

University of Chicago Law School

## Chicago Unbound

---

Journal Articles

Faculty Scholarship

---

1926

### Resale Price Maintenance

Ernst W. Puttkammer

Follow this and additional works at: [https://chicagounbound.uchicago.edu/journal\\_articles](https://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

#### Recommended Citation

Ernst W. Puttkammer, Comment, "Resale Price Maintenance," 21 Illinois Law Review 389 (1926).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

tion of the parties is to be sought and carried out whenever possible.<sup>7</sup>

If the language of the instrument is unambiguous, the intention must be ascertained from the language itself,<sup>8</sup> but if the language of the instrument is vague and general or is ambiguous, evidence is admissible to show the actual intention of the parties.<sup>9</sup> In the absence of any such explanation, the instrument is to be construed most favorably to the grantee.<sup>10</sup>

Ordinarily a gift in general terms to A followed by a gift to another "at" or "upon" A's death creates merely a life estate in A.<sup>11</sup>

It is submitted that under the general rules of construction of a deed, the deed in the instant case created merely a life estate in the grantee with a remainder in fee to the grantor and that in any event the decision of the court reads into the instrument a condition which is not actually there and which could only be read in upon competent evidence as to the intention of the parties on the ground that the language of the deed itself was ambiguous and uncertain.

BERNARD C. GAVIT.

RESALE PRICE MAINTENANCE.—[Federal] The doubtful wisdom, from the economic viewpoint, of holding that a seller's efforts to control the resale price of his product are always harmful and should not be permitted to succeed, is interestingly illustrated in a recent case which raises the question in a somewhat unusual manner.<sup>1</sup> The American Tobacco Company (hereafter called the defendant), as well as other manufacturers of tobacco products, sold its goods to jobbers at 90% of a certain schedule of prices called "list" prices. It suggested that its customers should sell to retailers only on the basis of these list prices. This suggestion was frequently disregarded by jobbers, to the mutual dissatisfaction of competing jobbers who saw their margin of profit reduced or even wiped out, and of the defendant which found its system of distribution disorganized. As a result in various cities where the extremest price-cutting conditions prevailed the jobbers themselves took steps to protect themselves by forming loose organizations, which all jobbers were urged to join, which then fixed the proper prices at which sales to retailers should be made. Members were urged to observe these prices, and all violators, whether members or not, were subjected to such pressure as the organization could bring to bear, to

7. *Mittell v. Karl* 133 Ill. 65, 24 N. E. 553, 8 L. R. A. 655; *Wilson v. Carrico* 140 Ind. 533, 40 N. E. 50, 49 A. S. R. 213.

8. *Fowler v. Black* 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670.

9. *Dixon v. Van Hoose* 157 Ala. 459, 47 So. 718, 19 L. R. A. N. S. 719.

10. *Davenport v. Gwilliams* 133 Ind. 142.

11. *Tiffany* op. cit. (2nd ed.) Vol. 1, p. 79.

1. *American Tobacco Company v. Federal Trade Commission* (1925) 9 Fed. (2d) 570.

get them in line. The most effective measure was to shut off their purchases from the manufacturers. The manufacturers, including the defendant, were not only in sympathy with the aims of such organizations, but actively urged upon jobbers the desirability of establishing them. When, therefore, one of these organizations transmitted to the defendant the names of several offending jobbers (members and non-members) and requested its assistance by a refusal to send any further supplies to them, the defendant readily agreed and did refuse to make any further sales to the offenders until they should be reinstated. The respondent commission thereupon issued an order requiring it to cease from assisting any of its dealer customers in maintaining the resale prices agreed upon by such dealer customers. The present proceeding was on a petition to review this order. It should be noticed (1) that there was no attempt by anyone to set the prices at which retailers should sell to ultimate consumers, (2) that while the defendant did suggest the prices to be exacted of retailers, it did not insist on the organizations' adopting these suggestions; the latter were free to agree on other prices and in the present case had in fact decided on a scale substantially lower than the defendant's suggestions. Provided that the jobbers were satisfied, the defendant was quite content also.<sup>2</sup> The commission's order to cease and desist was set aside by the Circuit Court of Appeals.

The English courts have never felt the hostility to any form of resale price maintenance so strikingly shown by our federal courts.<sup>3</sup> Typical of their reaction is Mr. Justice Phillimore's statement<sup>4</sup> that "Price maintenance agreements are modern things and are strange to those who have been brought up on older lines, but they are in almost universal commercial use, and it would be a scandal if they could not be enforced." Such a view, however, has never been adopted by the Canadian courts, which have held without exception that this type of agreement was opposed to public interests.<sup>5</sup> In the United States the state courts have been unable to reach any agreement, such provisions in a sale contract being sometimes considered with little or no disfavor,<sup>6</sup> sometimes regarded as clearly against public policy because in reduction of the competition between job-

2. Although the various manufacturers who thus co-operated with the jobbers' organizations controlled so large a share of the tobacco products that jobbers could not carry on business without dealing with them, the proceedings raised no question of monopoly under the Sherman Act. The sole question was as to the fairness or unfairness of the defendant's method in itself.

