

CHAPTER 10

Commercial Law

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§10.1. Security interest: Self-help repossession of collateral: Constitutionality: Due process. The case of *Boland v. Essex County Bank & Trust Co.*¹ presented the question of whether self-help repossession of collateral upon a default by the debtor without notice to the debtor and an opportunity for the debtor to be heard violates the due process clause of the Fourteenth Amendment to the United States Constitution. The issue, which Judge Garrity called "one of the liveliest on the current judicial scene,"² emanates from the rationale of cases such as *Fuentes v. Shevin*,³ *Schneider v. Margossian*⁴ and *Bay State Harness Horse Racing & Breeding Association, Inc. v. PPG Industries, Inc.*⁵ Resolution of the question, however, rests not only upon a determination of whether due process forbids self-help repossession without notice and an opportunity to be heard, but initially whether there is sufficient "state action" arising in connection with self-help repossession so as to bring the due process clause into play.

The issue of whether self-help repossession involves "state action" has been the subject of extensive litigation in the past three years. At the time of this writing, twelve federal district courts have upheld the constitutionality of the remedy, mainly on the basis of finding a lack of state involvement, while five federal district courts⁶ have found that the remedy fails to pass constitutional muster. The issue has also been litigated in various state courts with various results. Only the Courts of Appeals for the Eighth and Ninth Circuits have rendered decisions on the issue, both holding that self-help repossession was not violative of the due process clause because of the lack of significant state involvement.⁷

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§10.1. 1 361 F. Supp. 917 (D. Mass. 1973).

² Id. at 919.

³ 407 U.S. 67 (1972).

⁴ 349 F. Supp. 741 (D. Mass. 1972).

⁵ 365 F. Supp. 1299 (D. Mass. 1973).

⁶ *Adams v. Southern California First Nat'l Bank*, [1969-1973 Transfer Binder] CCH Secured Trans. Guide ¶ 52,216 (9th Cir. 1973).

⁷ *Hampton v. Bank of California*, [1969-1973 Transfer Binder] CCH Secured Trans.

The Fourteenth Amendment prohibits any *state* from taking the property of any person without due process of law. The required state action was found to exist in the *Fuentes*, *Schneider* and *Bay State* cases, either after full discussion or *sub silentio*, because the remedies and procedures challenged were created and authorized solely by legislative enactments of the various states. The unique question presented in the self-help repossession cases is whether state action can be found where the parties privately provide the remedy by the terms of their contract and where no state official or agent becomes involved in the act of repossession.

The various cases consolidated in the *Boland* action involved the defendants' motions to dismiss for failure to state a claim upon which relief could be granted. For the purposes of the motion, the court assumed that the plaintiffs in each of the cases were in default under their contracts and that the defendant creditors had repossessed the automobiles without notice to or the consent of the plaintiffs. The plaintiffs contended that state action existed in the self-help repossession procedures because of the enactment of the various state statutes⁸ (section 9-503 of the Uniform Commercial Code is representative of such statutes and will be referred to herein in lieu of the citation of each of such statutes) which "authorize" the creditor to repossess the property in the event of default by the debtor, because such statutes significantly encourage and regulate the method of repossession and because such statutes expand the common law rights of creditors by (1) permitting the creditor to enter upon the premises of the debtor without an express contractual authorization and (2) permitting the creditor both to repossess and to sue for a deficiency where under the common law the creditor was required to elect between his remedies. The defendants countered by arguing that the right and authority to repossess emanated from the security agreement, which was a private contract between consenting parties, and that the state statutes cited above, rather than authorizing and encouraging repossession, in fact severely limit the procedures which the creditor could undertake in accomplishing a repossession.

The court, although indicating that the issue was close, joined the minority of federal district courts and held that the state was significantly involved in the act of self-help repossession.⁹ The court adopted the plaintiffs' argument that the enactment of section 9-503 of the Uniform Commercial Code and the related statutes significantly encouraged self-

Guide ¶ 52,216 (9th Cir. 1973); *Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank*, 4 CCH Secured Trans. Guide ¶ 52,220 (8th Cir. 1973).

⁸ 361 F. Supp. at 919. G.L. c. 106, §§9-503, 9-504 (repossession and redemption rights); G.L. c. 255, §§13I, 13J (repossession and redemption rights with respect to mortgages, conditional sales and pledges of personal property); G.L. c. 255B, §§20A, 20B (repossession and redemption with respect to motor vehicles); G.L. c. 255D, §§21, 22 (repossession and redemption of retail installment sales and services).

⁹ 361 F. Supp. at 921.

help repossession and made the changes in the common law indicated above. The court was impressed by the extensive regulation of finance companies set forth in the related statutes and indicated that the provisions of section 9-503 and the related statutes set forth a policy which was simply carried over into the terms of security agreements. The court did not indicate its view as to whether creditors derived their authority to repossess from private contracts or otherwise prior to the enactment of the statutes in question, but stated that since the adoption of the statutes, all repossessions have been made under their color.¹⁰

The court also indicated its belief that creditors frequently employed state officials, such as police officers, in connection with repossession and that the plaintiffs' actions should not be dismissed until the plaintiffs had an opportunity to discover the extent to which such state officials might be involved in the act of self-help repossession.¹¹

An interesting aspect of this case was presented by one of the cases which involved a repossession under a Connecticut security agreement. The federal District Court for Connecticut in *Shirley v. State National Bank*¹² had determined on April 2, 1973 that self-help repossession was constitutional. The court noted that one of the cases before it was governed by Connecticut law, and that ordinarily the federal District Court in Massachusetts would adopt as its interpretation of Connecticut law an interpretation rendered by the District Court sitting in Connecticut. The court indicated, however, that it could find no substantial difference between the law of the two states on the issue and that the District Court for Connecticut apparently was unaware of the changes in the common law effected by the adoption of section 9-503. Therefore, the court ignored the *Shirley* holding and found "state action" to exist in both the Massachusetts and Connecticut cases.¹³

The issue of "state action" has not been finally resolved in this country despite the attention of the many state courts, federal district courts and the Courts of Appeals for the Eighth and Ninth Circuits. It would appear that the issue is of a nature to require determination by the United States Supreme Court. Although any suggestion of what action that Court may take is speculative, one must consider that *Fuentes* was a four-to-three decision, Justices Powell and Rehnquist having not been seated in time to join in the consideration of the case. One must also consider the implications of the fact that the Supreme Court did find a lack of state involvement in *Moose Lodge No. 107 v. Irvis*,¹⁴ a case following right on the heels of *Fuentes*. The activity in this area must be

¹⁰ Id. at 920-21.

¹¹ Id. at 921.

¹² [New Developments Transfer Binder] CCH Secured Trans. Rep. ¶ 52,210 (D. Conn. 1973).

¹³ 361 F.Supp. at 921.

¹⁴ 407 U.S. 163 (1972).

followed closely by the bar during the next few years until a final determination is rendered.

In Massachusetts, counsel should also be familiar with chapter 629 of the Acts of 1973, discussed in section 10.16 of this chapter, which imposes new restrictions on the ability of the secured creditor to employ self-help repossession.

§10.2. Real estate attachment: Constitutionality of Massachusetts statutory procedures: Due process. The case of *Bay State Harness Horse Racing & Breeding Association, Inc. v. PPG Industries, Inc.*¹ concerned a suit brought by the plaintiff landowners to determine the constitutionality of the Massachusetts statutory real estate attachment procedures under the due process clause of the Fourteenth Amendment to the United States Constitution. The owners of the attached real estate sought declaratory and injunctive relief against continued enforcement of G.L. c. 223, §§42, 62-66 on the ground that those provisions failed to provide for notice to defendants to be heard prior to the attachment of their real property. Under chapter 223, real property liable to be taken on execution is subject to attachment upon the original writ in any action in which a debt or damages is recoverable.² The statutes authorize the attaching officer to make the attachment upon the original writ and to record a certified copy of the original writ, together with his return as it relates to the attachment, in the appropriate registry of deeds.³ No notice of the attachment is required to be given the defendant prior to the making of the attachment and, of course, the defendant has no opportunity to be heard in a judicial proceeding prior to the attachment.

Relying primarily upon *Fuentes v. Shevin*⁴ and *Schneider v. Margosian*,⁵ the court held that the real estate attachment statutes do violate the Fourteenth Amendment because of the absence of procedures designed to give the landowner notice and an opportunity to be heard in a judicial proceeding prior to the attachment of his real property.

The three judge federal court⁶ declined to certify to the Massachusetts Supreme Judicial Court the question of whether said court would construe the applicable statutes as impliedly requiring notice and an opportunity to be heard.⁷ The determination not to certify was made by the court because of the desirability of a prompt adjudication of the issue and the remoteness of the possibility of a conflicting state decision in light of the *Schneider* decision.⁸

§10.2. 1 365 F. Supp. 1299 (D. Mass. 1973).

2 G.L. c. 223, §42.

3 G.L. c. 223, §§42, 63.

4 407 U.S. 67 (1972).

5 349 F. Supp. 741 (D. Mass. 1972).

6 Coffin, Circuit Judge, Murray & Freedman, District Judges.

7 365 F. Supp. at 1303.

8 Id.

The primary issues before the court were whether a real estate attachment constituted a "deprivation of property" as required for a violation of the Fourteenth Amendment and whether, if such constituted a deprivation of property, there were overriding governmental or societal considerations which would justify the deprivation without notice and bring the procedure safely within the ambit of due process. With respect to the issue of whether a "deprivation of property" existed, the court stated that

the interest created by the attachment operates as a superior interest against subsequent purchasers, mortgagees or attaching creditors, and thus restricts the owner's ability to sell or mortgage the property at its full value.⁹

The court held that the restriction on the owner's ability to sell or mortgage the property at its full value constituted a significant deprivation of property, even though the same (1) was temporary in nature, (2) did not take possession of the property from the landowner, and (3) did not restrict his physical use of the property.¹⁰ The court distinguished the case of *Black Watch Farms, Inc. v. Dick*,¹¹ a 1971 case where the federal district court in Connecticut held constitutional Connecticut real estate attachment statutes, which were similar to those of Massachusetts, on the basis that the *Black Watch* case was decided prior to *Fuentes* and relied upon a narrow interpretation of *Sniadach v. Family Finance Corp.*¹² The court noted that the narrow interpretation of *Sniadach*, as applying the due process requirements of notice and opportunity to be heard only to certain types of property which were deemed to be necessities, such as wages and welfare benefits, had been eliminated by *Fuentes*, thereby making *Black Watch* of little value as a controlling precedent.

The court next considered the standards set forth in *Fuentes* to determine whether there were extraordinary circumstances justifying the postponing of notice and a hearing. The court noted, without extensive discussion, that the statutory scheme permitting such attachments indicated no overriding governmental or societal interests, and it therefore held that the procedures authorized therein were subject to normal due process requirements. Following its discussion of the issues, the court granted the plaintiffs' prayer for declaratory relief—that is, that the statutory real estate attachment procedures were violative of the due process clause—and granted the plaintiffs' prayer for injunctive relief against the continued enforcement of the statutes by the defendant Registrar of Deeds for Norfolk County. In connection with the issuance of the injunction the court held that the Registrar was acting as a state officer in the perfor-

⁹ Id. at 1305.

¹⁰ Id. at 1304-05.

¹¹ 323 F. Supp. 100 (D. Conn. 1971).

¹² 395 U.S. 337 (1969).

mance of his duties under the applicable statutes and was, therefore, subject to injunctive orders of the court.

As has been traditional in the line of cases attacking long-standing statutory creditors' remedies under the due process clause, the court limited the effect of its judgment to the parties before it (including certain other parties in related cases in the Massachusetts Federal District Court where the constitutionality of the real estate attachment procedures had been challenged) and to prospective enforcement only from August 7, 1973, the date of the filing of the order.¹³ This course was taken to avoid the uncertainty and doubt that a retroactive order would have cast upon the validity of all prior attachments of real estate. The "prospective only" effect of the court's order, however, effectively bars a defendant whose real estate was attached prior to August 7, 1973, from attacking the validity of the attachment unless he had commenced his action in the federal district court prior to August 7. The lesson of the "prospective only" rulings is that defendant's counsel should not delay in bringing their client's cases to bar wherever a challenge against a similar statutory procedure is to be made on due process grounds. To wait until another has borne the burden of establishing precedent can leave one's client with an unenforceable constitutional right.

Although there were substantial issues considered and decided in this action, the decision holding real estate attachments unconstitutional appears generally to be consistent with the *Sniadach*, *Fuentes* and *Schneider* cases. It should be noted, however, that this action may have gone, *sub silentio*, beyond those cases in that this was not a consumer action, but one between two commercial enterprises. No discussion of this aspect of the matter appears in the decision.

Although no amendments to the applicable statutes have been adopted by the Massachusetts Legislature, various courts within the Commonwealth have adopted procedures whereby a plaintiff may apply for permission to attach real property.¹⁴ The applicant must give notice of the application and the date of the hearing upon the application to the defendant. The court must find that there is a reasonable likelihood that the plaintiff recover in an amount greater or equal to the amount of attachment if there is jurisdiction over the defendant.¹⁵ The *ex parte* approval may be secured upon findings that the defendant is not subject to personal jurisdiction of the court; upon findings that there is a clear danger that the defendant will remove his property from the Commonwealth or convey it if notified in advance; or upon findings that there is immediate danger that the defendant will damage, destroy or waste the

¹³ 365 F. Supp. at 1307.

¹⁴ Rule 3:27 of the Massachusetts Supreme Judicial Court. This rule is similar to Rule 4.1 of the Mass. R. Civ. Proc., effective July 1, 1974 and will be supplanted by Rule 4.1. See 18 Boston Bar J. 37-38 (Feb. 1974).

¹⁵ Rule 3:27(2) of the Massachusetts Supreme Judicial Court.

attached property.¹⁶ The plaintiff must "justify" the ex parte order if questioned by the defendant at any point.¹⁷

§10.3. Status of tax escrow accounts in Massachusetts. Joining a national trend, mortgagors in Massachusetts are seeking to require that their mortgagees account for any profits realized by the latter's investment of amounts paid periodically to them toward real estate taxes on the mortgaged property.¹ In the case of *Carpenter v. Suffolk Franklin Savings Bank*,² the essential allegations of plaintiffs' bill maintained that they owned real property which was mortgaged to the defendant bank and that the bank required the mortgagors to make monthly payments to the bank of one-twelfth the annual municipal real estate taxes assessed upon the property. The plaintiffs further alleged those tax payments were commingled with the assets of the bank and invested for profit. On the theory that the bank was holding the payments in the capacity of an "escrowee," the plaintiffs primarily prayed for an accounting of the earnings and an order that the bank has no beneficial interest in the tax moneys and that any profits realized belong to the plaintiffs.³ The bank demurred to the bill on the grounds that it failed to state a cause of action and that there was no basis for equitable relief. The superior court sustained the bank's demurrer without leave to amend and the plaintiffs appealed.

The Supreme Judicial Court held that the plaintiffs' bill alleged sufficient facts to state a cause of action⁴ and suggested that the right to relief depended upon "the relationship created between the plaintiffs and the defendant by the mortgages, loans, and payment of tax installments."⁵ The court rejected the plaintiffs' argument that the legislative framework surrounding the transaction authorized the relief of an accounting by the bank.⁶ Although the court concluded that "the statutes neither require nor prohibit the payment of interest to mortgagors on

¹⁶ Rule 3:27(5).

¹⁷ Rule 3:27(6).

§10.3. ¹ See generally, Comment, Payment of Interest on Mortgage Escrow Accounts: Judicial and Legislative Developments, 23 Syracuse L. Rev. 845 (1972); Comment, Applying Federal Antitrust Law to Banking Services—Noninterest-Bearing Mortgage Escrow Accounts, 25 Maine L. Rev. 315 (1973); Annot., 50 A.L.R.3d 697 (1973).

² 1973 Mass. Adv. Sh. 49, 291 N.E.2d 609.

³ Id. at 49-50, 291 N.E.2d at 611.

⁴ Id. at 59-60, 291 N.E.2d at 616.

⁵ Id. at 51, 291 N.E.2d at 611.

⁶ Id. at 52-53, 291 N.E.2d at 612-13. G.L. c. 167, §58 grants "the defendant bank . . . the statutory rights to require tax payments as part of the mortgage and loan agreements." 1973 Mass. Adv. Sh. at 52, 291 N.E.2d at 612. In fact, G.L. c. 168, §35 permits banks to include tax payments in the mortgage or loan agreements. G.L. c. 167, §58 also authorizes the defendant bank to invest tax payments until due. However, §58 does not "indicate which of the parties . . . had the right to any profit returned upon such investments [of tax payments]." 1973 Mass. Adv. Sh. at 52-53, 291 N.E.2d at 612-13.

tax deposits,"⁷ it went on to analyze the relationship between mortgagor and mortgagee as one of agreement or contract, and stated that "particular mortgage and loan agreements may, however, give rise to additional obligations on the part of mortgagor or mortgagee."⁸ If such additional obligations are not imposed by the express language of the mortgage and loan agreements,⁹ they may be by implication of the language used or construction of the agreements.¹⁰

According to plaintiffs' bill the particular mortgages in question recite "an obligation on the part of the mortgagors to make periodic payments of municipal real estate taxes in monthly installments . . . estimated by the defendant."¹¹ The bill also states that the defendant in October of each year remitted payments to the tax collector in satisfaction of the real estate taxes assessed upon the plaintiffs for the pertinent year. The question presented was whether the above were sufficient allegations of a relationship that could provide a basis for an accounting.¹² In determining that the plaintiffs' bill stated a cause of action, the court suggested that the plaintiffs' case could be grounded on a common law trust relationship which would give rise to fiduciary obligations.¹³ In the court's language, "[w]here the mortgagor pays funds to a bank with an expressed purpose that the funds shall be used for a particular purpose, then the funds may be deemed to be held in trust."¹⁴ The court accepted the averments in the bill as true and apparently derived factual conclusions from the averred facts. As a prologue to its discussion of the trust theory, the court stated:

⁷ 1973 Mass. Adv. Sh. at 54, 291 N.E.2d at 613.

⁸ *Id.*, citing *Bennett v. Worcester County Nat'l Bank*, 350 Mass. 64, 213 N.E.2d 254 (1966).

