

1936

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Recommended Citation

Wallace H. Martin, *The Fair Trade Act*, 5 Fordham L. Rev. 50 (1936).

Available at: <https://ir.lawnet.fordham.edu/flr/vol5/iss1/3>

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The Fair Trade Act

Cover Page Footnote

Member of the New York Bar.

THE FAIR TRADE ACT

WALLACE H. MARTIN†

THE fight over the constitutionality of New York's Fair Trade Act has begun. Justice Brennan of the Kings County Supreme Court upholds the constitutionality of the Act:¹

"In enacting the statute, . . . the Legislature acted within its constitutional powers. It recognized an existing condition as evil and did not act arbitrarily or unreasonably when it provided a means of making effective a remedy for that condition."

Justice Close of Westchester County Supreme Court, holds the Act unconstitutional:²

"Unless the courts are prepared to hold that by placing his brand upon a commodity, the producer retains a property right in that commodity until it reaches the hands of the consumer, so that he may fix its price at every state of distribution, this statute must fall. . . . The use of so-called 'loss-leaders' is to attract customers and is no more destructive of competitors than are other forms of advertising that attract public attention. . . .

"Many writers on economic questions have long urged that legislative relief be granted against so-called price cutting, maintaining that it is an economic evil that should be eradicated. That may be so but my present opinion is that our fundamental law must be changed before such an act as this can be upheld."

Justice Rosenman of the New York County Supreme Court finds the Act unconstitutional:³

"An analysis of this statute discloses several startling features so arbitrary and discriminatory in effect that the statute cannot be sustained under this principle, in so far as it applies to retailers who have not signed price maintenance agreements."

Which viewpoint is correct will, no doubt, be determined in the near future by an appellate court. In the meantime, a discussion of the Act and its history seems warranted.

The stated purpose of the Act is laudable. It is an act "to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark brand or name."⁴ There is no dis-

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1. *Cooper & Cooper v. Angert*, N. Y. L. J., Nov. 2, 1935, at 1655 (N. Y. Sup. Ct.).

2. *Doubleday, Doran & Co., Inc. v. R. H. Macy & Co.*, N. Y. Sup. Ct., Nov. 18, 1935.

3. *Coty, Inc. v. Hearn Dep't Stores, Inc.*, N. Y. L. J., Nov. 26, 1935, at 2077 (N. Y. Sup. Ct.).

4. N. Y. Laws 1935, c. 967. Approved May 17, 1935.

Section 1. Subdivision 1. No contract relating to the sale or resale of a commodity

pute that predatory price cutting and other similar "uneconomic practices" are injurious. They despoil the good will represented by trademarks. They deprive the honest dealer of a fair profit and thus tend to cause economic distress. They are "bait" held out to the public to attract trade in other merchandise, which may be sold at exorbitant profits. Mr. Justice Holmes said in his dissenting opinion in the *Dr. Miles Medical Case*,⁵ one of the early price fixing cases:

"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."

For more than twenty years manufacturers of trade-marked products have sought the remedy for these practices. The decision in the *Miles Medical Case* came in 1911. That decision outlawed contracts between manufacturers, wholesalers and dealers providing for minimum resale prices. Such contracts were found violative of the Sherman Anti-Trust

which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of New York by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(b) That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

2. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(c) By any officer acting under the orders of any court.

§ 2. Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section one of this act, 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.

§ 3. This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

§ 4. The following terms, as used in this act, are hereby defined as follows: "Producer" means grower, baker, maker, manufacturer or publisher. "Commodity" means any subject of commerce.

§ 5. If any provision of this act is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

§ 6. This act shall take effect immediately.

5. *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373, 412 (1911).

Act and the common law. Persistent attempts were made to break down the barrier against maintaining retail prices. Prior to the *Miles Medical Case*, a copyright owner had attempted unsuccessfully to maintain that the copyright statute could be made the basis for price maintenance contracts.⁶ Subsequently patentees contended that the exclusive right to vend given by statute included the right to fix prices.⁷ The results were the same. Ownership was held to carry with it the privilege of selling at any price desired.

Contemporaneous with these legal proceedings, efforts were made to secure national legislation authorizing resale price contracts, but without success.

In 1916, a New Jersey statute⁸ was enacted providing as follows:

"It shall be unlawful for any merchant, firm or corporation to appropriate for his or their own use a name, brand, trade-mark, reputation or good will of any maker in whose product said merchant, firm or corporation deals, or to discriminate against the same by depreciating the value of such products in the public mind, or by misrepresentation as to value or quality or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever except in cases where said goods do not carry any notice prohibiting such practice, and excepting in case of a receiver's sale, or a sale by a concern going out of business."

