Washington Law Review

Volume 35
Number 2 *Washington Case Law—1959*

7-1-1960

Government Regulation

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necessarily that the other is unfit unless there is a finding to that effect. It means only that the one awarded custody was more suitable to have custody *at the time of the award.* It would seem to be only reasonable to have a present determination of whether the non-consenting parent is suitable to have custody. It is not altogether impossible that he might be more suitable, all factors considered, than the adopting parents.

When it is realized that a court weighs the rights of the state and the welfare of the child without careful investigation or consideration, against the rights of a parent—which seem to be characterized by the courts as insubstantial, qualified, or conditional—it is not difficult to see why the parent has been unsuccessful in any contention that the non-consent provision of the adoption statute is unconstitutional. Although a few courts have indicated that there might be some due process limitations on the non-consent provisions of an adoption statute, or have shown concern for and careful consideration of a non-consenting parent's right,[31] others have found no constitutional limitations or have not carefully analyzed the basic factors.[32] It is to be hoped that the Washington court will in the future give the due process considerations more complete analysis, as they do in deprivation and divorce questions involving children, and eliminate the hardships and injustices that the *Candell* case so strikingly illustrates.

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GOVERNMENT REGULATION

Government Regulation—Fair Trade Regulation—"Non-signer" Provision Unconstitutional. By a five to four decision, the Washington Supreme Court recently brought to an end twenty-five years of effective "fair trade" regulation in this state.

In *Remington Arms Co. v. Skaggs*[1] the plaintiff-producer brought an action to enjoin the defendant-retailer from selling the plaintiff's products at less than the minimum price established by the plaintiff in fair

[31] Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81 (1931); *In re* Knott, 138 Tenn. 349, 197 S.W. 1097 (1917); Lee v. Purvin, 288 S.W.2d 405 (Tex. Civ. App. 1955); Lacher v. Venus, 177 Wis. 588, 188 N.W. 613 (1922); Schiltz v. Roenitz, 86 Wis. 31, 56 N.W. 194 (1893).

[32] Succession of Pizzillo, 223 La. 328, 65 So.2d 783 (1953); Winter v. Director, Dept. of Welfare, 217 Md. 391, 143 A.2d 81 (1958); *In re* Asterbloom's Adoption, 63 Nev. 190, 165 P.2d 157 (1946); Booth v. Robinson, 120 Ohio St. 91, 165 N.E. 574 (1929); Adoption of Simpson, 203 Ore. 472, 280 P.2d 368 (1955); *in re Beers,* 78 Wash. 576, 139 Pac. 629 (1914).

[1] 155 Wash. Dec. 1, 345 P.2d 1085 (1959).

trade agreements with other retailers in Washington. The cause was tried on an agreed statement of facts whereby it was stipulated that: (1) the plaintiff had entered into approximately 570 fair trade agreements with Washington retailers, (2) the defendant wilfully and knowingly advertised, offered for sale, and sold products manufactured by the plaintiff at less than their established fair trade price, and (3) the defendant had never entered into fair trade agreements with the plaintiff or any other person. Relying on *Sears v. Western Thrift Stores*,[2] a case which had previously held that the Washington Fair Trade Act in its entirety was not in violation of article XII, section 22[3] of the state constitution, and that the "nonsigner" clause, in particular, was a valid exercise of the state's police power, the superior court gave judgment for the plaintiff.

The only question decided on appeal was the constitutionality of section 3[4] of the Fair Trade Act,[5] generally referred to as the "nonsigner" clause. This particular section provides that once a valid fair trade agreement is executed in Washington, anyone, whether a party to the agreement or not, who knowingly and wilfully sells at less than the stipulated price will be guilty of an act of unfair competition and may be sued by any injured person.[6]

Writing for the majority, Judge Rosellini determined that the "nonsigner" provision was unconstitutional, because it did not pass the judicial test of reasonableness which any law must meet before it can be held to have been a valid exercise of the state's police power. As authority for this proposition, several similar cases from other jurisdictions were cited, as well as two law review articles.[7] The majority opinion also rejected the retention of a proprietary interest theory established in the *Sears* case.[8] The court expressly overruled the *Sears* case, insofar as it validates the "nonsigner" clause, and ordered the lower court decision reversed.

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[2] 10 Wn.2d 372, 116 P.2d 756 (1941).

[3] This clause prohibits the establishment of monopolies or trusts and other restraint of trade practices.

[4] RCW 19.89.030.