⁹ See *Bennett v. Worcester County Nat'l Bank*, 350 Mass. 64, 213 N.E.2d 254 (1966), and *Hooper v. Mayo*, 298 Mass. 411, 10 N.E.2d 249 (1937), where the "additional obligations" were imposed by express agreement between the parties.

¹⁰ See *Sears v. First Fed. Sav. & Loan Ass'n*, 1 Ill. App. 3d 621, 627, 275 N.E.2d 300, 303 (1971).

¹¹ 1973 Mass. Adv. Sh. at 54, 291 N.E.2d at 614.

¹² *Id.*, 291 N.E.2d at 613.

¹³ *Id.* at 55-56, 291 N.E.2d at 614. See also 2 A. Scott, *The Law of Trusts* §§164, 170 (3d ed. 1967). Other courts have considered this to be a "well settled" doctrine of common law. See, e.g., *Andrew v. Union Sav. Bank & Trust Co.*, 220 Iowa 712, 715, 263 N.W. 495, 497 (1935).

¹⁴ 1973 Mass. Adv. Sh. at 55, 291 N.E.2d at 614, citing 1 A. Scott, *The Law of Trusts* §24 at 192 (3d ed. 1967); *Andrew v. Union Sav. Bank & Trust Co.*, 220 Iowa 712, 715, 263 N.W. 495, 497 (1935); Comment, *Payments of Interest on Mortgage Escrow Accounts: Judicial and Legislative Developments*, 23 Syracuse L. Rev. 845, 852 (1972). The court overstates the doctrine as presented in Scott; the precise language of such doctrine was later quoted by the court: "[w]here the owner of property transfers it to another with a direction to transfer it to . . . a third person, this may be a sufficient manifestation of an intention to create a trust." 1973 Mass. Adv. Sh. at 55, 291 N.E.2d at 614. Compare *Carpenter* with *Andrew v. Union Sav. Bank & Trust Co.*, 220 Iowa 712, 715, 263 N.W. 495, 497 (1935).

The bill designates the installments paid to the bank as "real estate taxes." We think that it is clear from the bill that the tax payments were designated by the mortgagors for a specific purpose, namely to pay the real estate taxes.¹⁵

This language, read in light of the court's statement of the common law doctrine quoted above, is confusing. It is unclear whether the court intended to conclude as a matter of fact or matter of law¹⁶ that the "designation" of periodic payments to defendant bank as "real estate taxes" is a sufficiently "expressed purpose" ("namely to pay real estate taxes"¹⁷) so that a trust is "deemed" to have been created. If the court's dictum is to be read as applicable to the later determination of the merits, then the Supreme Judicial Court will be the only court to have adopted the trust theory as a result of this type of action.¹⁸ Despite the confusion created by the language of the court regarding conclusions of fact, the superior court still must determine on remand all factual questions;¹⁹ the superior court must now ascertain "the intention of the parties [as] 'manifested by their words and conduct and the end to be accomplished' "²⁰ so as to determine whether a trust was created.²¹

¹⁵ 1973 Mass. Adv. Sh. at 55, 291 N.E.2d at 614.

¹⁶ To reiterate the court's language: "[w]e think it is clear" *Id.*

¹⁷ A rationale supporting the quantum leap made by the court, i.e., from designation as "real estate taxes" to designation of the "specific purpose, namely to pay the real estate taxes," may be inferred from the language of G.L. c. 168, §35 and G.L. c. 167, §58 and their various amendments. See 1973 Mass. Adv. Sh. at 51-53, 291 N.E.2d at 611-13.

¹⁸ See, e.g., *Sears v. First Fed. Sav. & Loan Ass'n*, 1 Ill. App. 3d 621, 275 N.E.2d 300 (1971); *Umdenstock v. American Mortgage & Inv. Co.*, 363 F. Supp. 1375 (W.D. Okla. 1973); *Zelickman v. Bell Fed. Sav. & Loan Ass'n*, 13 Ill. App. 3d 578, 301 N.E.2d 47 (1st Dist. 1973); *Richman v. Security Sav. & Loan Ass'n*, 57 Wis. 2d 358, 204 N.W.2d 511 (1973); *Brooks v. Valley Nat'l Bank*, No. C-254842 (Super. Ct., Maricopa County, Ariz., May 8, 1973); *Cale v. American Nat'l Bank*, No. 901,760 (Common Pleas, Cuyahoga County, Ohio, November 29, 1973).

¹⁹ "Our holding, limited to the present record, is simply that there are sufficient averments in the plaintiffs' bill to state a cause of action." 1973 Mass. Adv. Sh. at 59-60, 291 N.E.2d at 616.

²⁰ *Id.* at 55, 291 N.E.2d at 614. An express trust is created "only if the settlor properly manifests an intention to create a trust" 1 A. Scott, *The Law of Trusts* §23 at 191 (3d ed. 1967); a resulting trust arises where "circumstances indicate the absence of an intention to give the beneficial interest to the person in whom the legal title to the property is vested." 5 A. Scott, *The Law of Trusts* § 404.1 at 3213 (3d ed. 1967). In each case the court must ascertain "the intention of the parties [as] 'manifested by their words and conduct and the end to be accomplished.'" 1973 Mass. Adv. Sh. at 55, 291 N.E.2d at 614.

²¹ Determination of this issue may have to await some time in that plaintiffs amended their bill so as to represent that "class of persons consisting of Massachusetts real estate owners who were or are mortgagors of one of the defendant banks . . . and, during the last six years, have each made tax escrow account payments to one of the said banks pursuant to mortgage instruments which required the mortgagors to make such payments in monthly installments equal to one-twelfth of the municipal real estate taxes" (Final Amended Complaint, *Carpenter v. Suffolk Franklin Sav. Bank*, at 1) and to

§10.4. Nonsigner provision of the so-called Fair Trade Law declared unconstitutional. In the case of *Corning Glass Works v. Ann & Hope of Danvers, Inc.*,¹ the nonsigner provisions of the Fair Trade Law² were held unconstitutional, thus overruling *General Electric Co. v. Kimball Jewelers, Inc.*³ The court joins "most of the courts of other states"⁴ that have "resolve[d] constitutional doubts"⁵ against the validity of fair trade laws.⁶ Challenged in this case on several constitutional grounds, the nonsigner provision survived repeated attacks before the court as violations of due process and equal protection,⁷ and as an unconstitutional exercise of police power;⁸ it weakened when ruled to be "a delegation of

include as party defendants "all of the savings banks and co-operative banks lawfully incorporated under the laws of the Commonwealth," (id. at 2) thereby creating additional preliminary issues of service of process, venue and standing to represent the above class.

§10.4. 1 1973 Mass. Adv. Sh. 575, 294 N.E.2d 354. This case is treated more extensively in a student comment in §10.15 *infra*.

2 G.L., c. 93, §§14A-14D. The nonsigner provision is contained in §14B, which provides:

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 preceding section, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is hereby declared to constitute unfair competition and to be actionable at the suit of any person damaged thereby. Any person advertising, offering for sale or selling any commodity as aforesaid shall, in addition, forfeit through civil process to the commonwealth the sum of fifty dollars.

3 333 Mass. 665, 132 N.E.2d 652 (1956). The *General Electric* case was overruled to the limited extent that the court in that case held that "[t]he fair trade law does not constitute an unlawful delegation of power to the owner of the trademark or brand." Id. at 677, 132 N.E.2d at 659.

4 1973 Mass. Adv. Sh. at 580, 589, 294 N.E.2d at 357, 363.

5 Id. at 580, 294 N.E.2d at 357.

6 It is curious that the court goes to great lengths to present statistical data as to the status of fair trade laws in other states and the District of Columbia. Id. at 579, 589, 294 N.E.2d at 357, 363. The court decides that developments in other jurisdictions compel reconsideration of *General Electric* when the court's reconsideration involves only the interpretation of Massachusetts law (none of which has substantially changed since 1956). If the court is so concerned about the doctrine of *stare decisis*, I would think the words of Mr. Justice Brandeis would be more apt:

in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often over-ruled earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-08 (1932) (dissenting opinion) (footnotes omitted). See also *Olin Mathieson Chemical Corp. v. White Cross Stores, Inc.*, 414 Pa. 95, 199 A.2d 266 (1964). "[T]he courts should not perpetrate error solely for the reason that a previous decision, although erroneous, has been rendered on a given question." Id. at 100, 199 A.2d at 268.

7 1973 Mass. Adv. Sh. at 580-81, 294 N.E.2d at 357-58; U.S. Const. amend. XIV.

8 Mass. Const. pt. II, c. 1, §1, art. IV, "as limited by arts. 1, 7, 10 and 12 of its Declaration of Rights." 1973 Mass. Adv. Sh. at 581, 294 N.E.2d at 358.

power to private parties;"⁹ and finally succumbed as an impermissible delegation of power: "[w]e hold that the nonsigner provision of G.L. c. 93, §14B, amounts to an unconstitutional delegation of legislative power to private parties."¹⁰

The stipulated facts indicated that Corning produces and sells specialty glassware of standard quality in competition with similar glassware produced by other companies. Corning has considerable goodwill in its products and advertises its products heavily. Pursuant to G.L. c. 93, §§14A-14D, Corning entered into fair trade contracts with Massachusetts retailers other than Ann & Hope in which the retailers agreed not to sell Corning products at prices other than "fair trade" prices set by Corning. Ann & Hope was aware of fair trade contracts on the part of Corning and other retailers but sold Corning products at prices below fair trade prices.¹¹

The Supreme Judicial Court conceded that it was "bound" by decisions of the United States Supreme Court on federal questions, "regardless of rationale or lack thereof."¹² Thus, *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*¹³ is dispositive of Ann & Hope's contentions that the nonsigner provision violates the due process and equal protection clauses of the Fourteenth Amendment.¹⁴

Ann & Hope also argued that "the nonsigner provision here in issue is an unreasonable exercise of the police power, unrelated to the public welfare, in violation of Part II, c. 1, §1, art. 4, of our State Constitution, as limited by arts. 1, 7, 10 and 12 of its Declaration of Rights."¹⁵ The court announced that "[o]n such issues . . . we are not bound by Federal decisions,"¹⁶ but went on to note that as long as legislation "bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare,"¹⁷ the court "'cannot substitute [its] judgment for that of the Legislature.'"¹⁸

The Fair Trade Law was previously upheld as a valid exercise of the police power in *General Electric*: "'[o]ur decision . . . [in the *General*

⁹ 1973 Mass. Adv. Sh. at 586, 294 N.E.2d at 361.

¹⁰ Id. at 589, 294 N.E.2d at 362. The Court is to be commended for its sense of the dramatic.

¹¹ Id. at 576-77, 294 N.E.2d at 355-56.

¹² Id. at 581, 294 N.E.2d at 358.

¹³ 299 U.S. 183 (1936).

¹⁴ The Court states that the rationale of the *Old Dearborn* case was undermined in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), but goes on to note that "subsequent decisions of the Supreme Court of the United States, though without rationale, make it clear that such assertions [that nonsigner provisions violate the due process and equal protection clauses of the Fourteenth Amendment] present no substantial Federal question." 1973 Mass. Adv. Sh. at 580, 294 N.E.2d at 358.

¹⁵ Id. at 581, 284 N.E.2d at 358.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id. at 585, 294 N.E.2d at 360, quoting *General Elec. Co. v. Kimball Jewelers, Inc.*, 333 Mass. 665, 132 N.E.2d 652 (1956).

Electric case] necessarily holds that a manufacturer's good will is a valid legislative interest, and that the means adopted to protect that good will are appropriate.'"¹⁹ With the disappearance of the depressed economic condition from which fair trade legislation arose, the court was more willing to examine the effects of such legislation on a broader public interest rather than just the manufacturer's interest; however, the court was compelled to recognize that disputes as to what extent the nonsigner provision protects the public interest by preventing injurious price cutting, or harms such interest by the elimination of intrabrand price competition, involve questions of economic theory and political judgment²⁰ which are "regularly and properly resolved in the political and legislative arenas."²¹ Thus, the court adhered to its previous judgment in *General Electric*: "that the Legislature could rationally conclude that authorization of resale price maintenance serves the public interest."²²

When considering the question of an unlawful delegation of legislative power, the court was not willing to adhere to the conclusion in *General Electric* that "[t]he fair trade law does not constitute an unlawful delegation of power to the owner of the trade mark or brand."²³ The court thought the question required greater consideration than that given in *General Electric*.

First, the court adopted, without any discussion, the conclusions of Professor Davis:

The plain fact is that the statute confers upon the manufacturer (or other distributor), acting in combination with a single retailer, [the power] to fix the minimum price at which other retailers may sell. That is undeniably a delegation of power to private parties.²⁴

Thus, the court took the first step in overruling *General Electric Co. v. Kimbal Jewelers, Inc.*²⁵ and contradicting *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*²⁶ with few words of explanation. The court's "entire discussion of [the] question" consists of little more than the announcement of the conclusion.²⁷

¹⁹ 1973 Mass. Adv. Sh. at 582, 294 N.E.2d at 359, quoting *Colgate-Palmolive Co. v. Elm Farm Foods Co.*, 337 Mass. 221, 228-29, 148 N.E.2d 861, 866 (1958).

²⁰ Id. at 584, 294 N.E.2d at 360. The court noted "[t]here is respectable current opinion in support of 'fair trade,' as well as in opposition. See National Institute on Prices and Pricing under the Antitrust laws, 41 Antitrust L.J. 1, 14, 19 (1971); Callmann, Unfair Competition, Trademarks and Monopolies (3d ed.) §22.4." Id.

²¹ Id. at 584, 294 N.E.2d at 360.

²² Id. at 585, 294 N.E.2d at 360.

²³ 333 Mass. at 677, 132 N.E.2d at 659.

²⁴ 1973 Mass. Adv. Sh. at 586, 294 N.E.2d at 361 quoting K. Davis, *Administrative Law Treatise* §2.14 at 147 (1958 ed.).

²⁵ 333 Mass. 665, 132 N.E.2d 652 (1956).

²⁶ 299 U.S. 183 (1936).

²⁷ 1973 Mass. Adv. Sh. at 585-86, 294 N.E.2d at 360-61. It is disappointing that the

The court went on to examine the question as to "whether the delegation is constitutionally permissible."²⁸ Here the court abandoned any deference to legislative judgment, and, in the guise of wooden pronouncements as to the constitutional limits of ("exceptions to or qualifications of") delegation of powers, the court substituted its own judgment²⁹ as to the limits of "general public policy" behind fair trade legislation. The court went to great length to pay homage to the Legislature's determination of valid protectable interests,³⁰ but proved such homage false by not even attempting to find any rational or reasonable basis upon which to uphold the legislative means adopted to protect such interests.³¹

The court may be correct in concluding that changed economic conditions no longer necessitate legislative protection of a manufacturer's good will.³² The court also may have selected the best available means for abolishing a particularly obnoxious legislative policy that permits a manufacturer, by agreement with a single retailer, to set resale prices for all retailers in the Commonwealth.³³ However, the court's decision, as

court did not specify the legislative power that it "concluded" to be delegated: was it the power to fix minimum prices, or the power "to fix the minimum price at which other retailers may sell?" In this regard, see *Remington Arms Co. v. G.E.M. of St. Louis*, 102 N.W.2d 528, 534-35 (Minn. 1960). Although, admittedly, such distinction is not necessary for analysis of the nonsigner provision of G.L. c. 93, §14B, the distinction will be necessary upon a now likely challenge to the validity of contracts exempted pursuant to G.L. c. 93, §14A.

²⁸ 1973 Mass. Adv. Sh. at 586, 294 N.E.2d at 361.

²⁹ There is a possibility that the court merely desires to be "in harmony with most of the decisions in other States." *Id.* at 589, 294 N.E.2d at 363, thus escaping the stigma of being "one of the minority jurisdictions which hold the Fair Trade Law to be valid." *Shulton, Inc. v. Consumer Value Stores, Inc.*, 352 Mass. 605, 607, 227 N.E.2d 482, 483 (1967); see *Black & Decker Mfg. Co. v. Ann & Hope, Inc.*, 1972 Mass. Adv. Sh. 143, 148, 277 N.E.2d 687, 690.

³⁰ 1973 Mass. Adv. Sh. at 581-85, 294 N.E.2d at 358-61.

³¹ See *Colgate-Palmolive Co. v. Elm Farm Foods Co.*, 337 Mass. 221, 148 N.E.2d 861 (1958): "the means adopted to protect that good will [held to be a "valid legislative interest"] are appropriate." *Id.* at 229, 148 N.E.2d at 866; *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936): "[t]he price restriction is adopted as an appropriate means to that perfectly legitimate end [protection of the manufacturer's good will]." *Id.* at 193. See also 1 K. Davis, *Administrative Law Treatise* (1958 ed.):

Some delegations to private parties are and ought to be valid. The question is one of judgment as to whether the courts should allow the legislative bodies to govern in this manner, or whether vague constitutional provisions should be interpreted to prevent vesting this kind of power in private parties. That question must be considered in the context of the broad policies for and against the so-called fair trade legislation, and it must be considered in the context of the variety of views about the fundamentals of the proper role of the judiciary in preventing what the judges deem to be bad government.

Id. at §2.14 at 147 (footnotes omitted).

³² Compare *Corning Glass* with *General Elec. Co. v. Kimball Jewelers, Inc.*, 333 Mass. at 677, 132 N.E.2d at 658-59 and *Colgate-Palmolive Co. v. Elm Farm Foods Co.*, 337 Mass. at 229, 148 N.E.2d at 866.

³³ Compare Mass. Const. pt. I, art. XXX.

written, creates serious doubt as to the validity of contracts executed pursuant to G.L. c. 93, §14A,³⁴ despite the deliberate attempt to limit its decision to consideration of only section 14B:³⁵ section 14A sanctions contract provisions that prohibit resale of certain commodities "except at the price stipulated" by the manufacturer or distributor, yet the court states, with reference to such stipulated prices, that "[t]here is no provision . . . for any policy or standard to govern the prices set by [the manufacturer], nor for notice, hearing or judicial review of the prices fixed by the manufacturer."³⁶

Fair trade legislation has been the subject of debate for years; the court has not put an end to the controversy. This case is significant for what it does: it opens the entire "fair trade" scheme to question while invalidating only the nonsigner provision on the narrow grounds of an unconstitutional delegation of legislative power. The case is also significant for what it does not do: the Fair Trade Law will be invulnerable to attack on the federal questions of due process or equal protection as well as a violation of the police power. In both events, the case invites, if not compels, legislative action either to establish a fair trade scheme immune from the court's whim, or to repeal anachronistic legislation that "most of the courts of other states" have held invalid.