The constitutionality of this statute was upheld and an injunction granted by the New Jersey Chancery Court.⁹

In 1931, the California legislature passed a measure¹⁰ providing for resale price contracts between manufacturers and their distributors but giving no remedy against price-cutting by distributors not under contract. This law proved ineffective and, in 1933, it was amended by the addition of a section reading as follows:

"Section 1½—Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this act, 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."

The California statute as thus amended¹¹ has become a model for state legislation in Iowa, Maryland, Oregon, Washington, New Jersey, Penn-

6. *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339 (1908); *Straus v. American Publishers Ass'n*, 231 U. S. 222 (1913).

7. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20 (1912); *Bauer v. O'Donnell*, 229 U. S. 1 (1913); *Straus v. Victor Talking Machine Co.*, 243 U. S. 490 (1917).

8. N. J. COMP. STAT. (Supp. 1924) § 225-1.

9. *Ingersoll v. Hahne*, 88 N. J. Eq. 222, 101 Atl. 1030 (Ch. 1917).

10. Cal. Stats. 1931, c. 278.

11. Cal. Stats. 1933, c. 260.

sylvania, Illinois and Wisconsin, in addition to New York. Other states have bills pending.

The New York Act permits manufacturers of trade-marked merchandise to establish minimum resale prices to the consumer and to render those who disregard such minimum prices liable to suit for damages. Section 1 of the Act permits manufacturers to enter into contracts with wholesale and retail distributors specifying the minimum prices below which the goods may not be sold. It provides that the goods must be in "free and open competition" with other products of similar kind or character. It also provides that such contracts shall not apply where the goods are disposed of in *bona fide* clearance sales or as assets in bankruptcy pursuant to court order.

Sub-sections (a) and (b) of Section 1 specify those who may enter into contracts under the Act.

Sub-section (a) reads:

"That the buyer will not resell such commodity except at the price stipulated by the vendor."

The sub-section seems to contemplate a contract between a buyer and his vendor. Manufacturers, under this construction of sub-section (a), may not enter into contracts with retailers if they sell to jobbers and not direct to retailers.

Subdivision (b) reads:

"That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee."

Obviously an error occurs here. Probably the words "in delivery" were intended to be "the person." This sub-section would seem to require that the manufacturer contract with the person to whom he sold the goods and that in turn his vendee enter into similar contracts and so on down the line until the retailer is reached. A construction of these sub-sections which will permit the manufacturer to contract with the retailer, even though the retailer buys from the jobber would simplify operation under the Act. There seems no necessity that "Fair Trade" contracts be in connection with actual sales, since the consideration in contracts between manufacturers and retailers, having no direct contact, sales being made through jobbers, would seem to be substantially the same as in the case of subscriptions for business purposes.¹² If Section 2 of the Act is finally declared constitutional sub-sections (a) and (b) of the first section should be clarified by amendment.

Section 2 embodies the text of the amendment to the California statute quoted above. It provides in effect that whenever such contracts are in

12. 1 WILLISTON, CONTRACTS (1920) § 117.

existence in connection with any given trade-marked article, those who "wilfully and knowingly" fail to conform to the minimum price established under such contracts, are guilty of unfair competition and are liable at the suit of any person who may be damaged thereby, *whether or not they are themselves parties to such contracts.*

Section 3 of the Act reads as follows:

"This act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices."

This section was intended to prevent price fixing agreements between particular classes. No two producers are permitted to enter into Fair Trade contracts and the same is true of any two or more wholesalers or retailers. The Act applies to "vertical" contracts only, not to "horizontal" contracts.

The Act in principle conflicts with the Federal Anti-Trust Acts.¹³ The state Act permits price maintenance, the federal Acts forbid it. In enforcing the respective statutes, however, there is no conflict—at least in theory. The federal statutes are restricted to sales in interstate commerce or to sales directly affecting interstate commerce. The Fair Trade Act contemplates sales in intrastate commerce only. In practice, there may be considerable difficulty in avoiding what would seem to be a clash between the state and federal statutes. In the event of a clash the state statute must give way. A state cannot stand in the way of the enforcement of federal laws.¹⁴

The violation of the federal Anti-Trust Acts subjects the violator to a suit for triple damages by anyone injured,¹⁵ to criminal prosecution under the direction of the United States Attorney General's office,¹⁶ and to a suit by the Federal Trade Commission.¹⁷ Under such circumstances, manufacturers will wish to avoid any plan involving sales directly affecting interstate commerce. The construction of the phrase "directly affecting interstate commerce" becomes of paramount importance.