3. The leading case is *Elliman v. Carrington* (1901) 2 Ch. 275.

4. In *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.* (1913) 29 T. L. R. 270.

5. *Wampole v. Lyons* (1904) 25 Rap. Jud. de Québec (Supér.) 390; *Wampole & Co. v. Karn Co.* (1906) 11 Ont. L. 619.

6. *Grogan v. Chaffee* (1909) 156 Calif. 611; *Ghirardelli Co. v. Hunsicker* (1912) 164 Calif. 355; *Garst v. Charles* (1904) 187 Mass. 144; *Ingersoll v. Hahne* (1917) 88 N. J. Eq. 222; *ditto* (1918) 89 N. J. Eq. 332. The two last named were decided after the U. S. Supreme Court had taken its definite stand on the opposite side.

bers or between retailer,<sup>7</sup> and sometimes as depending for their fate on further considerations, such as whether the article involved was the monopoly in any event (e. g., where made under a patent) of the seller, who in such a case could not be charged with attempting to restrain trade.<sup>8</sup> Almost without exception they show little attempt to make any real analysis of the economic significance of a contract whose economic desirability or undesirability is the entire question before them. The opposite aspect of the problem, viz., the desirability of freedom of contact, gains even slighter notice. In only two cases was a more thorough analysis made, and in both the restriction was upheld.<sup>9</sup>

The federal courts, under the leadership of *Miles v. Park*<sup>10</sup> have taken a decided stand against resale price maintenance, and although a producer has the bare right to refuse to sell to anyone he chooses,<sup>11</sup> he may not by agreement or concerted action with others make this refusal follow as a consequence of violations of price agreements reported to him.<sup>12</sup> In view of this background a decision adverse to the defendant might have been looked for. It comes as a surprise to find that the decision favors the defendant's price fixing efforts. To arrive at this result the court was forced to distinguish *Miles v. Park* and *Federal Trade Commission v. Beech-Nut Packing Co.* For the former this was done by showing that in it the producer was attempting to control the price at which retailers were selling to consumers by preventing wholesalers from making sales to recalcitrant retailers. Here however the defendant was concerning itself only with wholesalers' prices to retailers. The latter were free to charge what they liked. While this does distinguish the cases, their deeper opposition is not touched. The essence of the *Miles* case lies in Mr. Justice Hughes' statement that "The complainant having sold his product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic," even in the next sale it would seem. Another point of difference between the two cases lies in who did the price fixing. In the *Miles* case it was the producer himself who did so, and it was said that he could fare no better than would be the case if the restriction emanated from the dealers, thus plainly indicating at least as much hostility to the lat-

7. *Hill v. Gray* (1910) 163 Mich. 12; *Freeman v. Miller* (1909) 9 Ohio N. P. N. S. 26.

8. *Garst v. Harris* (1900) 177 Mass. 72.

9. *Fisher Flouring Mills Co. v. Swanson* (1913) 76 Wash. 649; *Park v. National Druggists' Assn.* (1903) 175 N. Y. 1. The latter is in many respects especially like the principal case, except that the price was fixed by the manufacturers, not by the association of druggists.

10. (1911) 220 U. S. 373.

11. *U. S. v. Colgate & Co.* (1919) 250 U. S. 300.

12. *Federal Trade Commission v. Beech-Nut Packing Co.* (1922) 257 U. S. 441. The United States Supreme Court cases down to and including this case are analyzed by Ch. W. Dunn in "Resale Price Maintenance" (1923) Yale Law Jour. 32:676.

ter situation. Yet here it was precisely the dealers who set the price, and for some reason this seems to have been regarded as a point in the defendant's favor. The *Beech-Nut* case too is distinguished on the ground that there was no attempt to fix retail prices. But the principal contribution made by that case was that price fixing passed the forbidden line when it was enforced or aided by co-operative means. Contracts were not a requisite; any form of joint effort was enough. It may be that this is an impossible line to draw, and that there is an insensible gradation from the clearest co-operation, on through mere "suggestions" by the producer, coupled with spontaneous aid by sympathetic distributors; all the way to unexplained conduct by the producer, on which he allows distributors to put their own interpretation.<sup>13</sup> But whether the line can be drawn or not, it has been laid down and the co-operation between the defendant and the jobbers' organization in the instant case was of the clearest kind.