§10.5. Prohibition against discrimination in the furnishing of credit based on sex or marital status: Penalty provisions. Chapter 151B, section 4 of the General Laws was amended by chapter 168 of the Acts 1973 to include a new subsection 14 which provides that it shall be an unlawful practice "[f]or any person furnishing credit or services to deny or terminate such credit or services or to adversely affect an individual's credit standing because of such individual's sex or marital status."

Said subsection 14 was further amended by chapter 325 of the Acts of 1973, which provides penalties for violation of the provisions of said subsection. A violator is liable for actual damages sustained, and, in the event that there are no actual damages, the court is authorized to assess special damages to the aggrieved party not to exceed \$1,000. Additionally, any person who is adjudicated liable shall be assessed the cost of reasonable legal fees actually incurred.

³⁴ The distinction made in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 388, 390 (1951) as between those retailers who have their prices fixed by "consensual agreement" and those retailers who have their prices fixed "by compulsion" or by force is specious; once the retailer decides to purchase a particular commodity for resale, the "price stipulated" by the manufacturer may, by reason of market conditions, be as well forced on "signers," by reason of G.L. c. 93, §14A, as "nonsigners," by reason of G.L. c. 93, §14B.

³⁵ To avoid misunderstanding, we point out that we are considering here only the constitutionality of the non-signer provision in G.L. c. 93, §14B. The present record presents no question with respect to the validity of the contracts between Corning and Massachusetts retailers, and no such question has been argued to us.

1973 Mass. Adv. Sh. at 580, 294 N.E.2d at 357.

³⁶ *Id.* at 588, 294 N.E.2d at 362.

The Federal Truth-in-Lending Act Amendments of 1973 (United States Senate Bill S. 2101 which has been adopted by the Senate) contains a similar provision applicable to consumer credit. The Senate report relating to S. 2101 specifies a variety of practices which are deemed to be discriminatory under the provisions of said bill.¹ The report, in essence, indicates that credit application of a female should be processed on the same basis as that of a male; that is, if the female (whether married or single) qualifies for credit under the standards applied to males by the credit grantor, it would be unlawful to deny such female credit or to condition the granting of credit upon the co-signing of the instrument evidencing the obligation by the female's spouse.

Under the new Massachusetts statute, it would appear to be unlawful to inquire on a credit application form or use as a basis for credit determination information concerning the sex or marital status of the applicant, such as whether the applicant is married, divorced, separated, widowed, or single. This prohibition will require many credit grantors to revise their credit policies particularly with respect to the effect of a marital separation on the individual's credit standing. Additionally, many shorthand devices used for the determination of creditworthiness, such as credit scoring systems, will require modification to the extent they contain factors based on the sex or marital status of the applicant for credit.

Although it would appear that a creditor could not require the spouse of an applicant for credit to co-sign if the applicant is qualified in his or her own right, the statute would not appear to make a joint application by married persons unlawful per se where the joint application is filed voluntarily by the married couple or where the credit grantor determines that the application of one spouse is not sufficiently favorable to warrant the granting of credit. Although not clear from a reading of the statute, it would appear that a creditor could require both spouses to execute the loan documentation where the security for the obligation is held in joint names, such as in the real estate mortgage situation where the residence is owned jointly.

At the present time, the Massachusetts Commission Against Discrimination has not adopted regulations relating to sex and marital status discrimination, but has indicated that it intends to do so in the near future.

§10.6. Protection against careless and erroneous billings: Definitions of "periodic billing statement" and "statement of account." The Protection of Consumers Against Careless and Erroneous Billings Act (G.L. c. 93C), became effective in 1972 and provides time limitations within which creditors must respond to a consumer who believes that a billing error has occurred with respect to his or her account. A troublesome aspect of the Act was its failure to define what was meant by a customer's

§10.5. ¹ Senate Comm. on Banking, Housing and Urban Affairs, Truth in Lending Act Amendments, S. Doc. No. 278, 93d Cong., 1st Sess. 3 (1973).

"statement of account." Counsel for creditors were unable to ascertain from the Act whether late notices, payment coupon books, payment pass-books or notices relating to escrow payments were included in the term "statement of the customer's account." The Commissioner of Banks attempted to alleviate some of the difficulty by issuing regulations in 1972. The validity of those regulations is questionable because the Act lacked a grant of specific authority to the Commissioner to promulgate rules and regulations.

Chapter 21 of the Acts of 1973 has eliminated some of the difficulties under the Act by providing express authority for the Commissioner of Banks to issue such rules and regulations as are necessary to carry out the provisions of the Act, and by defining the terms "periodic billing statement" and "statement of account."¹

A periodic billing statement is defined as "any statement, notice or reminder of payment due on any transaction which is mailed or delivered periodically to the customer in advance of the due date of the payment."²

A statement of account is defined as a "periodic billing statement other than a delinquency notice, payment coupon book or payment passbook, or a statement, billing or advice relating exclusively to amounts to be paid by the customer as escrow amounts for payment of taxes, or insurance, water, sewer or land rents."³

Section 5 of chapter 93C was also amended to clarify an ambiguity as to when the required quarterly notices could be omitted by creditors. As amended, the section permits a creditor to omit a notice as to the customer's rights in any quarter in which no statement is transmitted during that quarter, unless there is an unsettled complaint as defined by the provisions of the Act. Therefore, if the creditor renders a statement in January, but not in February or March, a quarterly notice is required. Creditors who elected to include the notice with the last billing in each quarter must, in the situation described above, adopt a procedure designed to insure that the customer receives a notice in March. Because of the difficulty of designing such a program, many creditors have elected to send the notice with every statement either separately or by printing the notice on the statement itself.

§10.7. Consumer credit transactions: Default: Repossession: Redemption: Deficiency judgment: Notices required. Chapter 629 of the Acts of 1973 amends G.L. c. 255, §§13I & 13J; G.L. c. 255B, §§20A & 20B and G.L. c. 255D, §§21 & 22. The amendments become effective January 1, 1974 and apply to consumer credit transactions entered into on and after that date. The amendments create new rights for debtors unable to carry out their contractual obligations.

§10.6. ¹ G.L. c. 93C, §1.

² Id.

³ G.L. c. 93C, §§1, 6.

Under the new law, in any consumer credit transaction where the loan is secured by a non-possessory security interest, a provision in an instrument relating to a default is enforceable only to the extent that the default is material and consists of a failure to make one or more required payments, or the occurrence of an event which substantially impairs the value of the collateral. In order to act upon such a default the creditor must wait ten days and then send a notice of default to the debtor in the form provided by the statute. Until the notice is given, no action can be commenced against the debtor or the collateral. The notice must specify the debtor's right to cure and specify a date (which date must be not less than twenty-one days from the date of the giving of the notice) before which the cure must be made. In the event the debtor fails to cure within the time period specified in the notice, the creditor would then have the right to bring an action against the debtor or repossess the collateral.

Repossession may occur only if (1) the creditor has followed the statutory notice procedures outlined above, (2) the default is material and consists of a failure to pay or the occurrence of an event which substantially impairs the value of the collateral, and (3) such repossession can be effected without force, without a breach of the peace and without entry upon property owned or rented by the debtor unless the debtor consents to such entry at the time of the entry. If any of the above conditions are not satisfied, the creditor must apply to a court, and, after notice to the debtor and a judicial hearing, the court may issue an order of repossession.

In the event of the lawful repossession of the collateral, the debtor has the right to redeem the collateral within twenty days of the repossession and thereafter until the creditor has disposed of or entered into a contract for the disposition of the collateral.

The new statute further provides that the debtor shall not be liable for any deficiency if the unpaid balance is \$2,000 or less at the time the creditor takes possession of or accepts surrender of the collateral. In those circumstances where the debtor is liable for a deficiency, the statute provides that "published trade estimates of the retail value of goods shall . . . be presumed to be the fair market value of the collateral."

A major objective of the new statute appears to be the establishment of time limitations which are imposed upon creditors from the date of the default until the creditor may bring an action against the debtor, repossess or accelerate the debt. The creditor must wait ten days before giving notice of the default and then advise the debtor that he has twenty-one days to cure the default. A major effect of the statute is the elimination of deficiency judgments where the unpaid balance of the loan is \$2,000 or less at the time of the repossession or the surrender of the collateral by the debtor. The limitation of a default to those situations where the debtor has failed to pay or where the collateral has been substantially im-

paired in value would not seem to be of major significance as most defaults are occasioned by a failure to pay. Curiously this debtor-oriented statute does not extend as far as those which would require, either on due process grounds or by statute, that notice be given to the debtor and a judicial hearing occur prior to any repossession. Notice and an opportunity to be heard are required by the statute only where the default is not material or does not occur because of a failure to pay or a substantial impairment of the value of the collateral. It is submitted that the vast majority of defaults will be caused by a failure to pay, and few instances will thus arise requiring the judicial hearing mandated by the statute.

Although there are some inconsistencies and ambiguities in the statute, counsel for creditors faced with a default and the necessity of taking some action against the consumer or the collateral ought to be familiar with the new procedures and advise their clients as to the procedures required by the same.

§10.8. Maximum finance charges for consumer open end credit transactions. G.L. c. 140, §114B, which was adopted in 1972 to become effective July 1, 1973, was amended prior to its effective date to correct certain deficiencies in the previous legislation.¹ The section as amended establishes maximum interest rates with respect to consumer open end credit plans. Such rates may not exceed an annual percentage rate of 18% on the first \$500 of the balance subject to finance charge and 12% on so much of such balance as exceeds \$500. In the event that a monthly finance charge does not exceed fifty cents, a minimum finance charge of fifty cents may be assessed.²

G.L. c. 140C, §6B was also amended to provide that a finance charge imposed under an open end credit plan on balances resulting from the sale of goods or services in reliance on a credit card may not be applied to any portion of such balance which is reflected for the first time on the billing statement, and otherwise must be computed on (1) the previous balance method after deducting all credits and payments received during the period, (2) the average daily balance method, or (3) the daily balance method.³ In addition, payments received under an open end credit plan, and also under a retail installment sale agreement subject to G.L. c. 255D, must be credited promptly to the obligor's account and in any event no more than two business days after receipt by the creditor.

The amendments discussed in this section became effective on July 1, 1973.

§10.9. Credit cards: Issuance by co-operative banks. Chapter 170 of the Massachusetts General Laws has been amended by chapter 258 of

§10.8. 11 Acts of 1973, c. 273, §1.

² G.L. c. 140, §114B.

³ Acts of 1973, c. 273, §3.

the Acts of 1973 to include a new section 32C which permits a co-operative bank to issue credit cards for the purpose of making loans to one or more persons. The outstanding principal balance of loans made through the use of such a credit card to any one person may not exceed \$4,500 at any one time and the outstanding principal balance of such loans may not exceed ten percent of the deposits of the co-operative bank. The authority is similar to that provided in 1972 to savings banks¹ and will result in an increase in competition between cooperative, savings and commercial banks.

§10.10. Checks: "Holder in due course": "Good faith". In the case of *Industrial National Bank v. Leo's Used Car Exchange, Inc.*,¹ the defendant involved had made two checks payable to Villa's Auto Sales, Inc. in consideration of the purchase of three automobiles. These checks were cashed for a corporate officer by a teller at a branch of the plaintiff bank. The drawee bank dishonored the checks upon presentation pursuant to a stop payment order issued by the defendant and the plaintiff thereafter brought this action claiming the status of a holder in due course.²

To the extent that a holder is a holder in due course, it takes the checks free from all defenses of any party with whom it has not dealt (except for certain so-called "real defenses" which were not present in the instant case).³ A holder in due course is a holder who takes an instrument of value, in good faith, and without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.⁴

The trial court found that the plaintiff met all of the tests for holder in due course status except the "good faith" requirement. The determination that the plaintiff lacked good faith apparently was based upon the cashing of the corporate checks by the bank's teller. The evidence indicated that the bank had a rule requiring branch manager approval before a corporate check could be cashed, that the teller in the instant case failed to obtain such approval, but that the manager in the instant case knew the corporate officer who "cashed" the checks and would have given his approval. No other evidence as to the good faith of the plaintiff was introduced.

The Supreme Judicial Court reversed the finding of the trial court, noting that the inclusion of observance of "reasonable commercial standards" as part of the test of "good faith" had been stricken from earlier drafts of the Uniform Commercial Code. Good faith is defined in the

§10.9. 1 G.L. c. 168, §37B.

§10.10. 1 1973 Mass. Adv. Sh. 79, 291 N.E.2d 603.

2 1973 Mass. Adv. Sh. at 80-81, 291 N.E.2d at 604-05.

3 G.L. c. 106, §3-305.

4 G.L. c. 106, §3-302(1).

Code as "honesty in fact in the conduct or transaction concerned."⁵ The court stated: "[N]othing in the definition suggests that in addition to being honest, the holder must exercise due care to be in good faith."⁶ Further, "good faith" is to be determined by the simple test of honesty and not by a test as to the holder's diligence or negligence, unless the conduct of the holder is so "outrageous" as to bring into question the honesty of the holder.⁷

Finding no evidence of the plaintiff's dishonesty, the court held that the plaintiff qualified as a holder in due course and in the absence of any "real defenses" ordered judgments to be entered for the plaintiff on each instrument.

§10.11. Comptroller of the Currency: Rulings and regulations: Authority of national banking associations to provide travel agency services. The issue of whether national banking associations have the authority to provide travel agency services to their customers has again been the subject of an appeal and again the national banks have been rebuffed. The case of *Arnold Tours, Inc. v. Camp*¹ involved an action commenced against the Comptroller of the Currency and a national bank located in Massachusetts to contest the validity of a 1963 regulation authorizing national banks to offer general travel agency services. At this state of the proceeding the First Circuit Court of Appeals reviewed the actions of the federal district court in Boston which had granted the plaintiffs' motion for summary judgment and denied the defendants' motion for summary judgment.²

The parties to the action agreed that if there was any statutory authorization permitting national banks to engage in the travel agency business, it was to be found in that clause of the National Bank Act which permits such banks "[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking. . . ."³

The court of appeals indicated its disagreement with the *sine qua non* standard which could have been implied from the decision of the district court. The court stated the use of the word "necessary" in the incidental powers clause did not mean that the activities in which the bank desired to engage must be "indispensable" to the operation of the bank, but that such services must be directly related to one or another of the national bank's express powers.⁴ As stated by the court:

⁵ G.L. c. 106, §1-201(19).

⁶ 1973 Mass. Adv. Sh. at 82, 291 N.E.2d at 606.

⁷ 1973 Mass. Adv. Sh. at 83 n.6, 291 N.E.2d at 606 n.6.

§10.11. ¹ 472 F.2d 427 (1st Cir. 1972). For a discussion of the First Circuit's decision, see Note, 15 B.C. Ind. & Com. L. Rev. 206 (1973). See also 1972 Ann. Surv. Mass. Law §6.14.

² 472 F.2d at 428.

³ 12 U.S.C. §24, Seventh (1970).

⁴ 472 F.2d at 430.

In our opinion, these decisions amply demonstrate that a national bank's activity is authorized as an incidental power, "necessary to carry on the business of banking," within the meaning of 12 U.S.C. §24, Seventh, if it is convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act. If this connection between the incidental activity and an express power does not exist, the activity is not authorized as an incidental power.⁵

Having established the appropriate legal standard, the court reviewed the express powers of a national bank and compared them to the nature of the travel agency business,⁶ examined the position of the Comptroller prior to 1963⁷ (which denied the authority of national banks to engage in such services) and reviewed the frequency of the offering of such services by national banks in the past⁸ (only a few offered such services). Having considered the factors indicated, the court determined that the district court had not erred in concluding that the operation of a travel agency was not "incidental" to the business of banking. The findings of the district court, including the finding that the 1963 regulation of the Comptroller was invalid, were upheld. The court of appeals did, however, recommend a slight modification of the district court's order, indicating that the lower court should give serious consideration to any presentation which the national bank might offer with respect to whether the six-month divestiture period was sufficient time for the bank reasonably to divest itself of its travel agency operation.⁹ The clear implication of the court of appeals was that the divestiture period was indeed too short.

§10.12. Second Mortgage Statute: Increase in assessed value of real estate subject to said statute. G.L. c. 140, §90A, the so-called "Second Mortgage Statute," defines a loan subject to its provisions as

a loan of more than fifteen hundred dollars secured wholly or partially by a mortgage of real estate having an assessed value of not over forty thousand dollars, having thereon a dwelling house with accommodations for six or less separate households and occupied in whole or in part at the time the loan is made as a home by any obligor on the mortgage debt or by any person granting or releasing any interest under said mortgage

Chapter 19 of the Acts of 1973 increased the amount of the assessed valuation from \$25,000 to \$40,000, thereby providing additional protection to Massachusetts home owners in light of recent changes in assess-

⁵ Id. at 432.

⁶ Id. at 433.

⁷ Id. at 434-35.

⁸ Id. at 435.

⁹ Id. at 438.

ment policies requiring "100% valuation." It should be noted that the Commissioner of Banks takes the position that assessed value means the value assessed by the local taxing authorities upon the mortgaged real property.

§10.13. Motor Vehicle Certificate of Title Law: Technical amendments. The Massachusetts Motor Vehicle Certificate of Title Law (chapter 90D of the Massachusetts General Laws) was amended by chapter 81 of the Acts of 1973 to cure various technical deficiencies in the statute as originally adopted in 1971. Knowledge of the Act is important for credit grantors because the law provides the sole method of perfecting a security interest in a vehicle which is titled under the law.¹ Several of the amendments relate to the security aspects of the title law.

One difficulty with the original statute involved the conditions under which a "previously registered vehicle" had to be titled. The difficulty arose because of the interrelationship of section 2(9) and section 35. Section 2(9) indicated that a previously registered vehicle must be titled if the vehicle was "transferred" on or after September 1, 1972. On the other hand, section 35 indicated that such a vehicle need not be titled until, among other things, it was purchased from a dealer in the Commonwealth. This inconsistency has been eliminated by deleting section 2(9) and by revising section 35 to require the owner to obtain a title when "there is a change in the ownership thereof"² This change conforms with the position that the Registrar of Motor Vehicles adopted at the time the Certificate of Title Law became effective.