[5] RCW Chapter 19.89 (1937).

[6] "Nonsigner" provisions are found in all fair trade acts and are considered by the advocates of fair trade as an important part of the regulatory scheme.

[7] Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175 (1954), and Shulman, *The Fair Trade Acts*, 49 YALE L.J. 607 (1940). Both writers argue that the consumer instead of being benefited by fair trade laws is in fact harmed by being compelled to pay a higher price for the commodity. Therefore, if this is the case, there is no reasonable relationship between the statutory enactment and the public welfare.

[8] This theory was first established by the United States Supreme Court in Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936), in which the Illinois

In the first of two dissents, Judge Hunter answered all of the points raised by the appellant in his brief, including the police power argument relied upon by the majority. It was his view that this question was expressly decided in the earlier *Sears* case, and that even if economic conditions had changed since the statute was enacted in 1937, this fact would not make a law which was valid when enacted invalid by the passage of time. The appellant's recourse, he said, is to the legislature, not the courts.

The second dissent, by Judge Donworth, was based upon the proposition that since the question of a valid exercise of the police power had already been decided by the court, this should not be overruled simply because the present majority thinks the legislature acted beyond its powers. The question of what is or is not in the best interests of the public welfare is for the legislature, not the court, to decide.

The result reached by the Washington court in the *Remington* case is in accord with the recent trend of decisions from other jurisdictions. Originally, forty-five states enacted fair trade laws, the majority of them being passed in the late 1930's.[9] Up until 1950 only one state supreme court had held a fair trade act unconstitutional on its merits,[10] although the highest courts of fourteen states had considered the question.[11] From 1952 on, the swing was the other way, as many courts began to declare the local fair trade act, particularly the "nonsigner" provision, unconstitutional.[12] Most of these courts were dealing with

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Fair Trade Act, including the "nonsigner" provision, was held constitutional. In essence, this theory is that the owner or producer of trade-marked goods retains a proprietary interest in the commodity which he may protect, although legal title may actually have passed to another. The Washington court originally followed this view in the *Sears* case, but in the present case it was rejected on the ground that unless he exacts an agreement from the buyer he should not be entitled to any special protection of the law.

[9] Oppenheim, UNFAIR TRADE PRACTICES 901 (1950).

[10] Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949).

[11] See cases cited in Oppenheim, UNFAIR TRADE PRACTICES 922-923 (1950).

[12] Arkansas: Union Carbide & Carbon Corp. v. White River Distrib., Inc., 224 Ark. 558, 275 S.W.2d 455 (1955); Colorado: Olin Mathieson Chem. Corp. v. Francis, 134 Colo. 160, 301 P.2d 139 (1956); Florida: Miles Labs. v. Eckerd, 73 So. 2d 680 (1954); Georgia: Cox v. General Elec. Co., 211 Ga. 286, 85 S.E.2d 514 (1955); Indiana: Bissell Carpet Sweeper Co. v. Shane Co., 237 Ind. 188, 143 N.E.2d 415 (1957); Kansas: Quality Oil Co. v. E. I. DuPont DeNemours & Co., 182 Kan. 488, 322 P.2d 731 (1958); Kentucky: General Elec. Co. v. American Buyers Co-op, 316 S.W.2d 354 (1958); Louisiana: Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets, 231 La. 51, 90 So. 2d 343 (1956); Michigan: Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952); Nebraska: McGraw Elec. Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N.W.2d 608 (1955); New Mexico: Skaggs Drug Center v. General Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957); Ohio: Union Carbide & Carbon Corp. v. Bargain Fair, 167 Ohio St. 182, 147 N.E.2d 481 (1958); Oklahoma: Revlon, Inc. v. American Mut. Co., 1959 Trade Cas. ¶ 69,483 (D. Okla. 1959); Oregon: General Elec. Co. v. Wahle, 207 Ore. 302, 296 P.2d 635 (1956); South Carolina: Rogers-Kent, Inc. v. General Elec. Co., 231 S.C. 636, 99

the constitutional question for the first time, but for two it was a matter of overruling prior decisions which had upheld the act,[13] and one held the statute unconstitutional in spite of a local federal district court decision to the contrary.[14]

The usual grounds upon which "nonsigner" clauses have been held unconstitutional are: (1) the clause reaches beyond the scope of the state's police power, (2) such a clause delegates to private persons the legislative authority to fix prices, (3) there is a denial of equal protection of the law, and (4) the act itself contains technical defects.[15] Only two states, Virginia and Ohio, have recently enacted fair trade laws.[16]