The Supreme Court has repeatedly defined interstate commerce and acts affecting interstate commerce. *The Schechter Case*¹⁸ is the Court's last word. In that case defendants petitioned for a writ of certiorari in a criminal action to review the judgment below in so far as it affirmed convictions for violations of the live poultry code.

13. SHERMAN ANTI-TRUST ACT, 26 STAT. 209 (1890), 15 U. S. C. A. §§ 1-7 (1926); CLAYTON ANTI-TRUST ACT, 38 STAT. 730 (1914), 15 U. S. C. A. § 12 (1926); FEDERAL TRADE COMMISSION ACT, 38 STAT. 717 (1914), 15 U. S. C. A. §§ 41-51 (1926).

14. See *Northern Securities Co. v. United States*, 193 U. S. 197, 333 (1904).

15. SHERMAN ANTI-TRUST ACT, 26 STAT. 210 (1890), 15 U. S. C. A. § 7 (1926).

16. SHERMAN ANTI-TRUST ACT, 26 STAT. 209 (1890), 15 U. S. C. A. § 1 (1926).

17. FEDERAL TRADE COMMISSION ACT, 38 STAT. 719 (1914), 15 U. S. C. A. § 5 (1927).

18. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 544 (1935); *Federal Trade Comm. v. Pacific Paper Ass'n*, 273 U. S. 52 (1927).

As to interstate commerce, Mr. Chief Justice Hughes speaking for the Court, said:

"Did the defendants' transactions directly 'affect' interstate commerce so as to be subject to federal regulation? The power of Congress extends not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations. Thus, Congress may protect the safety of those employed in interstate transportation 'no matter what may be the source of the dangers which threaten it.' *Southern Ry. Co. v. United States*, 222 U. S. 20, 27. We said in *Second Employers' Liability Cases*, 223 U. S. 1, 51, that it is the 'effect upon interstate commerce,' not 'the source of the injury,' which is 'the criterion of congressional power.' We have held that, in dealing with common carriers engaged in both interstate and intrastate commerce, the dominant authority of Congress necessarily embraces the right to control their intrastate operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. *The Shreveport Case*, 234 U. S. 342, 351, 352; *Wisconsin Railroad Comm'n v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 588. And combinations and conspiracies to restrain interstate commerce, or to monopolize any part of it, are none the less within the reach of the Anti-Trust Act because the conspirators seek to attain their end by means of intrastate activities. *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 310; *Bedford Cut Stone Co. v. Stone Cutters Assn.*, 274 U. S. 37, 46.

"In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as e.g., the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government.

"The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 310. But where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may

be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions. . . ."

In operating under the Fair Trade Act one obvious way to avoid conflict with the anti-trust laws presents itself, *viz.*, to conduct the business wholly within the state of New York. If the goods are manufactured within the state, are sold and distributed and contracts entered into within the state, certainly no interstate commerce would be directly or indirectly affected. On the other hand, if the goods are manufactured outside the state of New York, any attempt to operate under the Fair Trade Act becomes questionable. The manufacture and sale of the goods within the state of New York in many cases becomes impossible. Plans have been suggested which contemplate that the goods will be manufactured without the state, such as the following:

1. The foreign corporation to become qualified to do business within the state of New York, to ship its goods to itself, within the state of New York, where the goods come to rest within its warehouse; thereafter the goods to be sold in intrastate commerce; the "Fair Trade" contracts to be entered into in the state of New York between the manufacturer and the retailers.

2. The foreign corporation to sell its goods without price restriction to jobbers within the state of New York, delivery to be taken at the factory outside the state of New York; the goods then to be placed in the jobbers warehouses in the state of New York; and thereafter to be sold to retailers in intrastate commerce; the "Fair Trade" contracts to be entered into between the foreign manufacturer and the retailers.

In the first plan the contracts would seem not to affect interstate commerce because the foreign manufacturer, himself, would bring the goods within the state. Interstate commerce would be involved only in the actual transportation of the goods. In the second plan the contracts would not directly involve interstate commerce. The jobbers in bringing the goods into the state of New York, would cause the goods to be shipped in interstate commerce, it is true. Following the interstate transaction, however, the goods would come to rest within the state of New York and subsequently would be sold in intrastate commerce. The "Fair Trade" contract would be between the manufacturer and the retailer. The retailer would purchase his goods not from the manufacturer with whom he would be under contract but from the jobber over whom the manufacturer would have no control.

