law in interstate commerce, and thus subject it to all the attacks which had often and unsuccessfully been made against such laws in intrastate commerce. As the object of the proposed amendment to the Federal Trade Commission Act is to restore to law the intentions of the authors of the Miller-Tydings Act, it appears reasonable, as far as possible, not to deviate from the text of that rather unfortunate statute. Section 5(2)[13] of the Federal Trade Commission Act is thus to be amended by inserting after the first sentence the following paragraph:

> "Nothing herein contained shall render unfair or unlawful contracts or agreements prescribing minimum prices for the resale of a commodity 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 ... 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 ...."

This part of the Section is to be followed by a new provision that it shall not be regarded as unlawful to enforce any right of action as created by any State, Territory or the District of Columbia

> "which declares that willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in such contracts or agreements, whether the person so advertising, offering for sale, or selling is or is not a party to such contract or agreement is unfair competition and is actionable at the suit of any person damaged thereby."

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[11] Note (1951) 65 Harv. L. Rev. 114, 119 and 120.

[12] H. R. 5767, 82nd Cong. 1st Sess. (1951).

[13] Sec. 5 (a) of Federal Trade Commission Act, 38 Stat. 719 (1914), as amended 52 Stat. 111 (1938), 15 U. S. C. A. §45 (1951) reads: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

The McGuire Bill, like the Miller-Tydings Act, is based on the idea that the fair trade acts of the individual states cannot function[14] if price cutters are in a position to procure the goods through interstate channels, and thus be protected against legal prosecution. It is, therefore, intended, by federal statute, to remove this obstacle.

However, in view of the fact that three of the state legislatures[15] have not yet been inclined to join in the policy of the other forty-five states, Congress found it reasonable, for the time being, to renounce any policy of its own, or, more accurately, to recognize the different policies of the individual state legislatures by declaring that questions of fair trade, in interstate commerce, have to be solved in a manner corresponding with intrastate law in the particular states. It reconciled temporarily the opposing views by applying in interstate cases the rules of those states in whose territories the resale took place. To thus balance the economic policies of the forty-five fair trade states and the contrary policies of the remaining three states is no doubt the most practical expedient. Congress cannot remain unconcerned with what is going on in the individual state legislatures with regard to important matters of commerce. In creating a Congress and authorizing it to make federal laws, the Constitution mainly aimed at securing "union and harmony"[16] within the United States.

Insofar as the bill brings out no more than this logical and practical idea, it certainly is commendable. Any provisions reaching beyond the idea of avoiding the differentiation of the treatment of interstate cases from that of intrastate commerce, however, seems not only superfluous, but fraught with danger. As a matter of illustration, all the Fair Trade Acts of the individual states expressly declare that horizontal agreements are not protected by the statutes. To repeat that, as, unfortunately, the Miller-Tydings Act did, and as the McGuire Bill does again, can only lead to the objection that there is no downright recognition of the state laws with respect to issues arising out of interstate commerce. Otherwise, there would be no need expressly to declare horizontal agreements to be illegal.

Otherwise, and from a general point of view, however, the McGuire Bill appears to be a step in the right direction. A slight modification of the title of the Bill might be advisable. The present title reads:

"A Bill To Amend The Federal Trade Commission Act With

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[14]Note (1951) 65 Harv. L. Rev. 114, 119 n. 12: "The earliest states to adopt such [fair trade] regulations had found that fair trade was not feasible unless nonsigners were bound." See also Pepsodent Co. v. Krauss Co., 56 F. Supp. 922 (E. D. La. 1944).

[15] See note 4, supra.

[16]See Norton, The Constitution of the United States (1922) 143.

Respect To Certain Contracts And Agreements Which Establish Minimum Resale Prices And Which Are Extended By State Law To Nonsigners."

It would seem that something like the following formulation might be preferable:

"A Bill To Amend The Federal Trade Commission Act With Respect To Certain Contracts And Agreements Which Establish Minimum Resale Prices And, *By State Law, Are Protected Also Against Deliberate Interference By Outsiders.*"

In view of the previous comment this amendment would seem self-explanatory.

The idea of an immediate Federal Fair Trade Act which would supersede state acts and introduce a Fair Trade Law in Fair Trade states rose again in recent days. Obviously, from the point of view of fair trade proponents such a law would be preferable to all part solutions like the Miller-Tydings Act or the McGuire Bill. Such an act, however, would require a great deal of discussion in both houses of Congress. It is extremely doubtful whether it could ever pass during the present session. The most knotty problem in connection with a Federal Fair Trade Act would clearly be the question of reconciling the economic policies of the forty-five Fair Trade States with that of the other three states. To bring about a Federal Act, as was planned by the Capper-Kelly Bill[17] which would force all the states to accommodate their intrastate commerce to the Federal Fair Trade policy, would only irritate the advocates of broad state sovereignty, particularly so since, at the present time, the legislatures of the states which oppose fair trade have had sufficient opportunity to establish their own policy. This would, of course, not be in accordance with the peaceful harmony which Congress is supposed to maintain in accordance with its constitutional duties.[18]

While therefore the McGuire Bill seems to be the best way out at the moment, it should nevertheless not be forgotten that such bill can only mean a temporary solution. The federal solution of the entire problem remains the ideal to be striven for by fair trade proponents, even after the McGuire Bill may have become law.

Uniformity must be the goal. The Miller-Tydings Act and the McGuire Bill are only important phases of temporary harmonizing. Ultimately, it would seem that the ideal aim could best be attained

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[17]S. 240, 71st Cong. 1st Sess. (1929); H. R. 11, 71st Cong. 1st Sess. (1929); see also H. R. 536, 71st Cong. 2nd Sess. (1930).

[18]See Beck, The Constitution of the United States (1924) 185, 186.

by creating a commission of state delegates and to have them work out a proper uniform act. Perhaps the National Conference of Commissioners[19] might take a hand in this and pave the way.

For the moment interstate commerce is in urgent need of fair trade regulation. Whether the new law would be perfect or not cannot be be said in advance. Finally, it will, of course, be the "constructive genius of the Supreme Court,"[20] which must help to adapt the Commerce Clause of the Constitution to prevailing conditions and circumstances.

[19]The National Conference of Commissioners on Uniform State Laws is "to promote uniformity in state laws on all subjects where uniformity is deemed desirable and practicable."

[20]See Beck, The Constitution of the United States (1924) 185, 186.

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