This change of attitude toward fair trade legislation can probably be attributed to three primary factors: (1) the continuing opposition to fair trade laws by governmental agencies charged with the duty of regulating trade and interstate commerce,[17] and reporting committees;[18] (2) continuing criticism by both legal and lay writers,[19] and (3) a prosperous economy, creating a virile competitive situation which

S.E.2d 665 (1957); Utah: General Elec. Co. v. Thrifty Sales, Inc., 5 Utah 2d 326, 301 P.2d 741 (1956); West Virginia: General Elec. Co. v. A. Dandy Appliance Co., 103 S.E.2d 310 (1958).

[13] Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros., 231 La. 51, 90 So. 2d 343 (1956), overruling Pepsodent Co. v. Krauss Co., 200 La. 959, 9 So. 2d 303 (1942); Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109 54 N.W.2d 268 (1952). *Cf.*, Weco Prods. Co. v. Sam's Cut Rate, Inc., 296 Mich. 190, 295 N.W. 611 (1941).

[14] Rogers-Kent, Inc., v. General Elec. Co., 231 S.C. 636, 99 S.E.2d 665 (1957). *Contra,* Miles Labs., Inc. v. Seignious, 30 F. Supp. 549 (E.D. S.C. 1939).

[15] See Annot., 60 A.L.R.2d 420 (1958), for a complete discussion of all the cases through 1958.

[16] Va. Sess. Laws 1958, c. 259, 1959 2 CCH Trade Reg. Rep. ¶ 15,120. This act is similar to the Washington statute and is conventional in its wording. Ohio Rev. Code, tit. 13, c. 1333, 1959 2 CCH Trade Reg. Rep. ¶ 13,821. This act, passed after the "nonsigner" provision of the previous fair trade law had been declared unconstitutional in Union Carbide & Carbon Corp. v. Bargain Fair, 167 Ohio St. 182, 147 N.E.2d 481 (1958), represents a new type of fair trade law. The first section describes in great detail the evils which the legislature expects to eliminate and specifically states that the law is being enacted under the constitutional authority of the legislature to regulate the sale and conveyance of personal property. (The previous law was passed under the legislature's police power which the court later stated had been exceeded.) The law then goes to create a "proprietary" interest which is retained by the proprietor of a trade-marked commodity. The proprietor may then establish a minimum resale price for his commodity which will be binding upon all who have actual notice of its establishment. Notice may be given by mail, by affixing it to the merchandise or invoice, or by imparting it orally. Mailing of the notice is prima facie evidence of actual notice, and if the distributor acquires merchandise clearly marked with such notice, actual notice is conclusively established. Other provisions set out the remedies available, definitions, and that a sale below the established price is an unfair trade practice. As of yet there have been no cases involving this new law.

[17] FEDERAL TRADE COMM'N, REPORT ON RESALE PRICE MAINTENANCE at LIV-LXIV (1945).

[18] ATT'Y GEN. NAT'L COMM., ANTITRUST REPORT 149-155 (1955).

[19] Shulman, *The Fair Trade Acts,* 49 YALE L.J. 607 (1940); Fulda, *Resale Price Maintenance,* 21 U. CHI. L. REV. 175, 186-201 (1954); Fortune, Jan. 1949, p. 70; Fortune, Apr. 1949, p. 75.

makes resale price maintenance onerous to many types of businesses.[20]

One question not presented to nor answered by the court in the *Remington* case is whether or not the "nonsigner" clause is severable from the remainder of the Fair Trade Act. If it is not, the entire act is then unconstitutional. The answer to this question can be of importance to the Washington lawyer who finds it necessary to inform clients as to the advisability of entering into resale price maintenance contracts. The problem becomes particularly important if the client is engaged in interstate commerce.

