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and by the incontestability clause, without the construction given by the court.

To have admitted the unattached application in the *Donati* case would not have been unfair to the beneficiary when, obviously, the application alone would not have been enough to prove fraud. If corroborating evidence had substantiated the claim that the application contained fraudulent statements, then certainly the beneficiary would not have been deprived of anything due him.[27]

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FAIR TRADE CONTRACTS UNDER THE NEW VIRGINIA FAIR TRADE ACT*

In the past decade, the constitutional validity of state fair trade acts has been litigated at a steadily increasing rate.[1] Every state which had considered the validity of its fair trade act prior to 1949 had upheld it, but in that year the Florida Supreme Court declared the Florida Fair Trade Act unconstitutional.[2] A later re-enactment of this statute was held invalid because it contained a "nonsigner" clause[3] which required nonconsenting retailers to abide by minimum retail prices established in a contract between the manufacturer and one or more other retailers. Since that time, the nonsigner clause

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[27]In certain cases they might be entitled to a refund of the premiums paid by the insured.

*The scope of this comment is limited to the constitutional aspects of state fair trade acts, and the Virginia Fair Trade Act in particular. As was stated by the Kentucky Supreme Court:

"We are not concerned with the economic and social philosophy of such laws or the wisdom of the legislation. We are concerned only with the question of whether it is within the power of the Legislature . to enact a statute which sanctions the fixing of minimum retail prices as described." General Elec. Co. v. American Buyers Cooperative, Inc., 316 S.W.2d 354, 358 (Ky. 1958).

For a penetrating account of some economic aspects of fair trade see Fulda, Resale Price Maintenance, 21 U. Chi. L. Rev. 175 (1954). See also Bates, Constitutionality of State Fair Trade Acts, 32 Ind. L.J. 127 (1957).

[1]See table in appendix.

[2]The court held the act unconstitutional as a price fixing measure which did not fall within the state's police power. Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949).

[3]Miles Labs., Inc. v. Eckerd, 73 So. 2d 680 (Fla. 1954). See table in appendix. For a more detailed discussion of the history of the Florida Fair Trade Acts and the effect of federal legislation thereon, see Bates, Constitutionality of State Fair Trade Acts, 32 Ind. L.J. 127, 134-37 (1957).

of these acts has been declared unconstitutional by the courts of last resort in seventeen other states.[4]

The original Virginia Fair Trade Act[5] was declared invalid in 1956 by the trial court in *Benrus Watch Co. v. Kirsch*[6] on two separate grounds: (1) It was repealed by implication by a later statute; and (2) the nonsigner clause was unconstitutional. This decision was affirmed by the Supreme Court of Appeals of Virginia, but only on the ground that the act was repealed by the later anti-monopoly statute,[7] thus leaving the constitutionality of the act undecided.

In 1958 the General Assembly enacted a new fair trade act[8] in

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[4]See table in appendix.

"[T]he trend of recent cases is to strike down the nonsigner clause Since . 1951 [until 1958], the courts of last resort of thirteen states considering the question for the first time, eleven declared the nonsigner clause to be in violation of their respective constitutions while only two upheld it." Quality Oil Co. v. E. I. DuPont de Nemours & Co., 182 Kan. 488, 322 P.2d 731, 735 (1958).

[5]Va. Acts of 1938, ch. 413.

[6]198 Va. 94, 92 S.E.2d 384 (1956).

[7]Va. Code Ann. §§ 59-20 to 59-40 (1950).

[8]Va. Code Ann. §§ 59-8.1 to 59-8.9 (Supp. 1960). Sec. 59-8.3 of the act provides "No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark or trade name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the state by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller "

Sec. 59-8.2 provides: "The following terms, as used in this chapter, are hereby defined as follows:

(1) 'Commodity' means any subject of commerce, except meat and meat products, meal, flour, bakery products, fresh and canned fish, sea food, fresh and canned fruits and vegetables, coffee, tea, ice, sugar and wearing apparel

(10) 'Contract' means any agreement, written or verbal, or actual notice imparted by mail or attached to the commodity or containers thereof.