In addition to the change of ownership section indicated above, section 35 was amended so that the law becomes applicable to a previously registered vehicle when there is (a) a certificate of title issued for the vehicle; (b) a security interest created in the vehicle; or (c) September 1, 1979, whichever first occurs. Previously, the section made the law applicable to a previously registered vehicle whenever (a) it was purchased from a dealer in the Commonwealth; (b) a certificate of title was issued for the vehicle; (c) a security interest was created in the vehicle; (d) a lienholder who had an unperfected security interest on September 1, 1972 notified the owner that he wanted the security interest perfected; or (e) September 1, 1974, whichever first occurred. The postponement of the date to 1979 was made at the request of the Registrar of Motor Vehicles to eliminate the potential for a mass titling of the older motor vehicles immediately prior to the September 1, 1974 deadline.

Section 10(e) was amended so as to provide that the certificate of title, as distinguished from the vehicle itself, is not subject to attachment, execution, or other judicial process.³ The previous language of sub-

§10.13. 1 G.L. c. 90D, §26.

² Acts of 1973, c. 81, §7.

³ Acts of 1973, c. 81, §3.

section (e) indicated that it would not be lawful to levy upon the vehicle, but did not expressly indicate whether the vehicle could be attached or made subject to other judicial process.

Section 22 of chapter 90D was amended to permit an owner who creates a security interest in the vehicle to mail the title with the appropriate notation of the security interest to the lienholder, or, at the lienholder's request, to the Registrar of Motor Vehicles.⁴ Previously the statute required the owner to deliver the documentation directly to the lienholder.

Section 26 previously provided that the method provided by chapter 90D for perfecting and giving notice of security interests in motor vehicles for which certificates of title are issued was exclusive. That section was amended to provide that the method of perfecting a security interest in a vehicle for which a certificate of title is issued, *or is required to be issued*, is exclusive.⁵

Section 28 of chapter 90D was amended to include a \$1 fee for the addition of a lienholder upon an existing certificate of title and to provide for a \$3 fee in the event the Registrar is requested to amend or correct an outstanding certificate of title.⁶

Section 37 was amended by re-writing said section to provide that the perfection of a security interest, created prior to September 1, 1972, is to be governed by the provisions of the Uniform Commercial Code, until a certificate of title is issued naming the secured party as a lienholder.⁷ Previously the perfection of such a security interest was to lapse no later than September 1, 1974.

§10.14. Banks: Indemnification of directors, trustees, officers, employees and agents. Chapter 167 of the Massachusetts General Laws was amended by chapter 80 of the Acts of 1973 to include a new section 57A, which permits a bank to indemnify its directors, trustees, officers, employees and other agents. The statute expressly permits indemnification of expenses incurred in defending a civil or criminal action and further authorizes advance payments of expenses prior to the determination of whether such person is entitled to be indemnified if the indemnitee agrees to repay such expenses in the event that he shall be adjudicated thereafter not to be entitled to indemnification.

No indemnification is permitted with respect to any person relating to any matter as to which he shall be adjudicated in any proceeding not to have acted in good faith in the reasonable belief that his action was in the best interests of the bank.

Banks are permitted by the statute to purchase and maintain insurance

⁴ Acts of 1973, c. 81, §4.

⁵ Acts of 1973, c. 81, §5.

⁶ Acts of 1973, c. 81, §6.

⁷ Acts of 1973, c. 81, §8.

covering any liability of a director, trustee, officer, employee or other agent regardless of whether the bank would have the power to indemnify such individual against such liability.

STUDENT COMMENT

§10.15. The Fair Trade Law: Constitutionality of the nonsigner provision: *Corning Glass Works v. Ann & Hope, Inc.*¹ The plaintiff, Corning Glass Works, brought a bill in equity under G.L. c. 93, §14B² (the nonsigner provision of the Massachusetts Fair Trade Law) to enjoin the defendant, Ann & Hope of Danvers, Inc., from "knowingly and willfully advertising, offering for sale or selling any products bearing plaintiff's trademarks, brands, or names, at prices less than the fair trade prices set by plaintiff pursuant to the Fair Trade Law"³

§10.15. ¹ 1973 Mass. Adv. Sh. 575, 294 N.E.2d 354.

² The substance of the Fair Trade Law is contained in G.L. c. 93, §§A, B, and reads as follows:

§14A. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, or the vending equipment from which said commodity is sold to consumers 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 commonwealth by reason of any of the following provisions which may be contained in any such contract:

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

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

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

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity; provided, that such stock is first offered to the manufacturer of such stock at the original invoice stock price, at least 10 days before such stock shall be offered for sale to the public.

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

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

§14B. 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 preceding section, *whether the person so advertising, offering for sale or selling is or is not a party to such contract*, is hereby declared to constitute unfair competition and to be actionable at the suit of any person damaged thereby. Any person advertising, offering for sale or selling any commodity as aforesaid shall, in addition, forfeit through civil process to the Commonwealth the sum of fifty dollars. [Emphasis added.]

³ Reservation and Report at 7, *Corning Glass Works v. Ann & Hope, Inc.*, 1973 Mass. Adv. Sh. 575, 294 N.E.2d 354 [hereinafter cited as Reservation and Report].

The defendant's answer asserted, *inter alia*, that G.L. c. 93, §14B was unconstitutional in that it

deprives the defendant of its property rights without due process of law; it invidiously discriminates against non-signers, denying them equal protection of our laws; and it is an illegal delegation by the General Court to a private person of the legislature's exclusive control over prices.⁴

More specifically, it was contended that section 14B of chapter 93 of the General Laws was promulgated in violation of Articles I, VII, X, XI, XXI and XXX of the Declaration of Human Rights of the Massachusetts Constitution.⁵

The suit was instituted in Suffolk Superior Court, judgment reserved, and the case reported to the full bench of the Supreme Judicial Court.⁶ The sole question at issue was the constitutionality of a statute which authorizes the producer of a brand name product to set the price of that product in a contract with a retailer and further forbids all other retailers

⁴ *Id.* at 10.

⁵ For purposes of this note, it is necessary to consider only art. XXX, which reads: In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers or either of them: to the end it may be a government of laws and not of men.

Mass. Const. pt. I, art. XXX.

Defendant never sought to interpose by way of a defense Mass. Const. pt. II, ch. 1, §1, art. IV, which reads in part:

And further, full power and authority are hereby given and granted to the said General Court . . . to make, ordain, and establish, all manner of wholesome and reasonable Orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without . . .

Defendant relied solely on art. XXX of the Declaration of Human Rights in arguing that G.L. c. 93, §14B was an invalid delegation of legislative authority.

It may reasonably be argued that pt. II, ch. 1, §1, art. IV is a broad grant of powers to the General Court and does not impose any limitations on the alienability of the legislative power. If this is so, then defendant correctly relied upon art. XXX of the Declaration of Human Rights. Yet art. XXX, read literally, imposes specific limitations on the alienability of legislative authority solely with respect to the executive and judicial branches of government. Art. XXX articulates the separation of powers among the three branches of state government. Part II, ch. 1, §1, art. IV, on the other hand, makes the General Court the sole repository of legislative authority.

A more proper argument seeking to invalidate any legislation as an invalid delegation of legislative authority to private persons would refer the court to both art. XXX of the Declaration of Human Rights and pt. II, ch. 1, §1, art. IV of the constitution. See *Opinion of the Justices*, 328 Mass. 674, 105 N.E.2d 565 (1952); *Landers v. Eastern Racing Ass'n*, 327 Mass. 32, 97 N.E.2d 202 (1951). The *Corning* court did, in fact, cite part II, ch. 1, §1, art. IV in invalidating the nonsigner provision of the Fair Trade Law.

⁶ The case was reported with a companion case, *LCA Corp., S.W. Farber Div. v. Ann & Hope*. The records were consolidated inasmuch as identical issues were presented.

who have knowledge of the contract from selling below the stipulated price.

Corning Glass Works (Corning) is a New York corporation which manufactures and distributes specialty glassware under the familiar brandnames of "Pyrex" and "Corning Ware." As a result of advertisement, promotion and public acceptance of these products, Corning has acquired a goodwill in its trademarks and brandnames.⁷ Corning has executed numerous agreements under the Massachusetts Fair Trade Law wherein other retailers have agreed not to advertise, offer for sale or sell any of Corning's products at prices other than the fair trade prices stipulated in the contract. The effect of G.L. c. 93, §14B is to bind all retailers who have knowledge of any such agreement to the price schedule established by the manufacturer.⁸ It is of no matter that the retailer with notice⁹ has not signed, or refuses to sign, a similar agreement. In the instant case it was stipulated that the defendant, Ann & Hope of Danvers, Inc. (Ann & Hope), was aware of the existence of many such agreements.¹⁰ At no time had Ann & Hope or any of its authorized agents entered into a fair trade agreement with Corning. It was further stipulated that the plaintiff's products were in free and open competition with other products of the same general class,¹¹ that the defendant had in fact disposed of the plaintiff's products in violation of G.L. c. 93, §14B, and that the violations did not arise under any of the exceptional circumstances enumerated in G.L. c. 93, §14A.¹²

In summary, the plaintiff argued that the nonsigner provision of the Fair Trade Law was a legitimate and permissible method to protect the

⁷ See Statement of Facts, Reservation and Report, *supra* note 3, at 11-12.

⁸ For text of §14B, see note 2 *supra*.

⁹ It is clear that §14B would apply in the case where a retailer acquires certain property for resale with the knowledge that it was subject to fair trade restriction. It is not clear, however, exactly what would happen in the case where a retailer acquires property without notice of any restriction and subsequent to acquisition and prior to sale he is notified of the restriction. A literal reading of §14B would seem to indicate that he would have been bound to the extent of his knowledge at the time of resale. But see *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936), discussed in text at note 31 *infra*; see also *General Elec. Co. v. Kimball Jewelers, Inc.*, 333 Mass. 665, 132 N.E.2d 652 (1956).

These cases suggest that the retailer must have had knowledge of the restriction at the time of acquisition of the property in order to be bound by the nonsigner clause.

¹⁰ Reservation and Report, *supra* note 3, at 12.

¹¹ In *Shulton, Inc. v. Consumer Value Stores, Inc.*, 352 Mass. 605, 227 N.E.2d 482 (1967), the court said: "Whether competition is 'fair and open' presents a question of law which cannot be admitted under the guise of a question of fact" *Id.* at 609, 227 N.E.2d at 484. This is merely to say that a conclusion of law cannot be admitted by an agreed stipulation between the parties. As in *Shulton*, the court could have remanded the case to the trial court for a full determination as to the question of whether Corning's products were, both factually and legally, in "fair and open competition." It chose not to do so. See 1967 Ann. Surv. Mass. Law §3.11.

¹² For text of §14A, see note 2 *supra*.

goodwill inherent in the plaintiff's trademarks.¹³ Price-cutting, it was argued, tends to cheapen the product in the eyes of the public with a consequent decline in sales.¹⁴ Furthermore, predatory price-cutting by high volume outlets threatens an effective distribution system;¹⁵ large retailers are able to undersell small retailers, eventually forcing them out of business, thereby reducing the total number of outlets available to the consumer. The plaintiff further contended that the nonsigner provision was merely a legal recognition of the property rights retained by the manufacturer.¹⁶ It was reasoned that the defendant could acquire no property rights in plaintiff's trademarks merely by purchasing an item bearing that trademark. That degree of interest retained by the manufacturer enabled him to condition the resale of a branded commodity. Furthermore, where defendant acquires a product with knowledge of a reasonable restriction he is deemed to have consented to the restriction.¹⁷

Ann & Hope answered these contentions by referring to the history of the fair trade movement which allegedly indicates that these laws were designed primarily to support the profit margins of the small retailer. If, in fact, this is the principal effect of the laws, they would be beyond the scope of the police power of the state in that they protect a special interest to the detriment of the public at large. Ann & Hope also hypothesized that there are less arbitrary methods to protect the goodwill attached to a trademark.¹⁸ Finally, it was argued that the nonsigner provision amounted to an unlawful delegation of legislative authority to private parties. It effectively allowed the manufacturer to determine the prices at which the retailer would sell, and it did so without notice to interested parties, without opportunity for them to be heard, without identifiable standards, and without opportunity for review. It would thus be an intolerable and unconstitutional invasion of the free market.¹⁹

¹³ Brief for Plaintiff at 8, *Corning Glass Works v. Ann & Hope, Inc.*, 1973 Mass. Adv. Sh. 575, 294 N.E.2d 354.

¹⁴ *Id.* at 27.

¹⁵ *Id.* at 28, 29.

¹⁶ *Id.* at 7-12.

¹⁷ *Id.*

¹⁸ See, e.g., G.L. c. 93, §§14E-K (Unfair Sales Law) (prohibiting sales below cost); G.L. c. 93A, §2 (prohibiting unfair methods of competition, unfair or deceptive acts or practices); G.L. c. 110, §§2, 3, 7-11 (prohibiting "palming off" confusion of goods, imitation and "dilution"); G.L. c. 93, §§1, 2, 8, 9, 14 (prohibiting noncompetition covenants, monopolies, price discrimination boycotts, tie-in sales).

¹⁹ For a complete discussion of the relative merits of resale price maintenance, see Adams, *Resale Price Maintenance: Fact and Fancy*, 64 *Yale L.J.* 967 (1955); Fulda, *Resale Price Maintenance*, 21 *U. Chi. L. Rev.* 175 (1954); Herman, *Fair Trade, Origins, Purposes and Competitive Effects*, 27 *Geo. Wash. L. Rev.* 621 (1959); Federal Trade Comm'n, *Report on Resale Price Maintenance, Summary and Conclusion* (1945) [hereinafter cited as *FTC Report*]. These authorities conclude generally that resale price maintenance is a device primarily designed to preserve profit margins and only incidentally designed to protect goodwill. See also 2 *CCH Trade Reg. Rep.* ¶ 6000-6374 (1972).

The court, declining to review the wisdom of the Act on the ground that it was at least arguably in the public interest, nevertheless HELD: G.L. c. 93, §14B is an unconstitutional delegation of legislative authority in violation of Article XXX of the Declaration of Human Rights and pt. II, ch. 1, §1, art. 4 of the state constitution.²⁰

This comment will consider first two early decisions which effectively restricted fair trade to specific contracts involving goods in intrastate commerce. It will then trace the legislative attempts to provide a much needed antitrust exemption for state enacted fair trade laws. The latter part of the comment will analyze selected state decisions which held that the constitutionality of nonsigner provisions turns on due process considerations and finally it will examine *Corning* and those decisions which hold that the constitutionality of nonsigner provisions turns on the validity of the delegation of legislative authority inherent in the nonsigner provisions.

I. HISTORY OF FAIR TRADE LEGISLATION

In 1901 the Supreme Judicial Court first dealt with what has become known as "resale price maintenance"²¹ in *Garst v. Hall & Lyon Co.*²² In that case a manufacturer sought to enjoin a retail druggist from selling his tonic at less than the price stipulated in a contract to which the defendant was not a party. It should be remembered that at the time there was nowhere in existence even the shadow, let alone the substance, of a fair trade law.²³ Refusing to enjoin the defendant from selling below the stipulated price, the court stated:

The purchaser . . . has an absolute right to dispose of the property. He may consume it or sell it to another. The plaintiff has contracts from his vendees in regard to the prices at which they will sell If they sell in violation of their contracts . . . he has a remedy against

²⁰ *Corning Glass Works v. Ann & Hope, Inc.*, 1973 Mass. Adv. Sh. 575, 589, 294 N.E.2d 354, 362-63.

²¹ The terms "resale price maintenance," "vertical price fixing" and "fair trade" all refer to the same practice whereby a manufacturer establishes the retail price for any of his branded products. All fair trade laws, however they denominate this practice, involve a provision allowing, as a matter of policy, contracts between a manufacturer and a retailer stipulating the price at which the retailer will sell the branded commodity. Most of the laws contain a further provision binding all retailers who have knowledge of the contract to the stipulations contained therein. The latter provision has come to be known as the "nonsigner clause."

²² 179 Mass. 588, 61 N.E. 219 (1901).

²³ California adopted the first fair trade law in 1931, an act permitting vertical price fixing contracts. The law was amended in 1933 to include a nonsigner provision. Cal. Bus. & Prof. Code §16,904 (West 1964). Following this a number of states enacted fair trade legislation in the early and mid 1930's. Massachusetts enacted its statute in 1937.

them to recover his damages. This right is founded on the personal contract alone, and it can be enforced only against the contracting party.²⁴

The court added that the plaintiff's trademark did not give him the rights of a patentee in property manufactured under a patent. It concluded that a trademark is to secure the manufacturer and the public from deception and fraud as to the origin and source of a commodity.²⁵ Thus, even in this early case, the court was unable to find the requisite relationship between the manufacturer and the branded commodity to extend equitable relief for violation of a property interest. If there was to be a proprietary interest sufficient to compel a nonsigner to sell at a stipulated price, it would have to be legislatively created inasmuch as it did not inhere in the common law.²⁶

Then in 1911, the United States Supreme Court dealt fair trade a further blow when in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,²⁷ it ruled that even explicit contracts between manufacturers and subscribing retailers containing a resale price schedule were invalid as violative of the Sherman Antitrust Act.²⁸ The *Dr. Miles* decision signalled the demise, at least until there might be curative legislation, of vertical price fixing arrangements of any sort where the subject of such agreement was in interstate commerce. This substantially reduced the incidence and effectiveness of resale price maintenance agreements. The debate on fair trade receded somewhat for a period of twenty years.²⁹

In 1931, California became the first state to enact a statute permitting vertical resale price maintenance by agreement or contract.³⁰ Two years later it was amended to include a nonsigner provision.³¹ Of course, the

²⁴ 179 Mass. 588, 591, 61 N.E. 219, 219-20 (1901) (citation omitted).

²⁵ *Id.*

²⁶ But see Chafee, *Equitable Servitudes on Chattels*, 41 Harv. L. Rev. 945, 969-77 (1928); Adams, *supra* note 19, at 975-78 (1955).

²⁷ 220 U.S. 373 (1911). In *Dr. Miles* the Court was willing to weigh the relative benefits of resale price maintenance against those of free and unrestrained competition in the market. It conceded that some restraints on trade may be permissible if reasonable and necessary. There, the balance spoke against resale price maintenance. *Id.* at 405-09.

²⁸ 15 U.S.C. §§1-7 (1970).