Prior to 1937, the federal courts had held that any resale price maintenance contract was in restraint of trade and illegal under both the common law and the Sherman Anti-Trust Act.[21] Because of the growing agitation for fair trade laws during the 1930's, Congress enacted the Miller-Tydings Amendment to section 1 of the Sherman Act.[22] This was an enabling act which legalized resale price maintenance contracts in interstate commerce only if such a contract would be valid under the law of the state where the sale is to be made. In 1951 the Supreme Court held that the amendment did not apply to parties who had not entered into an agreement,[23] and this decision motivated Congress to pass the McGuire Amendment to section 5(a) of the Federal Trade Commission Act[24] which legalized "nonsigner" clauses as applied to interstate commerce transactions. Because these two amendments are only enabling acts, if the entire Washington Fair Trade Act is held to be unconstitutional, contracts made in conformity with its provisions may become illegal when they involve interstate transactions. However, it is submitted that if the Washington tests for severability are applied, the remainder of the Fair Trade Act should still stand as valid legislation, for the following reasons:

First, the Fair Trade Act contains a severability clause[25] which, although not binding on the court, is entitled to consideration and is indicative of the legislative intent.[26]

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[20] Fulda, *Resale Price Maintenance,* 21 U. CHI. L. REV. 175, 186-201 (1954). Significantly, even some manufacturers have, within the past several years, abandoned their fair trade policies. The General Electric Company, long one of the most staunch and strict enforcers of fair trade laws, has removed many of its small appliances from fair trade restrictions. Business Week, March 8, 1958, pp. 26-28.

[21] Dr. Miles Medical Co. v. John D. Park, 220 U.S. 373 (1911).

[22] 26 STAT. 209 (1890) as amended, 50 STAT. 693 (1937), 15 U.S.C. § 1 (1958).

[23] Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

[24] 38 STAT. 719 (1914) as amended, 66 STAT. 632 (1952), 15 U.S.C. § 45. Held constitutional in Schwegmann Bros. Giant Super Mkts. v. Eli Lilly, 205 F.2d 788 (5th Cir.) *cert. denied,* 346 U.S. 856 (1953).

[25] RCW 19.89.900.

[26] State *ex rel.* Pennock v. Coe, 42 Wn.2d 569, 257 P.2d 190 (1953).

Second, the primary test of severability is whether the constitutional and unconstitutional provisions are so intimately connected and interdependent in their meaning and purpose that it could not be believed that the legislature would have passed the one without the other, and to eliminate an unconstitutional part would render the remainder incapable of accomplishing the legislature's purpose.[27] If the parts are separable, the courts are not authorized to declare the whole act void, but must give effect to that part of the act which is within the constitution.[28]

It would be difficult to argue that had the legislature known the "nonsigner" clause would be held unconstitutional they would not have enacted the remainder of the law. This clause, although considered by some as necessary for practical fair trade enforcement, has no effect upon the rights of the contracting parties. Its only purpose is to require those who do not sign an agreement to observe the stipulated minimum price. Without the unconstitutional provision, the Fair Trade Act still legalizes certain specified resale price maintenance agreements.

It could also be validly argued that one of the purposes of the legislature in enacting this law was to make certain that resale price maintenance agreements made in Washington would be lawful in interstate transactions by qualifying for the exemption provided in the Miller-Tydings Amendment to the Sherman Act. This is supported by the fact that although the original Fair Trade Act came into effect in 1935,[29] it was re-enacted in 1937,[30] which was the same year Congress passed the Miller-Tydings Amendment. Another point in favor of separability is that the California Fair Trade Act, passed in 1931 and from which the Washington law was copied, went into effect without a "nonsigner" clause but one was added two years later.[31] It is interesting to note that only one of the fourteen states which have struck down the "nonsigner" clause has also held the entire act invalid on the grounds of inseparability.[32]

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[27] Unemployment Comp. Dept. v. Hunt, 17 Wn.2d 228, 135 P.2d 89 (1943).
[28] State *ex rel.* Fair v. Hamilton, 92 Wash. 347, 159 Pac. 379 (1916).
[29] Wash. Sess. Laws 1935, c. 177.
[30] Wash. Sess. Laws 1937, c. 176.
[31] WEIGEL, FAIR TRADE ACTS 33-35 (1938).
[32] Nebraska—McGraw Elec. Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N.W.2d 608 (1955). The court felt that the unconstitutional section was an inducement to the passage of the entire act, and therefore the whole statute was held invalid. It should be mentioned that in Utah the entire act was also held unconstitutional, but on the grounds that it violated the state constitutional provision against monopolies. General Elec. Co. v. Thrifty Sales, Inc., 5 Utah 2d 326, 301 P.2d 741 (1956). It has been determined that the Washington Fair Trade Act does not violate a similar constitutional provision. Sears v. Western Thrift Stores, 10 Wn.2d 372, 116 P.2d 756 (1941).

