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Price Fixing Agreements --- Patented Products

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Supreme Court has recognized the impossibility of embracing in a statute every variation of the type of conduct prescribed as criminal; and has sanctioned the use of broad language in defining crimes, provided the line between criminal and non-criminal conduct is clearly and distinctly drawn.

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PRICE FIXING AGREEMENTS—PATENTED PRODUCTS—Defendants, Line Material Company and Southern State Equipment Company, cross-licensed each other to use complementary patents on an electrical product. The Line Material Company was authorized to sublicense on condition that the sublicensee maintain the same price schedule as Southern States and other licensees. *Held*, this violates the Sherman Anti-Trust Act.[1] "Even if a patentee has a right in the absence of a purpose to restrain or monopolize trade, to fix prices on a licensee's sale of the patented product in order to exploit properly his invention or inventions, when patentees join in an agreement as here to maintain prices on their several products, that agreement, however advantageous it may be to stimulate the broader use of patents, is unlawful per se under the Sherman Act."[2] *United States v. Line Material Company*, 68 S. Ct. 550 (U.S. 1948).

The conflict between the monopoly granted by the patent laws[3] and the competition prescribed by the Sherman Act has been recognized in a series of cases. The immediate problem of price fixing under the protection of the patent laws was considered in *United States v. General Electric Company* and *Bement & Sons v. National Harrow Company*.[5] Both cases upheld the validity of price fixing provisions in contracts between the patentee and a licensee to make and sell. Although the decisions suffered subsequent sharp attack,[6] they were never overruled.

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taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential."

This article was held constitutional in State v. Pete, 206 La. 1078, 20 So.(2d) 368 (1944).

1. 26 Stat. 209 (1890).
2. 68 S.Ct. 550, 564 (U.S. 1948).
3. 35 U.S.C.A § 31 and annotations thereunder.
4. 272 U.S. 476, 47 S.Ct. 192, 71 L.Ed. 362 (1926).
5. 186 U.S. 70, 22 S.Ct. 747, 46 L.Ed. 1058 (1902).
6. Kelley, Restraints of Trade and the Patent Law (1944) 32 Geo. L. J. 213; Note (1927) 40 Harv. L. Rev. 656; Note (1927) 27 Col. L. Rev. 567.

However, fixing the resale price of the patented product itself had been declared violative of the Sherman Act.[7]

The *Line Material* case involved a license to manufacture and sell and not the sale of the patented article itself. The district court decided that the situation was the same as that presented in the *General Electric* case, and that the price-fixing provisions in the licenses should be held valid upon the authority of that case.[8] The Supreme Court, however, reversed the trial court. Three different approaches were taken to the *General Electric* case. Mr. Justice Reed, who delivered the opinion of the Court, thought that the *General Electric* case was meant to include only isolated contracts and not cross-licensing agreements. Mr. Justice Douglas, with Mr. Justice Black, Mr. Justice Murphy, and Mr. Justice Rutledge joining, agreed in a concurring opinion that the *General Electric* case recognized the validity of price fixing provisions between a patentee and his licensee to make and sell. He thought, however, that the situation in the *Line Material* case was exactly the same as that presented in the *General Electric* case, and, therefore, that the earlier case should be expressly overruled, since the "exclusive right" given the patentee in the United States Constitution[9] was never meant to authorize price restrictions. Mr. Justice Burton, with whom Mr. Chief Justice Vinson and Mr. Justice Frankfurter concurred, dissented. They considered the rule of the *General Electric* and *Bement* cases sound and controlling in the instant case.

It is submitted that the concurring opinion in the *Line Material* case is the better view, and that the *General Electric* and *Bement* cases should be overruled. A distinction was originally made between a contract *of sale* of the patented article and a

7. It appears well settled today that any resale price maintenance, not specially authorized by statute, where the patented product itself has been sold is a contract in restraint of trade and violates the Sherman Act. United States v. Univis Lens Co., 316 U.S. 241, 62 S. Ct. 1088, 86 L. Ed. 1408 (1942) (where the patentee attempted to control the price of the patented product in the hands of the finishing licensee who took the final steps in the manufacturing process after purchase from the manufacturing licensee); Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 60 S.Ct. 618, 84 L.Ed. 852 (1940); Boston Store of Chicago v. American Graphophone Co., 246 U.S. 8, 38 S.Ct. 257, 62 L.Ed. 551 (1918); Straus v. Victor Talking Machine Co., 243 U.S. 490, 37 S.Ct. 412, 61 L.Ed. 866 (1917); Bauer v. O'Donnell, 229 U.S. 1, 33 S.Ct. 616, 47 L.Ed. 1041 (1913). See Marcus, Patents, Antitrust Law and Antitrust Judgments Through Hartford-Empire (1945) 34 Geo. L.J. 1. This interpretation of the Sherman Act has been relaxed somewhat by the Miller-Tydings Amendment which allows price fixing under certain conditions. See 50 Stat. 693 (1937).