²⁹ The early drive for legalization of resale price maintenance was spearheaded by the American Fair Trade League, an association of manufacturers of branded goods, organized in 1913. Throughout the twenty-odd years of its leadership of the fair trade movement the League . . . concentrated its efforts on securing federal legislation sanctioning resale price maintenance contracts. However, although the movement was sufficiently influential during this period to secure the introduction of a fair trade bill in each session of Congress, from 1914 onward, the desired legislation was not yet forthcoming.

Herman, *supra* note 19, at 625; see also Comment, U. Ill. L.F. 307, 308 (1967).

³⁰ Cal. Bus. & Prof. Code §§16,900-13 (West 1964).

³¹ Cal. Bus. & Prof. Code §16,904 (West 1964).

Dr. Miles decision effectively prevented this statute from applying to contracts arising in interstate commerce.

By this time the National Association of Retail Druggists had assumed the lead in urging passage of statutes permitting vertical price fixing. The motives of this association were suspect if for no other reason than the fact that it represented retailers and not manufacturers. Proposed legislation was repeatedly submitted by the association on the grounds that it was a reasonable measure for the protection of manufacturers' goodwill in a trademark. The Federal Trade Commission, however, saw otherwise:

One of the principal objectives of the National Association of Retail Druggists . . . has been to obtain for retail druggists a margin of not less than $33\frac{1}{3}$ percent on the selling price, equivalent to a 50-percent mark-up on cost, on all products sold through drug stores. Beginning in 1935 the National Association of Retail Druggists made the enactment of State resale price maintenance laws and the passage of a national resale price maintenance law the main objective of its activities, and the obtaining of $33\frac{1}{3}$ percent margin, at least, on minimum selling prices its second objective.³²

It is not the purpose of this note to make a detailed analysis of the special interest influence brought to bear on these issues. It is sufficient to note that with the coming of the Depression, more and more states sought measures to control the disastrous effects of desperation selling. Though fair trade laws are not specifically designed to eliminate this practice characteristic of severe deflationary periods, one side effect might be to curb such selling. By the end of 1936 fifteen states³³ had enacted statutes which permitted resale price maintenance of goods shipped wholly in *intrastate* commerce.

In early 1935 the Supreme Court was on the verge of invalidating the administration's social experiment, the National Industrial Recovery Act and the offshoot "Codes of Fair Competition."³⁴ The codes included minimum resale provisions designed, in part, to prevent panic selling at below cost.³⁵ When the codes were invalidated it was feared that depressed conditions would signal the spread of this condition once again. Some saw vertical price fixing as a reasonable alternative that was not without precedent; as one state court explained:

³² FTC Report, *supra* note 19, at XXXI.

³³ Arizona, California, Illinois, Iowa, Louisiana, Maryland, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Virginia, Washington and Wisconsin.

³⁴ See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

³⁵ See Fulda, *supra* note 19.

The Fair Trade Acts were adopted in an effort to salvage some of the wreckage of the ill-fated N.I.R.A., commonly spoken of as the NRA. When the Supreme Court of the United States struck down that attempt by the national government to completely control and dominate business, labor, and industry, distributors who had been organized in Code Authorities under NRA and had dealt with the problems of loss leaders, price cutting and so-called predatory or cut-throat price competition, turned to the fair trade acts as a partial substitute.³⁶

In light of *Dr. Miles*,³⁷ however, the proponents of fair trade were severely restricted. It was unlikely that manufacturers selling to in-state retailers would want to fair trade an item when a comparable item shipped from out of state would be subject to no such limitation. Fair trade is an animal that must either thrive or die.

Finally, in 1936, the fair trade movement was revitalized as a result of two decisions handed down by the United States Supreme Court, *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*³⁸ and a companion case.³⁹ The Court in *Old Dearborn* upheld the Illinois Fair Trade Act against arguments that it denied due process of law and the equal protection of the laws, and in so doing it stated:

We are here dealing not with a commodity alone, but with a commodity plus the brand or trade-mark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trademark stands. Appellants own the commodity; they do not own the mark or the goodwill the mark symbolizes. And goodwill is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation.⁴⁰

Seizing on the notion of a property interest which inheres in goodwill, the Court further noted that the law will afford relief to a proprietor whose goodwill has been impaired wrongly. The Court then concluded:

[The nonsigner provision] of the act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the goodwill of the vendor; and it interferes then only to protect that goodwill against injury.⁴¹

³⁶ *General Elec. Co. v. Wahle*, 207 Ore. 302, 318-19, 296 P.2d 635, 643 (1956) (citations omitted). See also Shulman, *The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels*, 49 Yale L.J. 607, 616 (1940); FTC Report, *supra* note 19, 50-52.

³⁷ See text at note 24 *supra*.

³⁸ 299 U.S. 183 (1936).

³⁹ *Pep Boys, Inc. v. Pyroil Sales Co., Inc.*, 299 U.S. 198 (1936) (ruling on the constitutionality of the California Fair Trade Law).

⁴⁰ 299 U.S. at 194 (citation omitted).

⁴¹ *Id.* at 195.

The Court had, in effect, given a constitutional imprimatur to fair trade legislation enacted in the states. However, it should be noted that *Old Dearborn* did not overrule *Dr. Miles* in even a limited sense since the former case approved of fair trade legislation only insofar as it pertained to *intrastate* commerce.⁴² Where *interstate* commerce was concerned, the holding of the *Dr. Miles* case—that fair trade agreements and enabling legislation ran contra to the Sherman Act and must therefore fall—was still good law.

The Supreme Court's decision in *Old Dearborn* has been the subject of much confusion and erroneous interpretation. The opinion made two important points: first, it recognized a sufficient proprietary interest in "goodwill," thereby justifying fair trade legislation;⁴³ and second, it upheld the law enacted to protect this interest against claims that it ran contra to the due process and equal protection clauses of the Fourteenth Amendment.⁴⁴ Simply put, *Old Dearborn* indicated there were no infirmities of federal constitutional proportion inherent in the nonsigner clauses. With the constitutional hurdle aside, fair trade proponents hoped to overrule *Dr. Miles* by securing federal legislation which would provide an antitrust exemption for these state fair trade laws. At both the state and the federal level the lobbyists' job was greatly simplified when *Old Dearborn* settled the constitutional challenge.

In addition, state legislatures were facing ever increasing pressure to enact protective legislation, but lawmakers were hesitant in the face of the admittedly stringent rule announced in *Dr. Miles* almost twenty-five years earlier. However, encouraged by both the "hands off" policy exhibited by the Court in *NLRB v. Jones & Laughlin Steel Corp.*,⁴⁵ and the tacit approval in *Old Dearborn* of both the wisdom and legality of state fair trade legislation, twenty-eight states, including Massachusetts, adopted fair trade legislation in 1937.

Again, lobby group activity was especially strong and this fact is exemplified by the legislative history of the Massachusetts Fair Trade Law. The record indicates that among the sponsors of resale price maintenance legislation in Massachusetts were the National Association of Tobacco Distributors,⁴⁶ the Massachusetts Federation of Retail Liquor Package Store Dealers, Inc.,⁴⁷ the Massachusetts State Pharmaceutical

⁴² *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968).

⁴³ 299 U.S. at 194-95.

⁴⁴ *Id.*

⁴⁵ 301 U.S. 1 (1936). In *Jones*, the Court upheld the validity of the National Labor Relations Act against the contention that it was an invidious constraint on an employer's right to bargain freely with his employee. The NLRA prohibited "unfair labor practices" in interstate commerce and specifically coercion of employees in their right to self-organization and their right to bargain collectively through representatives of their own choosing.

⁴⁶ 1937 Mass. Legis. Doc., Senate No. 122.

⁴⁷ 1937 Mass. Legis. Doc., Senate No. 296.

Association,⁴⁸ and the Retail Liquor Package Dealers of Massachusetts, Inc.⁴⁹ These associations operated in much the same manner as the National Association of Retail Druggists had operated on a national scale. They had a two-fold concern in that they were seeking to preserve the then present structure of retail distribution while at the same time maintaining a predetermined profit margin.⁵⁰ "Fair trade" was the framework which they needed.

In 1937 Congress at last provided an antitrust exemption for duly enacted state fair trade legislation, with the enactment of the Miller-Tydings Amendment to the Sherman Antitrust Act.⁵¹ The real purpose and effect of the bill were unclear to many Congressmen, who exhibited a definite reluctance to pass the law at first.⁵² However, it was added as a rider to a much-needed appropriation bill and finally approved.⁵³ The act was read as an indication by Congress that it wished the states to exercise their concurrent jurisdiction over commerce. It consequently rendered the *Dr. Miles* decision obsolete by providing a legislative exemption where a judicial exemption had been refused.⁵⁴ Henceforth, interstate commerce was amenable to state-enacted vertical price fixing legislation.⁵⁵ States which had enacted fair trade legislation were now free to enforce such laws, and states which had been reluctant to pass fair trade laws were now encouraged to do so.

Effective fair trade legislation was virtually a universal fact until the Supreme Court decision in 1951 in *Schwegmann Bros. v. Calvert Dis-*

⁴⁸ 1937 Mass. Legis. Doc., House No. 548.

⁴⁹ 1937 Mass. Legis. Doc., House No. 397.

⁵⁰ See Fulda, *supra* note 19; Herman, *supra* note 19; FTC Report, *supra* note 19, at LIV, LVII.

⁵¹ [N]othing contained in §§1-7 [of the Sherman Antitrust Act] shall render illegal, *contracts or agreements* prescribing minimum prices for the resale of a commodity which bears . . . the trademark, brand, or name of the producer . . . of such commodity and which is in free and open competition with commodities of the same general class . . . when such *contracts or agreements* are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State

⁵² 15 U.S.C. §1 (1970) (emphasis added).

⁵³ See Herman, *supra* note 19, at 627.

⁵⁴ The technique of passing the Miller-Tydings Amendment via a rider to an appropriations bill met with some criticism. See, e.g., Hearings on H.R. 4365 Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 82d Cong., 2d Sess. 199 (1952), where Mr. James A. Rohl stated: "I think it is fair to say that the legislative technique there employed left something of a bad taste in the mouths of otherwise impartial observers."

⁵⁵ Vertical price fixing would still be unlawful under the Sherman Act—according to *Dr. Miles*—in those states which did not approve of such price fixing either legislatively or judicially.

⁵⁶ For a comprehensive examination of the factors leading to the passage of the Miller-Tydings Act, see the majority and dissenting opinions in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). For the legislative history of the Miller-

*tillers Corp.*⁵⁶ In that case the Supreme Court ruled that the nonsigner provisions of fair trade laws were not exempted, by reason of the Miller-Tydings Act, from the proscriptions of federal antitrust legislation. The Court looked to the specific wording of the Miller-Tydings Act,⁵⁷ which provided exemption for "contracts or agreements." Enforcement against a nonsigner would be secured under a specific provision of the state fair trade law and not pursuant to any "contract or agreement," which by definition does not exist between a manufacturer and a nonsigning retailer. The words "contract or agreement" could not be reasonably said to include the mechanism, wholly statutory, which binds a nonsigner to a specific price schedule.⁵⁸ The Court went on to say that the practical effectiveness of the Sherman Act would be irreparably impaired by a ruling to the contrary.⁵⁹ Furthermore, the Court inferred from the legislative history of Miller-Tydings that the proposed exemption for nonsigner clauses had been carefully and *purposely* omitted from the Act.⁶⁰

Within a year, however, Congress passed legislation which effectively overruled the *Schwegmann* decision. The McGuire Act⁶¹ was enacted in 1952 as an amendment to the Federal Trade Commission Act, and almost completely superseded the Miller-Tydings Act. The McGuire Act provided federal antitrust exemptions for vertical price-fixing agreements where they were otherwise lawful, much as the Miller-Tydings Act had done. But it took the further step of providing antitrust immunity for stipulations enforceable wholly under the nonsigner provisions of resale price maintenance legislation.⁶²

Tydings Act, see 16 F. Von Kalinowski, *Business Organizations, Antitrust Laws and Trade Regulations* §52.03[2] (1972).

⁵⁶ 341 U.S. 384 (1951).

⁵⁷ For text of the Miller-Tydings Act, see note 51 *supra*.

⁵⁸ 341 U.S. at 389-90.

⁵⁹ *Id.*

⁶⁰ *Id.* at 395.

⁶¹ 15 U.S.C. §45(a) (1970). The McGuire Act amended, generally, the Federal Trade Commission Act.

⁶² Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices for the resale of a commodity which bears . . . the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, *when contracts or agreements of that description are lawful as applied to intra-state transactions* under any statute, law or public policy . . . in effect in any state . . . in which such resale is to be made or to which the commodity is to be transported for such resale.

15 U.S.C. §45(a)(2) (1970) (emphasis added).

Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy . . . in effect in any State . . . which in substance provides that wilfully and knowingly advertising, offering for sale or selling any commodity at less than the prices prescribed in such contracts or agreements

The passage of the McGuire Act indicates the apparent high water mark for fair trade legislation. However, twenty-five states have, since 1952, seen fit to overrule the nonsigner provisions of their respective fair trade laws as violative, for one reason or another, of their constitutions.⁶³

It appears that the *Schwegmann* decision has given no small impetus to this movement in spite of the fact that *Schwegmann* was rendered inoperative by the McGuire Act. State courts were hoping for at least *sub silentio* criticism of the *Old Dearborn* decision, and they looked, logically, to the United States Supreme Court for guidance. The courts found that guidance in the Court's language in *Schwegmann*:

When they [manufacturers] seek, however, to impose price fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different. That is not price fixing by contract or agreement; that is price fixing by compulsion. That is not following the path of consensual agreement; that is resort to coercion.⁶⁴

Admittedly the language is strong, and it suggests that nonsigner provisions do in fact visit a deprivation of liberty of constitutional proportions upon nonsigners. But whatever the statement is, it is nothing more than dicta under the facts of the case. The sole question in *Schwegmann* was whether or not the Miller-Tydings Act exempted nonsigner clauses from federal antitrust legislation. That narrow issue of law was subcon-

whether the person . . . is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

15 U.S.C. §45(a)(3) (1970) (emphasis added).

⁶³ *Bulova Watch Co. v. Zale Jewelry Co.*, 274 Ala. 270, 147 So. 2d 797 (1962); *Union Carbide & Carbon Corp. v. White River Distribs., Inc.*, 224 Ark. 558, 274 S.W.2d 455 (1955); *Olin Mathieson Chem. Corp. v. Francis*, 134 Colo. 160, 301 P.2d 139 (1956); *Cox v. General Elec. Co.*, 211 Ga. 286, 85 S.E.2d 514 (1955); *Bulova Watch Co. v. Albertson's, Inc.*, 1963 Trade Cas. ¶ 70,596 (Sup. Ct., Idaho); *Bissell Carpet Sweeper Co. v. Shane Co.*, 237 Ind. 188, 143 N.E.2d 415 (1957); *Bulova Watch Co. v. Robinson Wholesale Co.*, 252 Iowa 740, 108 N.W.2d 365 (1961); *Quality Oil Co. v. E. I. DuPont de Nemours & Co.*, 182 Kan. 488, 322 P.2d 731 (1958); *General Elec. Co. v. American Buyers Cooperative, Inc.*, 316 S.W.2d 354 (Ky. 1958); *Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets*, 231 La. 51, 90 So. 2d 343 (1968); *Shakespeare Co. v. Lippmann's Tool Shop Sporting Goods Co.*, 334 Mich. 109, 54 N.W.2d 268 (1952); *Remington Arms Co. v. G.E.M., Inc.*, 257 Minn. 562, 102 N.W.2d 528 (1960); *Union Carbide & Carbon Corp. v. Skaggs Drug Center, Inc.*, 139 Mont. 15, 359 P.2d 644 (1961); *McGraw Elec. Co. v. Lewis & Smith Drug Co.*, 159 Neb. 703, 65 N.W.2d 620 (1955); *Zale-Las Vegas, Inc. v. Bulova Watch Co.*, 80 Nev. 483, 396 P.2d 683 (1964); *Skaggs Drug Center, Inc. v. General Elec. Co.*, 63 N.M. 215, 315 P.2d 967 (1957); *American Home Prods. Corp. v. Homsey* 361 P.2d 297 (Okla. 1961); *General Elec. Co. v. Wahle*, 207 Ore. 302, 296 P.2d 635 (1956); *Olin Mathieson Chem. Corp. v. White Cross Stores, Inc.*, 414 Pa. 95, 199 A.2d 266 (1964); *Rogers Kent, Inc. v. General Elec. Co.*, 231 S.C. 636, 99 S.E.2d 665 (1957); *House of Seagram, Inc. v. Assam Drug Co.*, 85 S.D. 27, 176 N.W.2d 491 (1970); *General Elec. Co. v. Thrifty Sales, Inc.*, 5 Utah 2d 326, 301 P.2d 741 (1956); *Remington Arms Co. v. Skaggs*, 55 Wash. 2d 1, 345 P.2d 1085 (1958); *General Elec. Co. v. A. Dandy Appliance Co.*, 143 W. Va. 491, 103 S.E.2d 310 (1958); *Bulova Watch Co. v. Zale Jewelry Co.*, 371 P.2d 409 (Wyo. 1962).

⁶⁴ 341 U.S. at 388.

stitutional in proportion, and yet the language quoted above has been relied upon by many state courts in holding nonsigner provisions contrary to the state constitution.⁶⁵ For example, the Massachusetts Supreme Judicial Court noted in *Corning* that the *Schwegmann* language undermined, if it did not overrule, the *Old Dearborn* rationale that "voluntary acquisition of the property with such knowledge [of the restriction] carried with it upon every principle of fair dealing assent to the protective restriction"⁶⁶

It must be remembered that the fair trade laws were born during the Depression and, whatever their rationale, they served an arguably useful purpose at the time. They were one method used to prevent desperate and injurious price cutting. By the early 1950's the Depression had long since passed and the economic factors which argued for the legality of such provisions were gone. The United States Supreme Court, cognizant of the fact that its prestige had suffered badly during and after its series of decisions invalidating New Deal legislation,⁶⁷ had begun to articulate a judicial "hands off" policy in *Old Dearborn*, which policy culminated in the *NLRB v. Jones & Laughlin Steel Corp.*⁶⁸ decision one year later. By 1952, the image of the Court had been restored, and there was considerably less political pressure to render a decision that would leave fair trade legislation intact in spite of arguable constitutional infirmities. *Schwegmann* indicated that the Court would, much as it had before 1936, make some critical evaluation of the efficacy of economic legislation, though the narrow holding in *Schwegmann* is based solely on the Court's construction of the language in the Miller-Tydings Act. It appears that state courts have taken a cue from, among other things, the dicta in *Schwegmann*.⁶⁹ However, it is also true that where the issue has presented itself the Supreme Court has declined to overrule *Old Dearborn* specifically.⁷⁰

II. FAIR TRADE AS AN INVALID EXERCISE OF POLICE POWER

It is appropriate at this point to examine some of the state court decisions invalidating fair trade laws, specifically as they compare to the

⁶⁵ See generally cases cited in note 63 *supra*.