Even if the Washington court should declare the whole Fair Trade Act unconstitutional, certain types of resale price maintenance contracts will still be permisible in this state and will probably also qualify under the federal enabling amendments, if the transaction involves interstate commerce. Washington has long permitted and enforced, by case decision, vertical resale price maintenance agreements between a manufacturer and distributor, provided they are incidental to a principal contract, reasonable in reference to the interests of the parties and the public, and the price fixed is fair to the consumer and furnishes the contracting parties only a reasonable profit. *Fisher Flouring Mills v. Swanson.*[33] Both the Miller-Tydings and McGuire Amendments state that resale price maintenance contracts involving interstate transactions will be permitted provided they are lawful as applied to intrastate transactions "under *any statute, law,* or *public policy* . . . in effect in and State" [emphasis added].[34] Although no cases in point could be found, it would seem that a contract which conforms to the doctrine of the *Fisher* case would qualify under the federal law, as this is certainly part of the "law or public policy" of the state of Washington.

With the "nonsigner" provision eliminated from the Fair Trade Act, it remains as a legislative approval plus an extension and clarification of the prior case law. The Fair Trade Act has no requirement that the profit or restraint must be reasonable; it requires only that the commodity have a trade-mark, brand, or name of the owner on it and be "in free and open competition with commodities of the same general class produced by others. . . ."[35] It readily becomes apparent that the extent of the restriction imposed in any future price maintenance contract will depend upon the status of the present Fair Trade Act.

Probably the biggest problem now facing the Washington attorney is what methods of resale price maintenance are available to a client. One of the earliest devices used in an attempt to control resale prices was that of refusing to sell to distributors who would not maintain established minimum prices. The United States Supreme Court has long recognized that a bare refusal to sell is not an unfair trade practice,[36] and that a seller may announce in advance the terms on which he will do business. Washington has recognized the existence of a

[33] 76 Wash. 649, 137 Pac. 144 (1913).

[34] 26 STAT. 209 (1890) as amended, 50 STAT. 693 (1937), 15 U.S.C. § 1 (1958) and 38 STAT. 717 (1914) as amended, 66 STAT. 632 (1952), 15 U.S.C. § 45 (1958).

[35] RCW 19.89.020.

[36] United States v. Colgate Co., 250 U.S. 300 (1919). *But see* United States v. Parke, Davis & Co., 4 L.Ed. 505 (1960).

similar right,[37] and the seller's motives are immaterial.[38] The drawbacks to this method are that unless the seller can also exact an agreement not to cut prices, he has no legal recourse if the buyer does not maintain the desired price, and if the procedure by which the seller keeps check on whether or not his dealers comply with his prices is too elaborate, he may find himself engaged in an unfair trade practice.[39] Depending upon the type of commodity involved, this may or may not be an effective device for forcing adherence to minimum prices. It should be pointed out that this and the method next discussed are available even though the commodity is not branded and in "free and open competition with commodities of the same general class produced by others. . . ."

Another method available to the seller is that of establishing an agency relationship with all of his distributors on both the wholesale and retail levels, and thereby fixing the price by which his agents transfer the title directly from him, to the consumer. This method has been approved by the United States Supreme Court even though the contracts themselves were very elaborate and involved over 21,000 agents.[40] However, the courts do require that the agency relationship be genuine and not merely a "sham."[41] The disadvantage of this particular method is that it would require many businesses to adopt entirely new methods of distribution, a factor which might involve a greater cost than it is worth.

A third method available would be for the producer[42] to enter into agreements with all wholesalers and retailers to maintain the stipulated prices. Such an arrangement would then give the producer a right of action for either an injunction or damages against those who violated their agreements.[43] A liquidated damages provision could be utilized to deter any party from venturing into the field of price cutting. Of course the requirement that the liquidated damages be reasonable would have to be met. Used in conjunction with a refusal to sell unless such an agreement was entered into, this particular method would probably secure the desired price maintenance only if the producer were willing actively to enforce compliance with the contracts.

[37] Powell v. Graham, 183 Wash. 452, 48 P.2d 952 (1935); State v. Scollard, 126 Wash. 335, 218 Pac. 224 (1923).
[38] State *ex rel.* Hamilton v. Standard Oil Co., 190 Wash. 496, 68 P.2d 1031 (1937).
[39] FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922).
[40] United States v. General Elec. Co., 272 U.S. 476 (1926).
[41] United States v. General Elec. Co., 80 F.Supp. 989 (S.D. N.Y. 1948).
[42] A "producer" is defined in the Fair Trade Act as a grower, baker, maker, manufacturer, or seller. RCW 19.89.010.
[43] Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 137 Pac. 144 (1913).