The acceptance of a commodity for resale, after notice imparted by mail or attached to the commodity or containers thereof, shall be prima facie evidence of actual notice of the terms of the 'contract.' Acceptance for resale with actual notice shall be deemed to be assent to the terms of the 'contract'."

The purposes of the act are expressed in § 59-8.9: "This chapter is enacted in the exercise of the police powers of the Commonwealth, and its purposes are generally to protect and preserve small business, to safeguard the goodwill of trademarks and trade names, to further wholesome competition "

The definition of "commodity" in § 59-8.2 (1) above, appears to have excluded some items while retaining others which are very similar in nature. For example, honey and maple syrup are included but sugar is not; postum and other hot or cold drinks are included but coffee and tea are not. A United States Supreme Court case which may give a basis for some of the exceptions in this definition is New State Ice Co. v. Liebmann, 285 U.S. 262 (1932). In that case Mr. Justice Sutherland said: "It [the ice business] is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the

which the nonsigner clause was apparently deleted, and the scope of the term "contract" was extended to include the situation where a retailer has "actual notice [of fair trade prices] imparted by mail or attached to the commodity or containers thereof."[9] This extension seems to place the retailer in a position where, although he has not expressly agreed to abide by fair trade prices, he is deemed to have done so. The new law was tested in *Standard Drug Co. v. General Elec. Co.*,[10] a declaratory judgment proceeding. The stipulated facts were that the General Electric Company provided a schedule of minimum retail prices and advised the Standard Drug Company that it was fair trading flashbulbs in Virginia. Standard purchased G. E. flashbulbs after receiving this notice and resold them at less than the fair trade prices. There was no express agreement as to fair trade prices. Whether Standard did or did not intend, at the time it accepted the flashbulbs, to sell them at less than the specified minimum prices was not stipulated. Nor was it stipulated that G. E. knew, at the time it shipped the flashbulbs, of such an intention on the part of Standard. The principal contention of Standard was that the Virginia Fair Trade Act was unconstitutional in that it violated the due process,[11] equal protection,[12] and delegation of powers[13] clauses of the Virginia Constitution. G. E. contended that the act was constitutional and that Standard, by accepting the flashbulbs with notice of the fair trade prices, agreed not to sell them at less than those minimum prices. The trial court refused the motion for a declaratory judgment of unconstitutionality and Standard appealed. The judgment of the trial court was affirmed by the Supreme Court of Appeals on the theory that, by accepting the flashbulbs, a voluntary contract was created in which Standard agreed not to sell the flashbulbs at less than the fair trade prices.

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tailor.... And this court has definitely said that the production or sale of food or clothing cannot be subjected to legislative regulation. ." 285 U.S. at 277. The scope of this comment will not permit further inquiry into this interesting problem.

[9]Va. Code Ann. § 59-8.2(10) (Supp. 1960).

[10]202 Va. 367, 117 S.E.2d 289 (1960).

[11]"That no person shall be deprived of his property without due process of law...." Va. Const. art. I, § 11.

[12]"The authority of the General Assembly shall extend to all subjects of legislation, not herein forbidden or restricted..

The General Assembly shall not enact any local, special or private law in the following cases:.

12. Regulating labor, trade, mining or manufacturing..

18. Granting to any private corporation, association, or individual any special or exclusive right, privilege or immunity." Va. Const. art. IV, § 63.

[13]"The legislative power of the state shall be vested in a General Assembly " Va. Const. art. IV, § 40.

Fair trade acts in some other states accomplish the same result as the Virginia act by a different method. Instead of creating a contract between the nonsigning retailer and the manufacturer, these acts state that the terms of a fair trade agreement between the manufacturer and one or more retailers are binding on all other retailers with notice thereof regardless of whether they consented to be bound or not.[14] It is this nonsigner clause which has been subjected to constitutional attack in many states.