In determining whether any particular plan for operating under the "Fair Trade Act" directly affects interstate commerce, the federal courts, following the *Schechter* decision, will carefully consider the motive and intent of the manufacturer in entering into the contracts. The facts in the *Schechter Case* are readily distinguishable from the facts involved

in either of the two plans here considered. The facts would be closer, should the anti-trust suit be brought against a New York retailer who had signed a "Fair Trade" contract. Then the retail sales would be local, as in the *Schechter Case*, and the effect, if any, on interstate commerce would be remote. No motive could be ascribed to the local retailer of avoiding the anti-trust acts. In an anti-trust suit against a foreign manufacturer, however, we start with the obvious fact that the goods of the foreign manufacturer must be transported over the state line to reach final consumers within the state. Any attempt to fix the price to final consumers in such a case, seemingly would affect interstate commerce. But the proposed plans involve contracts concerned with intrastate retail sales. The only restraint is in connection with the attempt to protect a "distinguished trade-mark." Commodities of the same general class under the terms of the Act must be in fair and open competition. Under such circumstances the intent of the foreign manufacturer would seem to be, not to restrain trade but to protect its good will.

The drastic regulation authorized by Section 2 of the Act at once raises the question of constitutionality. Three New York cases have been previously mentioned.¹⁹ In California, the Fair Trade Act has been declared unconstitutional in one case,²⁰ and constitutional in three,²¹ and is now before the state Supreme Court on appeal. One of these cases may be carried to the Supreme Court of the United States.

The arguments favoring the constitutionality of the Act include the following:

(1) The earlier Supreme Court decisions being based primarily on the federal Anti-Trust statutes are inapplicable to contracts in intrastate commerce.

(2) The Act is not an effort on the part of the state to fix the price of commodities but it seeks rather to curb the admitted evil of unfair or predatory price cutting in all lines of business.

(3) It is a proper exercise of the police power of the state. The police power of the state is not a circumscribed prerogative but is elastic, and in keeping with the growth of knowledge and belief in the popular mind of the need of its application, capable of expansion to meet existing conditions in modern life and thereby of keeping pace with the social, economic, moral and intellectual evolution of the human race; the legislature is primarily the judge of the economic necessity of such enactment; every possible presumption is in favor of its validity; and though the

19. See notes 1, 2 and 3, *supra*.

20. *Factor v. Kunsman*, Cal. Super. Ct., Oct. 18, 1933.

21. *General Cigar Co. v. The Drug Market*, Cal. Super. Ct., Sept. 18, 1934; *Weco Products Co. v. Sunset Cut-Rate Drug Co.*, Cal. Super. Ct., Jan. 24, 1934; *Emerson Drug Co. v. Weinstein*, Cal. Super. Ct.

court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

(4) The Act is not violative of the Fifth and Fourteenth Amendments to the Federal Constitution relating to "due process." The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large or upon any substantial group of people. Due process demands only that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have real and substantial relation to the object sought to be attained. The law is not unreasonable, arbitrary or capricious since full notice is required to be given by the manufacturer desiring to protect his exclusive right to the good will represented by his trade-mark. No penalty can be imposed and no action will lie unless the acts complained of are wilfully and knowingly contrived. The means selected have a real and substantial relation to the object sought to be attained (*i.e.*, the protection of good will), since the price-cut is *per se* a disparagement of the value of the product, and injurious to its standing in the public mind. It implies that the owner of the mark and also retailers who sell at normal prices are seeking unreasonable and exorbitant profits. No one is deprived of the right to own or deal in trade-marked merchandise. The law merely requires an exercise of property rights in such a way as not to inflict hardships upon those who are dependent for their livelihood upon a reasonable margin of profit between the cost and selling price of the goods.

(5) A price-cutter is guilty of unfair competition because he is inducing others to breach contracts approved by the state and is destroying the manufacturer's good will. The ability of the manufacturer to offer his product to the public at reasonable prices depends upon volume production and distribution. For a retailer to destroy the benefits of this system by cheapening the product in the public mind and impairing the public confidence in its value is inequitable. It is within the province of the legislature to declare such acts unfair competition.

Governor Lehman, in approving the Act, said:

"The maintenance of the resale price of commodities that are in open competition is not novel. We have in our present economic life many instances of it; for example, automobiles, gasoline, newspapers, magazines, electrical products.

