

# LAW AND CONTEMPORARY PROBLEMS

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## FOREWORD

Within recent years it has grown apparent that economic necessity is mothering a new ethic of competition. The privilege of buyer and seller to strike their bargain at the price dictated by their respective exigencies is becoming qualified by a new conception of fair dealing. To favor the large buyer as against the small, to sell trademarked goods at a price below that approved by their producer, to cut prices of goods below their cost to the seller, these are the practices, long commonplaces of competitive business, which are coming to be classed with chicane and fraud as beyond the pale of ethical tolerance. Moreover, under the pressure of depression, this emerging ethic has suddenly gained legal sanction. A year ago, with the enactment of the Robinson-Patman Act, the Congress shook the law against price discrimination from its twenty years of fitful slumber in the federal statute books, and drastically extended its provisions. During the past winter nearly a score of states joined the baker's dozen which within the preceding few years had abolished the judge-made restrictions against resale price maintenance. Ten states have sought to keep alive by statute the prohibitions against sales below cost which had flowered briefly in the N.R.A. codes.

Whatever the fate of these particular measures at the hands of enforcement agencies and courts—and, more important still, of business itself—it seems clear that the discontent which they evidence is not ephemeral. The depression is receding but those disparities in bargaining power and those developments in marketing methods which gave rise to this discontent will not disappear. It is the probability that we are witnessing not the culmination, but the inception, of a campaign aimed at governmental control over pricing practices that affords justification for an inquiry into some of the varied problems which are posed by, or lie beneath, this recent wave of legislation.

To place the new measures in the historical sequence of governmental controls over price in this country is the task of the first article in the symposium. The second deals with the relationship of the new laws, and especially the Robinson-Patman Act, to the body of anti-trust laws which antedated them. Since much of the recent legislation is premised on the assumption that cost affords a standard by which the rectitude of pricing may be judged, the necessity for an inquiry into the

concept of "cost" and its relation to price becomes manifest. This is undertaken in the fourth article in which the inquiry leads to an examination of the function of the accountant. The assumption is challenged in the fifth article which is also directed to a consideration of the difficulties in the path of price discrimination control arising out of that redistribution of marketing functions which itself has done so much to inspire the demand for control. Appended to this article is a suggested revision of the Robinson-Patman Act.

Since the efficacy of price controls at earlier stages of the distributive process must ultimately be tested in the retail market, an appraisal of the significance of restrictions upon price competition must include a consideration of the importance, in the quest for the consumer's dollar, of non-price forms of competition: product differentiation and improvement, special services, advertising, and the like. The relation of these forms of competition to the proposed controls is analyzed in the sixth article. The seventh gives specification to this analysis by a depiction of those factors in the bargain which are not embraced in the quoted price, a discussion which, though focused upon the retail sale, is also relevant to the wholesale transaction.

The last three articles are devoted to a consideration of public and judicial attitudes, forces which inevitably condition the life history of law in the statute books. The first of these articles discusses the group attitudes in those branches of the distributive trades from which has come the most insistent demand for resale price maintenance and the prohibition of the "loss leader" and on whose continued cooperation the success of laws to these ends must depend. The next article depicts the reactions of the business world to the Robinson-Patman Act. The final article notes the judicial treatment of laws regulating business practice and examines the possibilities for the strict construction of that Act as it runs the gauntlet of the courts.

The reader will find in this symposium a range of opinion toward the measures under consideration which runs from approval "in principle," tempered by doubt, to forthright condemnation. He should not, however, infer that this legislation has no warmer advocates among students of trade regulation or that more cannot be said in its behalf than is set forth herein. But the proponents have presented their case; their immediate legislative objectives have been attained. While awaiting the verdict of experience, it may not be amiss to ponder some of the implications of that victory as viewed by those who have not enlisted as partisans in the victors' camp.

D. F. C.