Those cases in which the nonsigner clause has been held invalid on constitutional grounds have generally held that the act, insofar as it requires nonconsenting retailers to abide by the minimum price provisions of a fair trade contract, (1) violates due process of law; (2) unlawfully delegates legislative power to private persons; or (3) denies equal protection of the laws.[15]

In *General Elec. Co. v. Wahle*[16] the Oregon Fair Trade Act, insofar as it related to persons who had not consented to be bound by fair trade prices, was held to have violated the due process of law provision of the Oregon Constitution. The right of an owner to sell his property at a price agreeable to him was held to be a valuable property right which the legislature could not take away except in a lawful exercise of police power to protect the public welfare. The Oregon court said that "to be a valid exercise of the police power, the statute and the regulations thereunder must have a well-recognized and direct bearing upon the health, happiness, and well-being of the public as a whole."[17] The court held that the establishment of minimum retail prices of electrical appliances and devices was not so related to the public welfare as to be a valid exercise of police power.

The Kansas court, in *Quality Oil Co. v. E. I. Du Pont de Nemours & Co.*,[18] held the Kansas Fair Trade Act unconstitutional as applied to a retailer who did not consent to maintain the fixed minimum prices in the sale of "Zerex" anti-freeze. The court did not accept an implied assent theory advanced by the defendant. It said:

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[14]The wording of the nonsigner clause is almost uniform throughout all fair trade acts. The old Virginia nonsigner clause stated: "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 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." Va. Acts 1938, ch. 413, § 6.

[15]Remington Arms Co. v. C.E.M. of St. Louis, Inc., 102 N.W.2d 528 (Minn. 1960). See also table in appedix.

[16]207 Ore. 302, 296 P.2d 635 (1956).

[17]Id. at 644.

[18]182 Kan. at 488, 322 P.2d 731 (1958).

> "A trade-mark owner is thus empowered to determine whether the provisions of the law *i.e.*, the nonsigner clause, shall be placed into operation, and, if placed into operation, to what commodities it shall apply and what minimum prices it shall make binding on nonsigning parties, and is also empowered to amend or alter the operation of the law by changing minimum prices, by eliminating or adding commodities, and fixing minimum prices for those added. In short, the trade-mark owner is privileged to place the law into effect, and to amend or alter it at his whim or caprice."[19]

The court held that this provision was unconstitutional as a delegation of legislative powers to private persons.

The Nebraska Supreme Court declared that state's Fair Trade Act unconstitutional for a variety of reasons. In *McGraw Elec. Co. v. Lewis & Smith Drug Co.*,[20] the court, in holding that the nonsigner clause violated the equal protection or special privilege or immunity provision of the Nebraska Constitution, said:

> "It permits the impairment and destruction of the right of any retailer ... from freely selling such commodities to his customers ....
>
> "These aspects of grant are limited, as is clear, only to contracting parties.... To all others engaged in trade and commerce as producers, wholesalers, distributors, and retailers the grants and privileges of the act are denied."[21]

Of the other courts which have considered the constitutionality of state fair trade acts, some have found them unconstitutional for these or other reasons[22] while others have sustained the validity of the statutes.[23] The table in the appendix to this comment gives the status of the constitutionality of nonsigner clauses in those states in which they have been considered by the state court of last resort since 1949.

On the stipulated facts in the *Standard* case, the court apparently felt that the statutory "contract" had been created by the voluntary acceptance of the flashbulbs with notice of the fair trade prices. The statute provides that the term " 'contract' means any agreement, written or verbal, or actual notice imparted by mail or

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[19]Id. at 737.

[20]159 Neb. 703, 68 N.W.2d 608 (1955).

[21]Id. at 616.

[22]See Annot., 60 A.L.R.2d 420 (1958).