It is difficult therefore to escape the conclusion that the court is in reality trying to reopen the entire subject of the economic undesirability of resale price fixing. This impression is strengthened by their reference in several parts of the opinion to such economic arguments as the demoralization of the defendant's means of distribution and by their assertion that "practices cannot be regarded as unfair methods of competition" which seek to prevent such demoralization.

Such a fundamental about-face may be highly desirable. Where there is one believer in the wisdom of enforcing entire freedom as to resale prices,<sup>14</sup> there are a half dozen who as earnestly urge the fairness and desirability of allowing producers to set the price at which their goods shall everywhere be sold. The center of their argument is that whatever the legal form may be the distribution of a specialty remains of vital concern to the producer even though he has parted with legal title to the article itself, that the jobbers and retailers are in fact as much a part of his selling organ-

---

13. The difficulty of determining where co-operation ceases and independent action begins, and of making a rule of public policy hinge on the answer is well put in a speech by Federal Trade Commissioner Gaskill, reprinted in the Congressional Record. 68th Congress. Feb. 13, 1924. p. 2383.

14. This view is admirably argued by *W. H. S. Stevens* in "Resale Price Maintenance as Unfair Competition" (1919) *Columbia Law Rev.* 19:265. See also *Fed. Trade Commission v. Mishawaka Woolen Mfg. Co.* (1919) 1 F. T. C. Dec. 506. The gist of these arguments is that fixing a resale price penalizes the efficient low-cost distributor in favor of the high-cost one. The weakness of this position is in its assumption that the price-cutting will be done by a more efficient distributor who by reason of his greater efficiency will still distribute at a profit. It is much more likely that the price-cutter will be no more efficient than his rivals, but that his cutting will be due simply to a desire to attract customers to whom he can then sell other goods at such a profit as to make up for the lack of profit (or even loss) on the article used as bait. Under such an interpretation the person desiring to cut prices would not necessarily be the more efficient distributor, but rather the distributor (whether efficient or not) who was large enough to deal in several different lines of goods.

ization as his salesmen are;<sup>15</sup> that if he is unable to control them in this manner he must either allow his good will and the reputation of his specialty to be appropriated by the price-cutter to benefit the latter's business, or at great cost to himself he must do his own distributing, a course impossible for the small producer and so tending directly toward more and more centralization of production;<sup>16</sup> in short, that it is unsound to declare always against public policy a practice that has many highly useful aspects which greater discrimination might enable us to preserve.<sup>17</sup> It is apparent, then, that there are weighty, if not preponderating arguments for a radical revision of the doctrines of the *Miles* and the *Beech-Nut* cases. It is still highly doubtful whether such a revision could or should come from the courts. The courts could carry out such a task only by close distinctions between almost identical situations, minute refinements resting on no real differences, a method of growth well enough suited to certain fields of law, but wholly unsuited to the development of a new formulation of public policy. Such a formulation must be clear and definite, not only that its meaning may be understood by everyone (certainly not an end achieved by the present line of Supreme Court cases), but also that its underlying idea may not risk becoming gradually lost. It would seem to follow that the change can be made most successfully only by means of legislation<sup>18</sup> and that the instant case, however sound its economic direction probably is, may in reality be merely postponing the thorough and entire reconsideration that the subject demands.

E. W. PUTTKAMMER.

SPECIAL ASSESSMENTS—VIEW OF PREMISES.—[Illinois] In *City of Carbondale v. Reith*<sup>1</sup> the court uses this language:

"It was held in *Vane v. City of Evanston*, 150 Ill. 616, that it was within the power of the court, in its sound discretion, to permit the jury in a special assessment proceeding, to view the premises to enable them better to apply the evidence, but the facts ascertained by the jury upon such view could not in themselves be considered as evidence in arriving at the verdict. . . . The parties had no means of

15. *Sumner H. Slichter* "The Cream of Wheat Case" (1916) *Pol. Sci. Quar.* 31:392.

16. This argument is used by the American Fair Trade League. See its *Daily News Record* for June 4, 1925.

17. Telling arguments for this side of the controversy can be found in *Kales* "Contracts and Combinations in Restraint of Trade" (1918) secs. 35 to 39. See also *Henderson* "The Federal Trade Commission" (1924) p. 287 ff., and *Rogers* "Predatory Price Cutting as Unfair Trade" (1913) *Harv. Law Rev.* 27:139 at 151 ff.

18. Many efforts have of course been made to get such legislation through Congress. One of the most promising of these was the Capper-Kelly Resale Price Bill, on which public hearings were held in Washington on April 22 and 23, 1926. An abstract of the testimony of those favoring the measure has been prepared by the American Fair Trade League.

1. (1925) 316 Ill. 538, 546.