"It seems to me to be sound economy to devise a method whereby a manufacturer or producer may protect himself against undue slashing of the price of his product, with the consequent destruction of the value of his trade-mark and good-will and with unnecessary loss to others.

"Moreover, I believe this bill will protect the small independent merchant, retailer and businessman. It should offer some protection against devastating cut-price practices, such as the ruthless method of loss-leader articles. The bill will also serve to discourage falsification and adulteration of commodities.

"The bill before me may not be perfect in its provisions. If enacted into law, it will undoubtedly have to be clarified and modified by amendment as we gather experience in its application. In all probability it will not bring about all the good results claimed by its proponents.

"After considerable study and consideration of this bill, I believe it to be in the general public interest that it be placed on our statute books."

Those opposing the Act on the ground that it is unconstitutional argue:

(1) Section 2 of the Act permits a manufacturer to charge a dealer with the breach of contracts made by others, to which he is not a party, and to which he has refused to become a party. The right of the owner to sell his property at a price satisfactory to himself is an inherent attribute to the property itself and is within the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States.²²

(2) A statute regulating or interfering with private business can be upheld only under the police power of the state, upon the theory that it is for the protection of the public safety, health or morals. It has consistently been held by the courts that the power to fix prices does not exist in respect of merely private property or business, but exists only where the business or property involved has become affected with a public interest.²³ The decisions of the Supreme Court upholding governmental price regulation, aside from cases involving legislation to tide over temporary emergencies, has turned upon the existence of conditions peculiar to the business under consideration, which bore such a substantial and definite relation to the public interest as to justify an indulgence in the legal fiction of a grant by the owner to the public of an interest in the use.²⁴ A business is not affected with a public interest merely because it is large or because the public is warranted in having a feeling of concern in respect to its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business, and while the word has not always been limited narrowly as strictly denoting a "right", that synonym more nearly than any other expresses the sense in which it is understood.²⁵

(3) Experience shows that the best interests of the public are served by permitting a free play of competitive conditions. While the purpose of the Act, *i.e.*, to suppress predatory price-cutters, is laudatory, the terms of the Act permit trade-mark owners to maintain any price they desire for their products, no matter how high. Free competition is eliminated; a monopoly is granted. The public is deprived of the benefit of lower

22. *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343 (1888).

23. *Tyson & Bro. v. Banton*, 273 U. S. 418 (1927) and cases cited.

24. *Id.* at 438.

25. *Id.* at 430.

prices, which economical management usually brings. The statute is not limited in terms to a suppression of unfair or predatory price-cutting. It may be employed to prevent any price variation no matter whether it may be justified or not. Consequently, the statute is not in the interest of the public.

(4) The statute is discriminative. It does not provide that the manufacturer sell his product at the same price, even to the same class of wholesale or retail customers. There is nothing in the statute which prevents the manufacturer from selling his product at varying discounts or even at less than cost; and at the same time he may sue for damages a retailer who resells his product at less than the price fixed by contract between the manufacturer and other dealers. An unscrupulous manufacturer, by such methods, may place a retailer at a serious disadvantage in competition with other dealers.

In vetoing the Fair Trade Bill the Arizona Governor said:

"I believe that through the drastic regulations of this measure price fixing on every commodity would be had. This would destroy competition and competition is the life of trade. I believe also that this bill would be very burdensome on many citizens of Arizona who are struggling for a livelihood."

A plaintiff in a suit under the Fair Trade Act normally would plead, in addition to other necessary allegations, merely that the defendant's act of price-cutting was unfair competition as defined by the Act. Very likely no effort would be made to show that price-cutting was unfair competition apart from the statute.

It may be that the framers of the Act in defining price-cutting as unfair competition intended to suggest evidence which should be included in a case testing the constitutionality of the Act. Why is price-cutting unfair competition? Every court will be interested in the answer to that question. In presenting the most favorable case the answer should be evident from the proofs. Testimony of the following facts might prove helpful:

1. Facts showing that plaintiff's advertising and selling methods are free from practices not consonant with the avowed purpose of the Act; that plaintiff is possessed of a distinguished trade-mark, sells his product at a reasonable price, and treats customers in a given class on an equal basis.

2. Facts showing that the sale of the trade-marked article in question at cut prices has injuriously affected the good will represented by the trade-mark. Members of the public might be called who were formerly regular purchasers of the trade-marked article at the standard price but refused to buy the product at the cut price believing it to have been cheapened by the manufacturer so that it could be sold at such a price.