⁶⁶ *Corning Glass Works v. Ann & Hope, Inc.*, 1973 Mass. Adv. Sh. 575, 580, 294 N.E.2d 354, 358, quoting *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 193-94 (1936).

⁶⁷ See note 34 *supra*.

⁶⁸ 301 U.S. 1 (1936). See note 45 *supra*.

⁶⁹ See Note, 47 Iowa L. Rev. 208, 214 (1961).

⁷⁰ The Supreme Court has declined to review a number of decisions on the ground that they lacked a substantial federal question. E.g., *Lionel Corp. v. Grayson-Robinson Stores, Inc.*, 15 N.J. 191, 104 A.2d 304, appeal dismissed, 348 U.S. 859 (1954); *General Elec. Co. v. Masters, Inc.*, 307 N.Y. 229, 120 N.E.2d 807, appeal dismissed, 348 U.S. 892 (1954). See also *Seagram-Distillers Corp. v. New Cut Rate Liquors, Inc.*, 221 F.2d 815, 820 (7th Cir.), cert. denied, 350 U.S. 828 (1955); *Standard Drug Co. v. General Elec. Co.*, 202 Va. 367, 117 S.E.2d 289 (1961), appeal dismissed, 368 U.S. 4 (1961).

Supreme Judicial Court's decision in *Corning*. There are two principal methods which state courts have used to obtain a constitutional "handle" on the allegedly offensive elements in fair trade legislation: first, challenged fair trade laws have been held to be an unconstitutional exercise of police power; and second, other such laws have been held to be unconstitutional delegations of legislative authority. This section of the comment will analyze those decisions which turn on the police power issue.⁷¹ These opinions involve an examination of the merits and effects of the nonsigner provision. The nonsigner provision, as a vehicle for economic regulation, is then evaluated in light of state constitutional provisions which hold that all laws, to be within the power of the legislature, must bear a rational relationship to the general well-being of the public. Economic regulations that clearly transgress the legitimate sphere of police authority work, ipso facto, a deprivation of liberty or property without due process of law. As will be subsequently shown, these decisions are based on due process provisions contained in the respective state constitutions and not on the due process clause of the Fourteenth Amendment. However, every court must initially examine the problem as it relates to the federal due process provision applicable to the states as well as to individual due process provisions contained in state constitutions.

The federal due process test was articulated in the landmark case of *Nebbia v. New York*⁷² where the United States Supreme Court said:

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied⁷³

With specific regard to fair trade legislation, the argument that such legislation works a deprivation of property without due process of law, as guaranteed by the Fourteenth Amendment, was answered in *Old Dearborn*:

⁷¹ See, e.g., *Remington Arms Co. v. G.E.M., Inc.*, 257 Minn. 562, 102 N.W.2d 528 (1960); *General Elec. Co. v. Wahle*, 207 Ore. 302, 296 P.2d 635 (1956); *Olin Mathieson Chem. Corp. v. Francis*, 134 Colo. 160, 301 P.2d 139 (1956); *Shakespeare Co. v. Lippmann's Tool and Sporting Goods Co.*, 334 Mich. 109, 54 N.W.2d 268 (1952).

⁷² 291 U.S. 502 (1934). In this case the New York Legislature had established a 3-member commission to set prices for milk that would be calculated to yield both the producer and the dealer a reasonable return and which insured an adequate supply of milk. Petitioner sold milk below minimum prices established by the board.

⁷³ *Id.* at 537.

Appellants here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive, if not actual knowledge of the law which authorized the restriction [T]heir voluntary acquisition of the property with such knowledge carried with it, upon every principal of fair dealing, assent to the protective restriction⁷⁴

To the extent that *Old Dearborn* is still viable law, this language is determinative of the federal due process argument. As previously stated, the Supreme Court has declined on numerous occasions to review this holding.⁷⁵ Citing *Old Dearborn* and subsequent decisions upholding that case, the Massachusetts Supreme Judicial Court felt compelled to question its present validity:

[S]ubsequent decisions of the Supreme Court of the United States, *though without rationale*, make it clear that such assertions [deprivations of property without due process of law] present no substantial Federal question. . . . We are bound by decisions of the Supreme Court on Federal questions, regardless of rationale or lack thereof.⁷⁶

The Massachusetts court is simply at a loss to explain the silence of the Supreme Court.

Another state court, that of Oregon, flatly ignored the implications of *Old Dearborn* when in *General Elec. Co. v. Wahle*⁷⁷ it said:

We are convinced that the Fair Trade Act as it applies to non-signers constitutes an unnecessary and unreasonable interference with an individual's constitutional right of contract and of property in violation of . . . the Oregon constitution, and of the due process clause of the federal constitution.⁷⁸

It would seem that this is in direct contradiction to the *Old Dearborn* decision.⁷⁹ It would further appear that where so many state courts are either confused or unpersuaded by *Old Dearborn* and its descendant cases

⁷⁴ *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 193-94 (1936).

⁷⁵ See note 70 *supra*.

⁷⁶ 1973 Mass. Adv. Sh. 575, 580-81, 294 N.E.2d 354, 358 (emphasis added) (citation omitted).

⁷⁷ 207 Ore. 302, 296 P.2d 635 (1956).

⁷⁸ *Id.* at 326, 296 P.2d at 647.

⁷⁹ It was not vital to the holding in *Wahle* that the Oregon court find the nonsigner provision in violation of the Fourteenth Amendment. It was enough that it clearly contravened certain provisions of the state constitution. A court may say it is "convinced" of a legal conclusion and yet the decision in the case will not *require* the conclusion. Thus, the *Wahle* court was not really attempting to hold contra to the United States Supreme Court on a constitutional issue.

that the United States Supreme Court would take an opportunity to clarify the law. Most courts have been unwilling to venture as far as the Oregon court did in 1956. Certainly the Massachusetts Supreme Judicial Court evinced in *Corning* a reluctance to disregard *Old Dearborn* though the wisdom of the 1936 decision was severely questioned.

The holding in *Old Dearborn*, even when followed, is not dispositive of the due process argument in state courts, where both federal and state due process tests must be passed. The Supreme Court of the United States cannot, of course, define the police power of the states as limited by state constitutions. This involves an examination of those provisions in the various state constitutions which correspond to the due process clause in the Fourteenth Amendment. In *Coffee-Rich Inc. v. Commissioner of Public Health*,⁸⁰ the Massachusetts Supreme Judicial Court observed: "What is permissible under the Federal Constitution in matters of state economic regulation is not necessarily permissible under state law. The Constitution of a state may guard more jealously against the exercise of the state's police power."⁸¹ It is true that state constitutional due process provisions are sometimes said to be, at the least, co-extensive with the federal due process provisions,⁸² but the determination of the scope of these provisions is properly left to a case-by-case definition. No less than sixteen states have overturned nonsigner clauses as being beyond the scope of the police power of the legislature as delimited by the due process requirement in the state constitution.⁸³ In *Corning*, the Massachusetts court was unwilling so to rule. Some comparisons may be helpful.

The numerous opinions which hold that nonsigner clauses are violative of due process and are beyond the scope of the police power of the states involve lengthy discussion of the relative merits of the law. The origins of the legislation are scrutinized and its operation is examined. Certain of these decisions have reached the conclusion that fair trade is not what it purports to be, that is, it is not designed to protect the goodwill that inheres in a trademark, but rather is a measure to insure maintenance of profit margins for the small retailer. To the extent that these laws are in derogation of free and open competition and serve only to further the aim of special interests, they are found to be outside the legitimate sphere of police authority.

In *Wahle* the Oregon court discussed the legitimacy of the objective of the challenged fair trade law:

⁸⁰ 348 Mass. 414, 204 N.E.2d 281 (1965).

⁸¹ Id. at 421, 204 N.E.2d at 286. See also *Hutcheson v. Director of Civil Service*, 1972 Mass. Adv. Sh. 651, 660, 281 N.E.2d 53, 59; *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940).

⁸² See *Lowell Gas Co. v. Department of Public Utilities*, 324 Mass. 80, 84 N.E.2d 811 (1949).

⁸³ See note 71 *supra*.

In substance, what is the real purpose of the Fair Trade Act? Regardless of how its true nature may be camouflaged . . . it is a matter of common knowledge that it is a price-fixing statute designed principally to destroy competition at the retail level. Protection of the "good will" of the trademark owner is simply an excuse and not a reason for the law.⁸⁴

The Oregon court concludes that the enactment of the nonsigner provision bears no substantial connection to the general public welfare and therefore works a deprivation of due process of law. The numerous opinions which hold that fair trade legislation is outside the police power of the state and violative of due process are characterized by similar discussions.⁸⁵ However, the *Corning* court was unwilling to engage in a similar process, dismissing the argument that the nonsigner clause bear no relation to the general well-being with these words:

Disputes of this type are regularly and properly resolved in the political and legislative arenas. . . . Nor is trial of such issues by a hearing officer, judge or jury likely to arrive at the truth "If the question is fairly debatable we cannot substitute our judgment for that of the Legislature." . . . [T]he Legislature could rationally conclude that authorization of resale price maintenance serves the public interest.⁸⁶

It seems that the Massachusetts court and others that have refused to pass on the wisdom of fair trade legislation⁸⁷ are on firmer ground. The opinions which follow the Michigan⁸⁸ and Oregon⁸⁹ rationale raise a number of problems. First of all, they violate the basic tenet that courts should not substitute their judgment for that of the legislature. It is properly the function of the legislature to choose between two arguably wise courses of action, and the court may then determine whether a challenged law meets specific constitutional requirements. Courts following the Michigan and Oregon rationale are required to pass on the economic merits of fair trade legislation and thus assume, to some degree, the legislative function. They conclude in summary fashion by holding that

⁸⁴ 207 Ore. at 317, 296 P.2d at 643.

⁸⁵ See note 71 *supra*.

⁸⁶ 1973 Mass. Adv. Sh. at 584-85, 294 N.E.2d at 360 (citation omitted), quoting *General Elec. Co. v. Kimball Jewelers, Inc.*, 333 Mass. 665, 675, 132 N.E.2d 652, 658 (1956).

⁸⁷ See note 92 *infra*.

⁸⁸ *Shakespeare Co. v. Lippmann's Tool Shop Sporting Goods Co.*, 334 Mich. 109, 54 N.W.2d 268 (1952). This was the first opinion which held the enforcement of a nonsigner clause invalid solely because it was an improper exercise of the police power of the state. The Florida court had ruled in 1949 that a nonsigner provision was both a denial of due process and an invalid delegation of legislative authority. See *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So. 2d 371 (Fla. 1949).

⁸⁹ *General Elec. Co. v. Wahle*, 207 Ore. 302, 296 P.2d 635 (1956).

their respective fair trade laws bear no relation to the general public well-being, an extreme conclusion which may not be warranted by the evidence. Furthermore, the fact that many state courts find the question of the *wisdom* of these laws, in fact debatable, suggests that there may be some logical nexus between the fair trade laws and the general public well-being. Current opinion seems to run contra to resale price maintenance but the question is by no means closed. The fact that sixteen states⁹⁰ have upheld nonsigner provisions is indicative of the vigorous debate involved here. It is simply unconvincing to hold that these laws are so irrational as to preclude debate.

Second, arguments which rest on the scope of the police power must inevitably conclude that nonsigner provisions work a deprivation of property without due process of law. State courts taking this approach must choose one of two alternatives. First, they can specifically disapprove of *Old Dearborn*, in effect reconsidering the status of fair trade under the due process clause of the Fourteenth Amendment. But clearly this is improper, as state courts are bound by Supreme Court opinions on questions of federal law. Alternatively, the court, may try to articulate some distinction between the federal due process clause and the corresponding provision in the state constitution. If the distinctions are found by the courts to be persuasive then, a fortiori, the nonsigner provision may be valid under federal law but invalid under state law. However, the arguments in support of these distinctions are inevitably weak. Often they will say nothing more than that the court is not constrained by federal discussions when interpreting its own constitution. This is undoubtedly sound reasoning, but it seems to be of little aid in reconciling the federal and state decisions.

Finally, it should be noted that there has been a general demise of substantive due process objections in the area of economic regulation since the mid 1930's. This has been quite pronounced in the federal courts and operates to a substantial degree in the state courts.⁹¹ Decisions holding the Michigan and Oregon view undermine this trend. On the other hand, *Corning* and similar decisions avoid resurrecting substantive due process issues.

III. THE CORNING DECISION

A growing number of states⁹² have seen fit to invalidate nonsigner provisions on the theory that they are an unconstitutional delegation of

⁹⁰ Arizona, California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Mississippi, North Carolina, New Hampshire, New Jersey, New York, Ohio, Rhode Island, Tennessee and Wisconsin.

⁹¹ See Conant, *Resale Price Maintenance: Constitutionality of Nonsigner Clauses*, 109 U. Pa. L. Rev. 539, 543 (1961).

⁹² See, e.g., *Bulova Watch Co. v. Robinson Wholesale Co.*, 252 Iowa 740, 108

legislative authority to private persons. That is, they allow a manufacturer to fix prices at which a retailer, not in privity with the manufacturer, must sell. This involves a comparison of the fair trade law being challenged with the appropriate state constitutional provisions which usually provide, in essence, that the legislature is the sole repository of lawmaking authority. This approach has an advantage in that it obviates a discussion of the scope of the police power, an area admittedly laced with political considerations. At the same time, these decisions have a solid foundation in law, and are not merely poorly reasoned opinions prompted by a basic skepticism of the economic wisdom of fair trade. The argument that a nonsigner clause is an invalid delegation of legislative authority is not a judicial disguise for a political decision.

Decisions, like *Corning*, invalidating fair trade laws as violative of the nondelegation doctrine have proliferated only recently⁹³ due to a number of factors. Chief of these has been the United States Supreme Court decision in *Old Dearborn*, which unfortunately has been widely misinterpreted on the narrow issue of delegation of power.⁹⁴ It is true that the Court there did make the broad statement: "We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others"⁹⁵ In its decision, in 1956, in *General Electric Co. v. Kimball Jewelers, Inc.*,⁹⁶ the Supreme Judicial Court cited the above quoted language from *Old Dearborn* as dispositive of the question of improper delegation.⁹⁷ The *General Electric* holding on this issue was in harmony with decisions in New York,⁹⁸ Pennsylvania,⁹⁹ New Jersey¹⁰⁰

N.W.2d 365 (1961); *Quality Oil Co. v. E.I. DuPont de Nemours & Co.*, 182 Kan. 488, 322 P.2d 731 (1958); *Olin Mathieson Chem. Corp. v. White Cross Stores, Inc.*, 414 Pa. 95, 199 A.2d 266 (1964); *House of Seagram, Inc. v. Assam Drug Co.*, 85 S.D. 27, 176 N.W.2d 491 (1970). See also Note, 47 Iowa L. Rev. 208, 211 (1961).

⁹³ There have been nine such decisions since 1958. See *Bulova Watch Co. v. Albertson's Inc.*, 1963 Trade Cas. ¶ 70,596 (Sup. Ct., Idaho); *Bulova Watch Co. v. Robinson Wholesale Co.*, 252 Iowa 740, 108 N.W.2d 365 (1961); *Quality Oil Co. v. E.I. DuPont de Nemours & Co.*, 182 Kan. 488, 322 P.2d 731 (1958); *Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets*, 231 La. 51, 90 So. 2d 343 (1968); *Remington Arms Co. v. G.E.M., Inc.*, 257 Minn. 562, 102 N.W.2d 528 (1960); *American Home Prods. Corp. v. Homsey*, 361 P.2d 297 (Okla. 1961); *Olin Mathieson Chem. Corp. v. White Cross Stores, Inc.*, 414 Pa. 95, 199 A.2d 266 (1964); *House of Seagram, Inc. v. Assam Drug Co.*, 85 S.D. 27, 176 N.W.2d 491 (1970); *Bulova Watch Co. v. Zale Jewelry Co.*, 371 P.2d 409 (Wyo. 1962).

⁹⁴ See 1 K. Davis, *Administrative Law Treatise* §2.14 (1958). See generally *Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets*, 231 La. 51, 90 So. 2d 343 (1968); Conant, *supra* note 90, at 548-49; Note, 10 Vand. L. Rev. 415, 417 (1957).

⁹⁵ 299 U.S. at 194.

⁹⁶ 333 Mass. 665, 132 N.E.2d 652 (1956).

⁹⁷ *Id.* at 677-78, 132 N.E.2d at 659.

⁹⁸ *Bourjois Sales Corp. v. Dorfman*, 273 N.Y. 167, 7 N.E.2d 30 (1937), followed in *General Elec. Co. v. Masters, Inc.*, 307 N.Y. 229, 120 N.E.2d 802 (1954).

⁹⁹ *Burche Co. v. General Elec. Co.*, 382 Pa. 370, 115 A.2d 361 (1955). *Burche* has been

and California.¹⁰¹ Nevertheless, it is quite clear that *Old Dearborn* cannot be dispositive of the issue of delegation of legislative authority vis-à-vis state constitutional law. Consonant with our concept of federalism, it is properly the task of the court of last resort in each state to determine whether its own fair trade law contravenes the state constitution. Unfortunately, the language in *Dearborn*¹⁰² is unequivocal on this issue of delegation of legislative authority. The discussion is not couched in terms of the limitation the Fourteenth Amendment places on a state delegation of legislative authority, but rather is a bare statement that fair trade does not involve an unconstitutional delegation of authority to private persons. While the language, when placed in proper context as a declaration by a federal court not reaching questions of state law, is not erroneous, it is misleading.

Granting the foregoing, we must reexamine the scope and implications of *Old Dearborn* in order to accord that decision its proper application in this area. As has already been mentioned, *Old Dearborn* was attempting to grapple with the due process objections raised by fair trade legislation. That case seems to recognize that there may be particular instances of delegation of state legislative authority which are so unnecessary, so broad, and so arbitrary as to be wanting in due process of law as required by the Fourteenth Amendment. *Old Dearborn* did not have to define the limits of this due process restraint on the delegation of state legislative authority.