[23]The courts which have sustained the constitutional validity of state fair trade acts have usually relied heavily on Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183, (1936). See cases cited in the appendix. See also Fulda, Resale Price Maintenance, 21 U. Chi. L. Rev. 175 (1954).

attached to the commodity or containers thereof."[24] If Standard accepted the flashbulbs with the intention of being bound by the fair trade prices, this would create the contract established by the act. In addition, even if Standard did not intend to be bound, the objective manifestation of intent shown by acceptance with notice would preclude a subsequent denial of the existence of the contract. Standard, in other words, would not be allowed to enjoy the benefits of a contract while secretly refusing to accept other terms of the contract. Thus, with regard to the statutory contract in this case, Standard's subjective intent is immaterial.

However, a retailer's intent may be material if the manufacturer knew when it shipped the merchandise that the retailer did not consent to be bound by the fair trade prices. That is, if Standard had notified G. E. that it refused to abide by the fair trade prices, and G. E. had subsequently filled Standard's order, an entirely different problem would have been presented. The constitutional objections raised by Standard would have to be viewed in a different perspective since the contract could no longer be considered voluntary.

Another situation in which the retailer's subjective intent may be material is that in which there is no direct contract between the manufacturer and the retailer except the sending by the manufacturer, and the receipt by the retailer, of the fair trade notice. That situation would exist if Standard obtained the flashbulbs from sources other than G. E.'s regular distribution channels in Virginia. In *Standard* the statutory contract was created in three steps: (1) Standard's order of the flashbulbs from G. E., (2) the shipment by G. E., and (3) the acceptance by Standard with notice. The holding in the case indicates that possibly only (3) above is necessary for the operation of the act.[25] It would therefore seem that acceptance of the flashbulbs with the intent to be bound by the fair trade prices may give rise to the fair trade contract regardless of the source of the goods. However, if there were an intention on the part of Standard not to be bound by G. E.'s fair trade prices when Standard purchased the flashbulbs from someone other than G. E., it would seem clear that there could be no voluntary statutory contract between G. E. and

[24]Va. Code Ann. § 59-8.2(10) (Supp. 1960).

[25]The court said: "Obviously actual notice imparted by mail or attached to a commodity, without more, is not a contract. [I]t is quite obvious that the notice is the offer to make a contract. [A]cceptance with actual notice of the minimum resale price is deemed assent to the terms imposed in the notice. Voluntary acceptance of the commodity with actual notice of the imposed minimum retail price creates the contract." 202 Va. 367, 117 S.E.2d 289 (1960).

Standard. This hypothetical situation could occur when a retailer sold his complete stock of flashbulbs in a liquidation sale or any similar transaction.[26] If the Virginia statute would allow the creation of a fair trade contract in this situation, it would seem that, again, the constitutional objections raised in the *Standard* case could not be answered on the premise that the contract was voluntary. The court in the *Standard* case said that "the restriction against selling the trade-marked goods at less than a specified minimum price is limited to voluntary agreements."[27] Possibly the addition of either of the suggested facts, *i.e.*, Standard's giving notice to G. E. or Standard's not buying directly from G. E., would negative the existence of a voluntary fair trade contract.

If the statutory definition of the term "contract" is held to include either of these situations, the Virginia retailer would be in the same position as retailers in other states which have the traditional nonsigner clause. He would apparently be bound by fair trade prices no matter what action he takes. In either of these situations, the same question of constitutionality is presented as in the nonsigner cases cited in the appendix. In those cases, as here, a nonconsenting retailer has been required to submit to the terms of a contract by which he had no intention to be bound. The only difference in the rights of a manufacturer against nonconsenting retailers in Virginia and those in other fair trade states is that in Virginia they are called contract rights while in other states they are not given a special name. The mechanics of operation of the two different types of acts are the same except that, under the Virginia procedure, the manufacturer need not enter into an express fair trade agreement with one or more other retailers.