3. Facts showing that the price-cutter was in effect making misrepre-

sentations. For example, members of the public might be called who believed that because of the price-cutter's low prices other retailers were charging exorbitant prices and were, therefore, not reliable.

4. Facts showing that dealers under contract with the manufacturer have been forced to breach their contracts by the acts of the defendant price-cutter with defendant's knowledge.

Inducing a breach of contract has been held to be actionable.²⁶ Disparagement of goods coupled with other unfair acts has been enjoined.²⁷ Contracts to maintain retail prices have been held to be legal irrespective of the Fair Trade Statute.²⁸

In view of decisions such as these the question of whether or not the Act is declaratory of the common law may be presented in one of the cases testing the constitutionality of the Act.

The law of "unfair competition" is forever developing. In its inception it was confined to acts which resulted in the passing off of the goods of one for those of another. Infringement of trade-mark was the most common form of unfair competition, although as early as 1843 Lord Langdale considered a case involving the dress of goods.²⁹ "Unfair competition" is a misnomer. No longer is the lack of competition between the parties a defense to an action for "unfair competition."³⁰ The law now even includes the sale of plaintiff's goods as defendant's.³¹ Equity looks not at the character of the business in which the parties before the court are engaged, but at the honesty or dishonesty of their acts.³²

In recent years Congress has developed a broader term. By the Federal Trade Commission Act³³ *unfair methods of competition* are declared unlawful, leaving to the courts the definition of that term.³⁴

26. *Dr. Miles Medical Co. v. Platt*, 142 Fed. 606 (C. C. N. D. Ill. 1906); *Wells & Richardson Co. v. Abraham*, 146 Fed. 190 (C. C. E. D. N. Y. 1906); *Dr. Miles Medical Co. v. Jayne Drug Co.*, 149 Fed. 838 (C. C. D. Mass. 1906); *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839 (1905); *Hornstein v. Podwitz*, 254 N. Y. 443, 173 N. E. 674 (1930) and cases cited.

27. *Maytag v. Meadows*, 35 F. (2d) 403 (C. C. A. 7th, 1929).

28. *Marsich v. Eastman Kodak Co.*, 244 App. Div. 295, 279 N. Y. Supp. 140 (2d Dep't 1935).

29. *Croft v. Day*, 7 Beav. 84, 49 Eng. Reprints 994 (Ch. 1843). The common law of trade-marks is but a part of the broader law of unfair competition. *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 413 (1916).

30. *Aunt Jemima Mills Co. v. Rigney & Co.*, 247 Fed. 407 (C. C. A. 2d, 1917); *Peninsula Chemical Co. v. Levinson*, 247 Fed. 658, 661 (C. C. A. 6th, 1917); *Ward Baking Co. v. Potter-Wrightington*, 298 Fed. 398 (C. C. A. 1st, 1924); *Vogue Co. v. Thompson Co.*, 300 Fed. 509 (C. C. A. 6th, 1924).

31. *Associated Press v. International News Service*, 248 U. S. 215 (1918).

32. *Dodge Bros. v. East*, 8 F. (2d) 872, 875 (E. D. N. Y. 1925) citing *NEIS, UNFAIR COMPETITION* (1909).

33. 38 STAT. 717, 724 (1914), 15 U. S. C. A. §§ 41, 51 (1926).

34. *Federal Trade Comm. v. Gratz*, 253 U. S. 421, 427 (1920).

The Tariff Act provides that "*unfair methods of competition and unfair acts* of importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent or either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful."³⁵

The National Industrial Recovery Act provided for codes of *fair competition* and the violation of any such code was made a misdemeanor.³⁶

More than twenty years ago *Printers' Ink* sponsored a model statute making untrue and misleading advertising a misdemeanor. The statute was adopted by many states, including New York.³⁷

Price cutting is now defined by the Fair Trade Act as unfair competition. Regardless of the final action on the Fair Trade Act, public consciousness of the unfairness of predatory price-cutting may have been sufficiently aroused that the courts will take cognizance of possible relief under the common law.

35. (Italics supplied). 46 STAT. 703, 19 U. S. C. A. § 1337 (a) (1930).

36. 48 STAT. 196, 15 U. S. C. A. § 703 (1933). Declared unconstitutional in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935). For a reference to Unfair Methods of Competition in the Codes see *Electric Auto-Lite Co. v. P. & D. Mfg. Co., Inc.*, 8 F. Supp. 314, 323 (E. D. N. Y. 1934), *mod.*, C. C. A. 2d, July 8, 1935.

37. N. Y. PENAL LAW (1915) § 421.