It does not follow, ipso facto, that the delegation involved in *Corning* comports with those provisions of the state constitution which make the General Court the sole repository of legislature authority.¹⁰³ Properly, this would involve a de novo consideration of the matter, without reference to the due process argument of *Old Dearborn*. And this is exactly the approach the Supreme Judicial Court took in the *Corning* decision. The court was unwilling to perpetuate the mistake made in *General Electric*¹⁰⁴ but neither was it willing to admit in so many words the earlier Court's interpretative error. *Corning* is at most a *sub silentio* admission of mistake.¹⁰⁵ Cases following *General Electric*, but prior to *Corning* had failed to correct the mistake, but the majority of these were

subsequently overruled by *Olin Mathieson Chem. Corp. v. White Cross Stores, Inc.*, 414 Pa. 95, 199 A.2d 266 (1964), which held the nonsigner provision of the Pennsylvania Fair Trade Law an unconstitutional delegation of legislative authority.

¹⁰⁰ *Johnson & Johnson v. Weissbard*, 121 N.J. Eq. 585, 191 A. 873 (1937), followed in *Lionel Corp. v. Grayson-Robinson Stores, Inc.*, 15 N.J. 191, 104 A.2d 304 (1954).

¹⁰¹ *Scovill Mfg. Co. v. Skaggs Pay Less Drug Stores*, 45 Cal. 2d 881, 291 P.2d 936 (1955); *Max Factor & Co. v. Kunsman*, 5 Cal. 2d 446, 55 P.2d 177 (1936).

¹⁰² See text at note 44 *supra*.

¹⁰³ Mass. Const. pt. I, art. XXX; Mass. Const. pt. II, ch. 1, §1, art. IV. See note 5 *supra*.

¹⁰⁴ See text at note 95 *supra*.

¹⁰⁵ Consider the following language in *Corning*:

decided on other than constitutional grounds,¹⁰⁶ and did not properly re-open the question.

Once the basic error of the *General Electric* decision was admitted, the question of delegation of power raised by the Massachusetts Fair Trade Law had to be reexamined in considerably greater depth. The issue was ripe for decision in *Corning*. When examining a legislative enactment challenged on the ground that it is an unlawful delegation of legislative authority two questions arise. The first asks whether in fact a delegation exists at all. If a delegation is found the second asks whether the delegation meets certain requirements thereby making it a lawful delegation.

Although there are opinions to the contrary, the growing feeling among state courts is that these laws do involve a delegation to private persons of the legislative authority to control prices when conditions demand. Professor Kenneth Davis, a noted commentator on administrative law, has said that fair trade laws, and specifically nonsigner provisions, unquestionably involve a delegation of legislative authority to private persons.¹⁰⁷ On this point, the *Corning* court cites Professor Davis with approval.¹⁰⁸ One court¹⁰⁹ has gone so far as to refer to manufacturers who can effectively restrict resale prices as "unrestrained sovereign[s]."¹¹⁰

As noted before, there are opinions directly *contra* which hold that these laws are complete upon enactment and leave no legislative powers

In [*General Electric*] we dealt separately with the question whether the "fair trade" law constituted an unlawful delegation of power to the owner of the trade mark or brand, and concluded that it did not Thus [in *General Electric*] we relied primarily on the opinion of the Supreme Court in the *Old Dearborn* case. 1973 Mass. Adv. Sh. at 585-86, 294 N.E.2d at 360-61. The court then cites Davis for the proposition that, in spite of all that is said, these laws do involve a delegation of legislative power. Id. at 586, 294 N.E.2d at 361, citing 1 K. Davis, *supra* note 94, §2.14. The court was somewhat mystified at the reliance *General Electric* placed on *Old Dearborn* but the court stops short of saying that the reliance was unfounded, or obviously misplaced.

¹⁰⁶ E.I. DuPont de Nemours & Co. v. Kaufman & Chernick, Inc., 337 Mass. 216, 148 N.E.2d 634 (1958) (the constitutional question was never argued); Colgate-Palmolive Co. v. Elm Farm Foods Co., 337 Mass. 221, 148 N.E.2d 861 (1958) (sole issue was whether the issuance of trading stamps violated the presumptively valid law); Shulton, Inc. v. Consumer Value Stores, Inc., 352 Mass. 605, 227 N.E.2d 482 (1967) (sole issue argued was what constitutes fair and open competition under the statute); Black & Decker Mfg. Co. v. Ann & Hope, Inc., 1972 Mass. Adv. Sh. 143, 277 N.E.2d 687 (sole issue argued was whether contracts stipulating only minimum prices were enforceable against non-signers).

¹⁰⁷ 1 K. Davis, *supra* note 94, at 147.

¹⁰⁸ *Corning Glass Works v. Ann & Hope, Inc.*, 1973 Mass. Adv. Sh. 575, 586, 294 N.E.2d 354, 361.

¹⁰⁹ *Olin Mathieson Chem. Corp. v. White Cross Stores, Inc.*, 414 Pa. 95, 199 A.2d 266 (1964).

¹¹⁰ Id. at 99-100, 199 A.2d at 268.

in the hands of private persons.¹¹¹ Those courts which hold that fair trade laws are not delegatory but are complete upon enactment usually point to the element of contract involved. These opinions generally hold that acquisition of a commodity with knowledge of the resale restriction placed upon the commodity constitutes assent to the contract. Again, courts have looked to the language in *Old Dearborn*:

Appellants [retailers] here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed and, of course, with the presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; *and their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction . . .*¹¹²

By this reasoning retailers are deemed to have waived their right to resell at any price and have entered an agreement to resell pursuant to the producer's predetermined prices.

It is submitted that the vast majority of these laws do not impose contracts by operation of law either implicitly or explicitly.¹¹³ Rather the

¹¹¹ See, e.g., *Eli Lilly & Co. v. Saunders*, 216 N.C. 163, 4 S.E.2d 528 (1939), where the court stated:

[W]e do not understand that it is contended there is any delegation of the legislative function The statute was complete when it left the hands of the Legislature. It required no person or group of persons or other external agency to further authorize it or put it in force.

Id. at 176, 4 S.E.2d at 537. See also *Corning Glass Works v. Max Dichter Co.*, 102 N.H. 505, 161 A.2d 569 (1964), in which the New Hampshire court said: "the law is complete as to purpose and general policies. It requires no persons or agencies to make it effective." *Id.* at 511, 161 A.2d at 574.

Opinions such as these appear to consist of little more than a statement of conclusion on this very important point. This is, no doubt, influenced by the rather inconclusive and terse treatment given the issue in *Old Dearborn*. However, these opinions may also be influenced by a narrow view as to what constitutes a delegation of legislative authority. It is true that the law is complete upon enactment in the sense that its operation is not contingent upon approval or disapproval by private parties. Cf. *Trustees of Phillips Exeter Academy v. Exeter*, 92 N.H. 473, 33 A.2d 665 (1943).

¹¹² 299 U.S. at 193-94 (emphasis added).

¹¹³ But see Va. Code Ann. §59.1-2(10) (1973), which provides:

"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."

A note following this section goes on to explain:

When . . . [§59.1-2(10)] and 59.1-3 [provisions which allow resale price maintenance contracts as a matter of policy] are considered it is quite obvious that

courts reason that upon acquisition of a commodity with knowledge of the price restriction, a contract is created, the existence of which cannot be challenged by the retailer. Generally, this approach is undesirable. It is one thing for the legislature to raise a presumption, explicitly stated, which is based on certain findings of fact. It is quite another thing for a court to gloss a statute so as to establish that in all cases in which the minimum conditions (voluntary acquisition and notice of restriction) are met there is raised an irrebuttable presumption that an enforceable contract exists. Stated otherwise, it seems impermissible for the courts in these cases to *create* the operation of law which establishes a contract between a producer and a non-signing retailer; this is legislating. Further, in light of due process constraints there is substantial doubt as to whether even the legislature can act in a manner such as this.¹¹⁴ Once

the notice is not . . . the contract Voluntary acceptance of the commodity for resale with actual notice of the imposed minimum retail price creates the contract. *Standard Drug Co. v. General Elec. Co.*, 202 Va. 367, 117 S.E.2d 289 (1960). . . .

The entire agreement made between the manufacturer of the trade-marked commodity and the retailer, embodying the restriction as to its minimum retail price, is not imposed by law; it is voluntary, and the agreement constitutes a contract within the meaning of pertinent federal and state legislation. *Standard Drug Co. v. General Elec. Co.*, 202 Va. 367, 117 S.E.2d 289 (1960).

It is difficult to see how the commentator can say the agreement with a nonsigner is not imposed by law. Under the statutory scheme a retailer cannot, at once, purchase a restricted item having notice of the restriction and deny that he has agreed to the stipulated price restriction. Clearly, purchase with notice raises an irrebuttable presumption of agreement, and to that extent the contract is imposed by operation of law. If the contract were not imposed by operation of law, a retailer might introduce evidence (putting aside, for the moment, parol evidence problems) tending to show that no such agreement ever existed. See *A. Corbin, Contracts* §9 (1952). Clearly, this is not the case since the objecting retailer is estopped to deny an "agreement."

See also Ohio Rev. Code §1333.28(I), which provides:

"Contract" means any agreement written or verbal or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of §1333.29 [permitting vertical price fixing agreements as a matter of policy] . . . and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling the commodity shall constitute a contract Any distributor . . . who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor.

This statute is only slightly different from the Virginia statute. It seems clear that these statutes impose certain contracts or agreements by operation of law. Where such is the case, there can be no problem of unlawful delegation of legislative authority as parties to a contract may stipulate whatever they wish subject only to certain policy constraints. The real problem with these laws seems to be that they raise a legal presumption which may not be generally supported by the facts. Where there is no rational relationship between the facts at hand and the ultimate fact presumed, the presumption denies due process of law. *Morrison v. California*, 291 U.S. 82 (1934); *James-Dickinson Farm Mortgage Co. v. Harry*, 273 U.S. 119 (1927).

¹¹⁴ See note 113 *supra*.

the court is satisfied that the fair trade law approves solely contracts or agreements, and that these contracts or agreements are valid, then no problem of invalid delegation arises.

The *Corning* court turned its back on this type of reasoning. There is no indication that the Massachusetts law creates contracts between manufacturers and retailers by operation of law. The statute cannot reasonably be construed to do so.¹¹⁵ The manufacturer is given the right, upon execution of a single contract, to impose price restrictions on all unwilling retailers.

If, therefore, it is concluded that the law delegates legislative authority to private persons, the second question arises as to whether the delegation is so obnoxious as to violate the state constitution. Art. XXX of the Declaration of Human Rights of the Massachusetts Constitution articulates the separation of powers between the three branches of the state government,¹¹⁶ while part II, ch. 1, §1, art. IV makes the General Court the sole repository of law-making authority in the Commonwealth.¹¹⁷ The latter provision, however, cannot be construed too restrictively since any workable system of government must permit some delegation of rulemaking authority lest the legislative process break down under the sheer magnitude of its own weight.¹¹⁸ Expedience demands that substantial authority and discretion be vested outside of the legislature proper. While there are numerous Massachusetts decisions which hold that the legislature may not delegate its lawmaking authority,¹¹⁹ this is a statement of theory and not of fact.¹²⁰ Each case involving a purported delegation of legislative authority must be examined separately.

Corning involved a delegation of legislative authority to *private persons*, a delegation that must be extremely suspect on its face. However, this does not ipso facto render the delegation invalid. For example, *Trumper v. City of Quincy*,¹²¹ a Massachusetts case, upheld a law¹²²—providing that no change of any zoning ordinance shall be adopted over the written protest of owners of twenty percent of the affected land—against the contention that it was an invalid delegation of legislative authority to private persons. The written protest could be overridden by a three-quarters vote of the city council, a mechanism which provided

¹¹⁵ See note 2 *supra*.

¹¹⁶ See note 5 *supra*.

¹¹⁷ See note 5 *supra*.

¹¹⁸ See generally 1 K. Davis, *supra* note 94, §2.15.

¹¹⁹ See, e.g., Opinion of the Justices, 286 Mass. 611, 191 N.E. 33 (1934); *Attleboro Trust Co. v. Commissioner of Corps. & Taxation*, 257 Mass. 43, 153 N.E. 333 (1926); *Wyeth v. Thomas*, 200 Mass. 474, 86 N.E. 925 (1909).

¹²⁰ See 1 K. Davis, *supra* note 94, §2.02.

¹²¹ 358 Mass. 311, 264 N.E.2d 689 (1970); see also *Godfrey v. Massachusetts Medical Serv.* 1971 Mass. Adv. Sh. 969, 270 N.E.2d 804.

¹²² G.L. c. 40A, §7.

for administrative review, and preserved the requisite procedural due process. Private organizations as well as individuals have been given powers of nomination, and this delegation has been upheld.¹²³ Therefore, the fact that a delegation of legislative power is to a private person or organization is not dispositive of the issue.

However, courts have increasingly begun to examine the delegation problem in terms of "due process" considerations; that is, where the delegation is so broad as to involve a substantial possibility that the decision-making mechanism will deny due process of law, the courts have little trouble holding such delegations to be unconstitutional.¹²⁴ The *Corning* court was, it will be submitted, particularly concerned with the "due process" overtones suggested by the fair trade law in Massachusetts.

It is readily apparent, as the Supreme Judicial Court recognized, that there are no *statutory* standards enunciated in chapter 93 with which to compare the prices established by the manufacturer. In answer to this alleged lack of standards, proponents of fair trade argue that market factors act to restrain wholly capricious price setting. No producer will price himself out of the market. No one can argue with that fact as a bare statement, but it deserves further examination. In a market where competition is minimal, a very few producers, conceivably a single producer, could, by resorting to fair trade, trigger artificially high prices. Market forces cease to be a factor constraining fair trade where these forces are not allowed reasonably full play. Fair trade in this type of market can dictate those variables which otherwise would militate against the fair trade prices established.

Furthermore, the lack of standards effectively precludes review of any decision made by a manufacturer. There is nothing against which the prices he establishes can be compared. He need offer no reasons for the action he takes. The Massachusetts Fair Trade Law did not provide for administrative review let alone judicial review of the decisions of a manufacturer. The law insulates him.

Perhaps of even greater significance than the lack of statutory standards is the absence from the Massachusetts Fair Trade Law of procedural due process. Professor Davis is of the view that procedural safeguards, in the form of notice and opportunity to be heard, can be a much more effective check on arbitrariness than statutory standards.¹²⁵ The Massachusetts court evidently found this a persuasive argument, for it says in *Corning*:

There is no provision for participation by any public board or officer in the process by which Corning fixes the prices at which Ann & Hope

¹²³ *Corning Glass Works v. Ann & Hope, Inc.*, 1973 Mass. Adv. Sh. 575, 587, 294 N.E.2d 354, 362.

¹²⁴ See 1 K. Davis, *supra* note 94, §2.15.

¹²⁵ K. Davis, *Administrative Law Text* 43, 44 (3d ed. 1972).

may sell its merchandise, nor for notice, hearing or judicial review of the prices fixed by the manufacturer.¹²⁶

Words to the same effect can be found in almost every other opinion¹²⁷ which invalidates these laws as an unconstitutional delegation of legislative authority. The general public must be afforded some method of review in order to be protected against wholly capricious action on the part of a manufacturer. It is not enough to say that retailers and consumers are free to avoid products upon which unreasonable restrictions are placed. Even if they could avoid such products, we have not remedied or even excused the law in question.

Summarizing this aspect of the problem, it is apparent that the nonsigner provision of the fair trade law effectively allowed a manufacturer to establish the price at which all retailers would sell his product. While it must be admitted that the Legislature has the authority to stipulate prices pursuant to a legitimate state interest, it is quite another matter to delegate this authority to a private group of citizens. As has been noted, any delegation of legislative authority must preserve due process of law for those persons who will be affected by the delegation. Accountability, in some form, must inhere in the delegation as a check on arbitrariness. Here Corning was accountable to neither the courts, nor the legislature, nor the people, in its decision-making process.

CONCLUSION

The *Corning* decision was the logical culmination of a series of decisions handed down by the Supreme Judicial Court. In addition, *Corning* pointed to the growing number of states which have invalidated their laws for one reason or another. Because of the growing dissatisfaction the courts have been forced to scrutinize these laws very closely. Many jurisdictions, including Massachusetts, now have an Unfair Sales Act¹²⁸ the availability of which undermines the case for fair trade. In general, unfair sales acts provide that no retailer may sell an item at less than cost plus a minimum statutory mark-up. The express purpose of the laws is to prevent loss-leader selling¹²⁹ and predatory price cutting. At this they are much more exact and palatable than the fair trade laws. The Unfair Sales Law enables the producer to protect his goodwill simply by adjusting his

126 1973 Mass. Adv. Sh. at 588, 294 N.E.2d at 362.

127 See note 92 *supra*.

128 G.L. c. 93, §§14E-K.

129 Loss-leader selling is the practice often engaged in by large retail outlets whereby a specific item is advertised at a price which is at or below cost to attract the customer. The customer is then induced in various ways to purchase other items while he is in the store. In this manner the store can recoup its loss on the single advertised item. Loss leaders mean somewhat higher prices on the remaining items in the store. It is argued that in reality the consumer saves nothing when he is made the unwitting subject of this deceptive practice.

sale price to the retailer. The statutory mark-up, usually around 6%, is small enough to allow competition among horizontal components of the market. The efficient retailer is still able to pass on the fruits of efficiency to the consumer, in the form of lower prices, and the consumer is not required to subsidize marginal retailers who, but for fair trade, would not exist.

To those who argue that the passing of fair trade will be marked by an increase in bankruptcy of small retailers the answer is simply that small retailers and independent businessmen offer a variety of services which have high market value. People are willing to pay for personalized service and attention, and for convenience of location. The small retailer can survive and even prosper if he is efficient in offering these services.

Recent decisions of the Supreme Judicial Court prior to *Corning* have suggested that the fair trade law was looked on with some dissatisfaction. In *Shulton, Inc. v. Consumer Value Stores*¹⁸⁰ the court held that the requirement that a fair traded item be in free and open competition was not established by a notice to admit facts or an agreement between parties.¹⁸¹ The burden of proving fair and open competition is on the plaintiff, a burden that may prove expensive to meet. This had the effect of greatly restricting the usefulness of the nonsigner provision of the law.