It would seem that if the Supreme Court of Appeals of Virginia is presented with either of the assumed fact situations, the *Standard* case will not be determinative; but the authorities cited in the appendix to this comment will be relevant. If the decision of the Virginia court upholds the act, then other states may consider the advisability of following the example of the General Assembly of Virginia. Even if the Virginia court holds the act unconstitutional in either or both of the assumed fact situations, at least the effect of the

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[26]A situation similar to this, and possibly with the same effect, could occur if Standard purchased the flashbulbs in a state whch did not have a fair trade act, or where the nonsigner clause of the act had been declared unconstitutional or even in a fair trade state with an effective nonsigner clause where G.E. had decided not to fair trade its flashbulbs.

[27]202 Va. 367, 117 S.E.2d 289 (1960).

fair trade acts might be extended to cover situations such as that presented in the *Standard* case, which would not be possible under other fair trade acts where the nonsigner clause has been declared unconstitutional. It therefore appears, from the decision in the *Standard* case, that the proponents of fair trade may have found an answer to the trend of decisions declaring the nonsigner clause of these acts unconstitutional.[28] The present decision indicates that the effectiveness of the statutes may be preserved, at least partially, without that objectionable clause.[29]

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[28]See 29 U.S.L. Week 1087 (Dec. 13, 1960).

[29]This seems inconsistent with the contention of the proponents of fair trade acts that the nonsigner clause is the backbone of the acts, without which the purposes of the statutes could not be realized. See Quality Oil Co. v. E. I. DuPont de Nemours & Co., 182 Kan. 488, 322P.2d 731, 736 (1958); General Elec. Co. v. Klein, 34 Del. ch. 491, 106 A.2d 206, 208 (Sup. Ct. 1954). It appears that, if the Virginia act is the answer to the constitutional attack on the nonsigner clause, the act must have the same effect on nonconsenting retailers as the other acts with a nonsigner clause. See text of this comment following note 26 supra.

APPENDIX

States which have considered the constitutional validity of nonsigner clauses in State Fair Trade Acts since 1949*

State	*Held Valid*	*Held Invalid*			
	Year	*Year*	*Due Process*†	*Delegation of Powers*	*Equal Protection*‡
Arizona[1]	1958				
Arkansas[2]		1955	x		
California[3]	1955				
Colorado[4]		1956	x	x	x
Delaware[5]	1954				
Florida[6]		1954	x	x	x
Georgia[7]		1955	x		
Illinois[8]	1958				
Indiana[9]		1957		x	

*The entries in this table are based on the latest decision by the courts of last resort of the various states. For other decisions before the date listed see the case cited. The cases cited are limited to decisions directly on the constitutional validity of the nonsigner clause of the state fair trade acts under the state constitution. Decisions on the acts which do not involve the nonsigner clause are not included; nor are decisions on unfair practices acts, sometimes called unfair sales acts, and sometimes included within the fair trade act itself. These acts refer to resales below cost as distinguished from sales below a designated fair trade price. For example, see State v. Ross, 259 Wis. 379, 48 N.W.2d 460 (1951). Decisions on special statutes which regulate the resale of particular commodities are not considered. State court cases which were decided on federal constitutional grounds are not included. See, e.g., General Elec. Co. v. Kimball Jewelers, Inc., 333 Mass. 665, 132 N.E.2d 652 (1956) and Bulova Watch Co. v. Anderson, 270 Wis. 21, 70 N.W.2d 243 (1955).

†Due Process as used here includes impairment of contract rights and freedom to contract.

‡Equal protection as used here includes special legislation giving privileges or immunities.

[1]Everybody's Drug Co. v. Duckworth, 84 Ariz. 141, 325 P.2d 400 (1958).

[2]Union Carbide & Carbon Corp. v. White River Distribs. 224 Ark. 558, 275 S.W.2d 455 (1955).

[3]Scoville Mfg. Co. v. Skaggs Pay Less Drug Stores, 45 Cal. 2d 881, 291 P.2d 936 (1955).

[4]Olin Mathieson Chem. Corp. v. Francis, 134 Colo. 160, 301 P.2d 139 (1956).