8. 64 F.(2d) 970 (E.D. Wis. 1948).

9. U.S. Const. Art. I, § 8(8).

contract *to manufacture and sell* that same article. In the case of a contract to sell, it was argued that title to the article passed. Therefore, the vendor was not the owner and could no longer control its sale. In that case it was said that what was sold was not the article but only the right to manufacture and sell it. Therefore, the licensor could legally impose price restrictions on the sale.[10] The practical foundation of this argument collapses when it is recognized that the restraint on commerce of a price fixing provision is equally effective whether imposed through a contract of sale or a contract to make and sell.

One policy argument for allowing price fixing in licenses to make and sell is to encourage the patentee to license, thus reducing the effect of the monopoly. But whether the patentee is the sole manufacturer, or whether he licenses others to manufacture and sell under fixed prices, the public still suffers the effect of monopoly price and remains without the advantages of the competitive market.

It is also argued that, since the patentee has the "exclusive right" to his discovery, he may exercise that right not only by refusing to license but also by attaching stipulations to any license which he does issue. Price fixing provisions in connection with the sale of non-patented products have been held illegal under the Sherman Act.[11] The right, therefore, to condition the license does not necessarily include the right to attach illegal conditions. *United States v. General Electric* condoned price fixing on patented products "provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly."[12] The view of the concurring opinion is that price fixing conditions in the *General Electric* case are not normal and reasonable. This view invalidates price fixing even in the case of an isolated contract to make and sell. Where licenses are issued to many licensees in concert, accompanying price fixing provisions have been declared invalid.[13] The pat-

10. See Havighurst, The Legal Status of Industrial Control by Patent (1941) 35 Ill. L. Rev. 495, 510.

11. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1910); United States v. Trenton Potteries Co., 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927); Sugar Institute v. United States, 297 U.S. 553, 56 S.Ct. 629, 80 L.Ed. 859 (1936); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940).

12. 272 U.S. 476, 47 S.Ct. 192, 71 L.Ed. 362 (1926).

13. Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 33 S.Ct. 9, 57 L.Ed. 107 (1912); Standard Oil Co. of Indiana v. United States, 283 U.S. 163, 51 S.Ct. 421, 75 L.Ed. 926 (1931); Hartford-Empire Co. v. United States, 323 U.S. 386, 65 S.Ct. 373, 89 L.Ed. 322 (1945); United States v. National Lead Co., 322 U.S. 319, 67 S.Ct. 1634, 91 L.Ed. 2077 (1947).

entee receives a normal and reasonable pecuniary reward through his royalty provisions. He would be equally well protected by royalty provisions where there is but one contract.

In *United States v. United States Gypsum Company*,[14] decided at the same time as the *Line Material Company* case, the Court held invalid an industry-wide licensing agreement, containing price fixing provisions, reversing a ruling by the district court[15] based on the precedent of *United States v. General Electric*. The Supreme Court held the *General Electric* case applicable only in the absence of conspiratorial intent. Under this reasoning Mr. Justice Reed's distinction between the *Line Material Company* case and the *General Electric* case is unnecessary if the distinction is grounded instead upon the existence of conspiratorial intent.

Whatever approach is adopted by the Court in the future its ultimate holding in the *Line Material Company* case seems justifiable on grounds of public policy and consistent with recent decisions restricting the "exclusive right" of the patentee to remain consonant with the best interests of the public. Free competition is one of the basic assumptions of a workable capitalistic economy. Competition, to be economically "free," necessarily involves price competition. Fixed prices, even under the guise of patent monopoly, disturb open competition and create abnormal and controlled market conditions.

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TORTS—AUTOMOBILES—POST-COLLISION ACCIDENTS—Defendant's truck was parked on the highway at night without flares or warning lights. The second defendant's automobile, traveling at an excessive rate of speed, crashed into the rear of the truck when defective brakes failed to hold. Plaintiff, a passerby, extricated defendant car driver and his wife from the burning car and returned for a floor mat to use as a pillow for the wife's head. On the floor of the car plaintiff found a pistol, which he handed to the defendant car driver. The car driver, temporarily deranged by the shock of the accident, fired the pistol, striking plaintiff in the leg. *Held*, on appeal from a judgment sustaining an exception of no cause of action, the proximate cause of plaintiff's injury was the concurring negligence of both defendants. Reversed and remanded. *Lynch v. Fisher*, 34 So.(2d) 513 (La. App. 1948).

14. United States v. United States Gypsum Co., 68 S.Ct. 525 (U.S. 1948).
15. 67 F. Supp. 397 (App. D.C. 1948).