A final possibility would be for the producer to enter into an agreement with his wholesale distributors whereby they would agree not to resell except at stipulated prices and, further, that they would exact a similar agreement from their customers. If the distributor should violate his agreement, the manufacturer would have recourse against him by way of the usual actions available for breach of contract. However, the problem becomes more complicated when the third party violates his agreement. Could the manufacturer bring an action as a third party beneficiary directly against the underselling retailer? The answer to this question would depend upon the Washington position as to who may qualify as a third party beneficiary, a subject beyond the scope of this Casenote.[44] Assuming that the manufacturer could enforce the contract as a third party beneficiary, another factor that will have to be considered is what type of a contract between the wholesaler and the retailer would be sufficient to bind the retailer. It has been held that merely printing a notice on the product to the effect that it may not be resold for less than the specified price will not be sufficient to bind the purchaser.[45] However, in an early California case[46] the court held that the producer could bring an action as a third party beneficiary of a contract between the jobber and the retailer entered into for his benefit, the terms of which were printed on the product. The court pointed out, however, that the retailer had entered into a direct agreement to be bound by the terms as printed on the goods. The court expressly refused to decide what would happen if the defendant had taken the goods with notice of the restriction but without entering into any direct agreement.[47]

The elimination of the "nonsigner" clause in the Washington Fair Trade Act has, for all but a few producers, virtually eliminated any possibility of engaging in resale price maintenance. Both the refusal to sell and agency methods of enforcing resale price maintenance have, as pointed out above, very definite drawbacks which would make them unattractive to most producers. The producer who feels that he can get all of his distributors to enter into actual agreements with him will

[44] See generally, Shattuck, *Contracts in Washington, 1937-1957,* 34 WASH. L. REV. 24, 73 (1959).

[45] Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908).

[46] D. Ghirardelli Co. v. Hunsicker, 164 Cal. 355, 128 Pac. 1041 (1912).

[47] *Cf.,* Garst v. Harris, 177 Mass. 72, 58 N.E. 174 (1900), which held that where the buyer took the goods with notice of the restriction printed thereon and did not express dissent, a contract resulted, which could be enforced by the immediate seller. However, the same court one year later held that the identical restriction would not result in a contract which could be enforced by the manufacturer as a third party beneficiary. Garst v. Hall & Lyon Co., 179 Mass. 588, 61 N.E. 219 (1901).

have to make certain that he has such complete control over his commodities that it would be impossible for non-contracting distributors to obtain them. Distributors who engage in the practice of price cutting never enter into fair trade agreements and have an uncanny ability to obtain fair traded goods from sources other than those controlled by the producer. Should a producer enter into fair trade agreements with his distributors and his products come into the hands of non-contracting price cutters, he would be in the unenviable position of having his normal outlets bound by contract not to lower their prices on goods which are in competition with identical goods selling at a lower price. Few producers would care to take such a risk.

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INSURANCE

Insurance—The Loan Receipt. The question of the validity of a loan agreement between an insurer and his insured was presented to the Washington court for the first time in *Clow v. National Indem. Co.*[1]

Plaintiff (Clow) had insured his personal car with Farmers Insurance Exchange. The policy made Farmers a primary insurer for liability arising from the "ownership, use, or maintenance" of the "described" car or for a newly acquired automobile replacing the described car, provided that notice was given to Farmers within thirty days after its acquisition. The policy also provided that Farmers was secondarily liable on substitute cars used by the insured while the described car was under repair.[2] The car originally insured was a Mercury which Clow traded in as part of the purchase price of a newer Ford. The day after the purchase of the Ford, Clow returned it to the dealer for needed repairs, and the dealer allowed Clow to drive the Mercury. Subsequently (but within thirty days after the purchase of the Ford) Clow, while driving the Mercury, was involved in an accident for which the other driver instituted suit against him. Defendant, who insured the dealer and drivers using "garage" cars with the dealer's permission, denied liability and refused to defend Clow. Clow then tendered the defense of the suit to Farmers, who settled the claim for $3,000, with notice to the defendant. Farmers advanced $3,000 to Clow under a loan agreement which provided that the money was advanced as a loan and was not payment of the claim. Clow agreed to bring an action against either the dealer or his insurer (the defendant), and to

[1] 154 Wash. Dec. 191, 339 P.2d 82 (1959).