[5]General Elec. Co. v. Klein, 34 Del. Ch. 491, 106 A.2d 206 (Sup. Ct. 1954).

[6]Miles Labs. Inc. v. Eckerd, 73 So. 2d 680 (Fla. 1954).

[7]Cox v. General Elec. Co., 211 Ga. 286, 85 S.E.2d 514 (1955).

[8]Kinsey Distilling Sales Co. v. Foremost Liquor Stores, Inc., 15 Ill. 2d 182, 154 N.E.2d 290 (1958).

[9]Bissell Carpet Sweeper Co. v. Shane Co., 237 Ind. 188, 143 N.E.2d 415 (1957).

State	Held Valid	Held Invalid			
	Year	Year	Due Process†	Delegation of Powers	Equal Protection‡
Kansas[10]		1958		x	
Kentucky[11]		1958	x		
Louisiana[12]		1956		x	
Maryland[13]	1956				
Michigan[14]		1952	x		
Minnesota[15]		1960		x	
Nebraska[16]		1955	x	x	x
New Hampshire[17]	1960				
New Jersey[18]	1954				
New Mexico[19]		1957	x		
New York[20]	1954				
Ohio[21]		1958	x	x	x
Oregon[22]		1956	x	x	x
Pennsylvania[23]	1955				
South Carolina[24]		1957	x		
Utah[25]		1956			

[10]Quality Oil Co. v. E. I. DuPont de Nemours & Co., 182 Kan. 488, 322 P.2d 731 (1958).

[11]General Elec. Co. v. American Buyers Cooperative, Inc., 316 S.W.2d 354 (Ky. 1958).

[12]Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Mkts., 231 La. 51, 90 So. 2d 343 (1956).

[13]Home Util. Co. v. Revere Copper & Brass, Inc. 209 Md. 610, 122 A.2d 109 (1956).

[14]Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952).

[15]Remington Arms Co. v. G.E.M. of St. Louis, Inc., 102 N.W.2d 528 (Minn. 1960).

[16]General Elec. Co. v. J. L. Brandeis & Sons, 159 Neb. 736, 68 N.W.2d 620 (1955).

[17]Corning Glass Works v. Max Dichter Co., 102 N.H. 505, 161 A.2d 569 (1960).

[18]Lionel Corp. v. Grayson-Robinson Stores, Inc., 15 N.J. 191, 104 A.2d 304 (1954).

[19]Skaggs Drug Center v. General Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957).

[20]General Elec. Co. v. Masters, Inc., 307 N.Y. 229, 120 N.E.2d 802 (1954).

[21]Union Carbide & Carbon Corp. v. Bargain Fair, Inc., 167 Ohio St. 182, 147 N.E.2d 481 (1958). Ohio re-enacted a fair trade act in 1959, and, though this act has not been considered by the Ohio Supreme Court, it was declared invalid by a lower court in Helena Rubenstein, Inc. v. Cinti. Vitamin & Cosmetic Distribs. Co., 167 N.E.2d 687 (Ohio C.P 1960).

[22]General Elec. Co. v. Wahle, 207 Ore. 302, 296 P.2d 635 (1956).

[23]Burche Co. v. General Elec. Co., 382 Pa. 370, 115 A.2d 361 (1955).

[24]Rogers-Kent, Inc. v. General Elec. Co., 231 S.C. 636, 99 S.E.2d 665 (1957).

[25]General Elec. Co. v. Thrifty Sales, Inc., 5 Utah 2d 326, 301 P.2d 741 (1956) (violated anti-monoploy provision of constitution).

State	Held Valid	Held Invalid			
	Year	Year	Due Process†	Delegation of Powers	Equal Protection‡
Washington[26]		1959	x		
West Virginia[27]		1958	x		

[26]Remington Arms Co. v. Skaggs, 345 P.2d 1085 (Wash. 1959).

[27]General Elec. Co. v. A. Dandy Appliance Co., 143 W Va. 491, 103 S.E. 2d 310 (1958).