More recently the court decided *Black & Decker Manufacturing Co. v. Ann & Hope, Inc.*,¹⁸² in which it was held that a fair trade contract which failed to stipulate *exact* prices was unenforceable against a nonsigner. Plaintiff's contracts stipulated that the retailer would not resell at prices *below* those indicated in the contract. The court construed the language of section 14B very strictly and found that plaintiff's contracts were not included, though clearly they could have held otherwise. The *Black & Decker* decision further noted the number of jurisdictions then holding nonsigner provisions unconstitutional, an oblique suggestion that the court would at least reconsider the issue, were it properly presented. *Corning* was the final step and brought Massachusetts law into line with the law in the majority of other jurisdictions.

STEPHEN J. KIELY

STUDENT COMMENT

§10.16. Consumer credit transactions: Newly modernized repossession procedures: Chapter 629 of the Acts of 1973.

From the foundation of civil society, two desires, in a measure conflicting with one another, have been striving for supremacy:

¹⁸⁰ 352 Mass. 605, 227 N.E.2d 482 (1967); see also note 11 *supra*.

¹⁸¹ See text at note 11 *supra*.

¹⁸² 1972 Mass. Adv. Sh. 143, 277 N.E.2d 687.

first, the desire of the individual to control and regulate his own activities in such a way as to promote what he conceives to be his *own* good, and, second, the desire of society to curtail the activities of the individual in such a way as to promote what it conceives to be the *common* good.

—George Sutherland¹

Historically, the law governing commercial transactions has been predicated upon the ability of the individual to act in his own behalf and to protect his own interests. Relying upon the assumption that the parties to a transaction possessed equal information and negotiated from positions of relative equality, the law has allowed the individual freedom to control and regulate his own activities, subject to the obligations of good faith, diligence, reasonableness and care.²

The recent growth in consumer credit,³ however, has significantly altered the composition of the credit market and undercut the assumptions upon which freedom in commercial transactions has been premised. Consumers are often unable to assess the quality of goods they purchase, resist sophisticated, high-pressure sales campaigns, or comprehend the complex credit terms which may be offered. Moreover, consumers often have no opportunity to negotiate either the price of goods or the terms of sales agreements. This lack of information and inability to bargain have upset the balance which formerly allowed "freedom of contract" principles to dominate commercial transactions. Recognition of this imbalance has induced both legislative⁴ and judicial⁵ action designed to equalize the position of the consumer with that of the creditor.

Much of the attention given to consumer credit transactions in recent years has focused on the rights of the consumer upon default under a conditional sales contract. In August of 1973, the General Court of Massachusetts enacted a new repossession statute, chapter 629 of the Acts of 1973, which is applicable to consumer credit transactions entered into on or after January 1, 1974. The statute repeals and replaces the

§10.16. 1 Address by George Sutherland, American Bar Association Annual Meeting, Sept. 4, 1917, in 8 *Modern Eloquence* 428 (1936).

2 G.L. c. 106, §1-102(3) and comment 2. See also G.L. c. 106, §2-302 limiting enforcement of contracts or clauses of contracts found to be unconscionable.

3 As of October 31, 1973, outstanding consumer instalment credit exceeded \$143 billion. Financial and Business Statistics, 59 Fed. Res. Bull. A54 (Dec. 1973).

4 For example, truth-in-lending legislation has been enacted in an attempt to provide, through the mechanism of disclosure, the consumer with the information necessary to make knowledgeable decisions about credit terms. See G.L. c. 140C and 15 U.S.C. §1601 et seq. (1970). Other consumer protection legislation has been designed to curtail deceptive advertising, misrepresentation, and high pressure sales tactics. See G.L. c. 93A.

5 See, e.g., *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

former chapter 255, sections 13I and 13J (dealing with secured loans to consumers); chapter 255B, sections 20A and 20B (dealing with secured and unsecured retail installment sales of motor vehicles); and chapter 255D, sections 21 and 22 (dealing with secured and unsecured retail installment sales of consumer goods and services other than motor vehicles).⁶

Under the former chapter 255, the secured creditor, upon default by the debtor, had the *option* to provide the debtor with fourteen days notice, in writing, of his intention to repossess the collateral.⁷ Repossession without notice was permitted, and failure to give notice resulted only in the forfeiture of minor charges amounting to the cost of repossession, storage and disposition of the collateral.⁸ If repossession could be effected without the use of force, the secured creditor could proceed non-judicially; otherwise, the collateral could be obtained only through judicial process.⁹ No more than five days after repossession, the secured creditor was required to give notice to the debtor that the collateral had been repossessed, and the collateral had to be retained for fifteen days after repossession in order to allow the debtor an opportunity to redeem the goods.¹⁰ It was also necessary for the creditor to give the debtor notice of his intention to sell the collateral at least five days prior to sale.¹¹ Upon sale of the collateral, the debtor was entitled to any surplus received by the creditor¹² and was, conversely, liable for any deficiency suffered by him.¹³

The new statute restricts the freedom of the secured creditor to repossess by placing limitations on those events which constitute an enforceable default and by mandating the formerly elective notice requirement prior to repossession. It also limits the availability of non-judicial repossession and eliminates the deficiency judgment in most consumer credit transactions. This comment will examine the major provisions of the new consumer repossession statute by specifically concentrating on the provisions relating to: (1) default, (2) notice of default, (3) repossession.

⁶ Since the provisions of G.L. c. 255, §§13I, 13J; G.L. c. 255B, §§20A, 20B; and G.L. c. 255D, §§21, 22 are substantially identical, all references in this comment shall be to G.L. c. 255, §§13I, 13J but, unless otherwise noted, apply equally to G.L. c. 255B, §§20A, 20B, and G.L. c. 255D, §§21, 22.

⁷ Acts of 1967, c. 822, §13I(a).

⁸ Acts of 1967, c. 822, §13I(c)(1)(2).

⁹ Acts of 1967, c. 822, §13I(a).

¹⁰ Acts of 1967, c. 822, §§13I(b), 13J(a).

¹¹ Acts of 1967, c. 822, §13I(c).

¹² Acts of 1967, c. 822, §13I(c)(4).

¹³ Acts of 1967, c. 822, §13I(d). In order to be entitled to a deficiency, a secured party had to file, on the return day of the action for a claimed deficiency, an affidavit, signed by either the purchaser at the sale, or by himself, stating the price of the goods at the sale as well as the date and place of the sale. Acts of 1967, c. 822, §13I(d). In this regard, see Acts of 1973, c. 1114, §326, quoted in note 38 *infra*.

sion, and (4) redemption and deficiency judgment. In the area of repossession, additional consideration will be given to recent judicial decisions and their effect upon the ability of creditors to obtain possession of the collateral upon default in satisfaction of the obligations of the debtor.

I. DEFAULT

The provisions of a security agreement which enumerate those events constituting a default by the debtor are obviously of primary importance to a consideration of repossession since the occurrence of a default is a condition precedent to the allowance of repossession by the creditor.¹⁴ In Massachusetts, under the former chapter 255, those events which could give rise to a default were strictly a matter of agreement between the parties.¹⁵ A secured creditor could "repossess consumer goods subject to a security interest when the debtor [was] in a default *under a security agreement*."¹⁶

The new statute restricts the creditor's freedom to repossess in consumer transactions by providing that

a provision relating to default is enforceable only to the extent that the default is *material* and consists of the debtor's failure to make one or more payments as required by the agreement, or the occurrence of an event which *substantially impairs* the value of the collateral.¹⁷

While the parties to the agreement continue to define default under the new law, the default provisions are now subject to judicial scrutiny. The requirement of materiality will serve to limit contractual default provisions, ensuring that the failure of the debtor to perform some trivial act will not justify repossession of the collateral; it will also provide minimum standards for determining whether repossession is warranted in the absence of specific contractual default provisions. Significantly, the failure to make one or more payments is not, by itself, presumed to constitute an enforceable default, even when the agreement so provides, unless such failure is determined to be "material."

¹⁴ See generally G.L. c. 106, §§9-503 to 9-505; R. Summers & J. White, *Handbook of the Law Under the Uniform Commercial Code* §26-2 (1972) [hereinafter cited as Summers & White].

¹⁵ Massachusetts was not untypical in this respect. See, e.g., *Whisenhunt v. Allen Parker Co.*, 119 Ga. App. 813, 818, 168 S.E.2d 827, 830 (1969). Commentators have also recognized the deference given to the parties' agreement. See, e.g., Summers & White, *supra* note 14, §26-2 n.6; Hogan, *The Secured Party and Default Proceedings under the U.C.C.*, 47 Minn. L. Rev. 205, 209 (1962).

¹⁶ Acts of 1967, c. 822, §137(a) (emphasis added).

¹⁷ G.L. c. 255, §137(a) (emphasis added).

The requirement that a default must be "material" or "substantially impair the value of the collateral" in order to be enforceable could be of particular value to the consumer-debtor bound by an adhesion contract drafted by the creditor and favoring the creditor's interests.¹⁸ Uncertainty as to what constitutes an enforceable default, however, could cause initial problems for creditors attempting to determine an appropriate course of action. It is quite possible that, since "[t]here is no simple test to ascertain whether a breach is material,"¹⁹ and since the question of whether an event substantially impairs the value of the collateral should be a question of fact for the jury, these provisions will produce substantial litigation.

It is probable that much of this anticipated litigation and uncertainty could have been avoided had the Legislature included in the Act specific default provisions, perhaps similar to those found in the National Consumer Act (NCA)²⁰ or the Model Consumer Credit Act (MCCA),²¹ drafted by the National Consumer Law Center. While the default pro-

¹⁸ The realities underlying the typical standard-form contract, in which creditors can dictate their terms to consumers who accept out of economic necessity, have been recognized by courts as well as by commentators. See, e.g., *Swarb v. Lennox*, 314 F. Supp. 1091, 1099 nn.19-22 (E.D. Pa. 1970); Llewellyn, Book Review, 52 Harv. L. Rev. 700 (1939).

¹⁹ J. Calamari & J. Perillo, *The Law of Contracts* §157 (1970) [hereinafter cited as Calamari & Perillo] citing 4 A. Corbin, *Contracts* §§945-46 (1951), 3A A. Corbin, *Contracts* §§700-12 (1951), and 6 S. Williston, *Contracts* §§812-86 (1938). See also Restatement (Second) of Contracts §266 comment a (Tent. Draft No. 8, 1973); *General Motors Acceptance Corp. v. Kyle*, 351 P.2d 768 (Cal. 1960).

²⁰ Section 5.103 of the NCA provides:

(1) "Default" with respect to a consumer credit transaction means the failure without justification under any provision of law of the consumer to pay:

(a) three successive installments within the period of time allowable by this Act, or

(b) any remaining balance within three months after the due date of the final installment, or

(c) an amount resulting from the total of unpaid delinquent installments constituting 30% of the amount financed.

²¹ Section 7.102(1) of the MCCA provides:

(1) "Default" with respect to a consumer credit transaction other than one pursuant to an open end credit plan means that the consumer, without justification pursuant to any provision of law, has remaining unpaid

(a) if the transaction is scheduled to be paid in full in six (6) or fewer installments, any two (2) or more delinquent instalments the total amount of which is equal to more than fifteen (15) per cent of the transaction total, or any remaining balance within two (2) months after the due date of the final instalment, or

(b) if the transaction is scheduled to be paid in full in more than six (6) instalments, any delinquent instalment or instalments the total amount of which is equal to more than fifteen (15) per cent of the transaction total, or any remaining balance within three (3) months after the due date of the final instalment

visions in these model acts could certainly have provided helpful guidance for both courts and creditors attempting to determine the materiality of a debtor's failure to make a payment or payments, it would appear that the Legislature was reluctant to restrict the concept of default to such a precise definition. It will, therefore, rest with the courts to develop useful guidelines as to what is "material" or "substantially impairs the value of the collateral." Judicial determination of materiality, which is founded upon the facts of each particular situation,²² will, it is submitted, be more appropriate than strictly defined legislative tests since the fairness inherent in the flexibility of the judicial process far outweighs the rigorous certainty of specific tests.

The addition of the materiality requirement allows a helpful analogy to be drawn between the concepts of material default and total breach of contract, since in either case the usual result is the termination of the agreement.²³ A total breach of contract has been defined as "a non-performance of duty that is so material and important as to justify the injured party in regarding the whole transaction as at an end."²⁴ Similarly, a material default, by giving rise to the right of the creditor to repossess the collateral, can effectively terminate the contract. A number of factors utilized by the courts in determining whether a breach of contract is total or partial may be useful in providing guidance to courts and creditors attempting to determine the materiality of a default in a consumer transaction. First, the extent to which the debtor has performed his obligations under the contract at the time of the breach should be considered in determining whether the present breach is "material."²⁵ In the interest of fairness, a breach by a party who has substantially performed his obligations under the contract should be considered less serious than a breach at the outset.²⁶ Second, the likelihood that the breaching party will cure his default and perform the remainder of the contract should be a significant consideration in determining the materiality of the breach.²⁷ In this regard, prior defaults, either under this contract or other contracts, are relevant considerations. In fact, the creditor is required by chapter 255 to provide the debtor with notice of and an opportunity to cure his default prior to the initiation of any action against the debtor; however, the creditor is not obligated to give notice when "the debtor has cured a default after notice three or more times."²⁸ Third, the reasons, if any, for the default are particularly significant considerations in determining the materiality of

²² See Calamari & Perillo, *supra* note 19, §157 n.3.

²³ See Comment, 11 B.C. Ind. & Com. L. Rev. 435, 438-39 (1970).

²⁴ 4 A. Corbin, Contracts §946 (1951).

²⁵ Restatement of Contracts, §275(c) (1932).

²⁶ Restatement (Second) of Contracts, §266 Comment d (Tent. Draft No. 8, 1973).

²⁷ Restatement (Second) of Contracts, §266(d) (Tent. Draft No. 8, 1973).

²⁸ G.L. c. 255, §131(b).

a default in a consumer transaction.²⁹ Over the course of a multi-year installment contract, it is possible that a temporary setback could render the consumer unable to meet a number of payments. The extent to which the consumer's failure to perform his obligations is a result of circumstances beyond his control should thus be a significant factor in determining whether the breach is material. Fourth, the extent to which the creditor is injured by the failure of the consumer to perform and the extent to which that injury can be remedied by the resumption of the contract payments and the payment of actual damages is relevant to a determination of materiality.³⁰ It does not seem unrealistic to assume that in the normal consumer credit transaction any injury to the creditor could be compensated by the payment of a minor charge by the consumer. Certainly, where the consumer is willing to continue with the agreement, this option is preferable to the termination of the contract and repossession of the collateral. Finally, the extent to which the consumer will suffer hardship by a determination that the default is material and the resultant termination of the contract should be considered, especially in combination with the other factors enumerated above.³¹

It is submitted that whether an event substantially impairs the value of the collateral should be a question of fact for the jury. In an analogous situation, under section 2-612(3) of the UCC,³² a buyer in an installment contract may treat a non-conforming installment which "substantially impairs the value of the whole contract" as a total breach. Ascertaining when a non-conforming installment substantially impairs the value of the whole, however, is a difficult question which will frequently be determined by the jury.³³ Similarly, it would seem reasonable to submit the question of substantial impairment in consumer transactions to the jury for determination.

While any failure to perform according to the terms of the agreement may be a breach for which the secured creditor will have a claim for damages,³⁴ only a determination that the breach is material or substantially impairs the value of the collateral will terminate the contract and give rise to the creditor's right to repossess.³⁵ It would seem inequitable to allow the creditor to make such a determination in a situation where his personal interest is likely to inhibit his ability to objectively evaluate

²⁹ Restatement (Second) of Contracts §266(e) (Tent. Draft No. 8, 1973).

³⁰ Restatement (Second) of Contracts §266(b) (Tent. Draft No. 8, 1973).

³¹ Restatement (Second) of Contracts §266(c) (Tent. Draft No. 8, 1973).

³² G.L. c. 106, §2-612(3) provides in relevant part that "[w]henver non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole."

³³ See Calamari & Perillo, *supra* note 19, §160 n.60.

³⁴ Restatement (Second) of Contracts §§261, 266 comment a, 268 (Tent. Draft No. 8, 1973).

³⁵ Calamari & Perillo, *supra* note 19, §§149, 157.

the seriousness of the default. Yet, the new statute continues to allow the creditor to determine his own rights and execute his own remedies.⁸⁶ While a creditor who errs in such determination or execution would certainly be subject to liability,⁸⁷ it is submitted that the inclusion of the materiality and substantial impairment requirements is incompatible with the retention of non-judicial repossession. In order for these requirements to be truly meaningful, the creditor should be required to proceed judicially and should not be permitted to determine his own rights.

II. NOTICE OF DEFAULT

Once a default has occurred, chapter 255 requires the creditor to provide the debtor with written notice of the default and an opportunity to cure such default prior to repossession or action on the debt.⁸⁸ Notice

⁸⁶ G.L. c. 255, §13J(a).

⁸⁷ See, e.g., *Whisenhunt v. Allen Parker Co.*, 119 Ga. App. 813, 168 S.E.2d 827 (1969); *Morris v. First Nat'l Bank & Trust Co.*, 21 Ohio St. 2d 25, 254 N.E.2d 683 (1970); *Stone Machinery Co. v. Kessler*, 1 Wash. App. 750, 463 P.2d 651 (1970).

It should also be noted that wrongful repossession may subject the creditor to liability under G.L. c. 106, §9-507.

⁸⁸ G.L. c. 255, §§13I(b), (c) and (d).

Section 13I(d) of chapter 255, as amended by §1(d) of chapter 629 of the Acts of 1973, provides:

(d) During the twenty-one day period after delivery of the notice required by this section the creditor may not because of that default accelerate the unpaid balance of the obligation, bring action against the debtor or proceed against the collateral.

Apparently through inadvertence, the Legislature later rewrote §13I(d) of chapter 255 in §326 of chapter 1114 of the Acts of 1973 to provide:

(d) No court shall enter a deficiency judgment against a debtor which includes a finance charge or insurance premiums allocable to instalments due after repossession. A debtor whose goods have been repossessed shall not be liable in a civil action for a deficiency unless the secured party files an affidavit signed either by the purchaser at the sale or by the secured party stating the price for which the goods were sold and the date and place of sale. Such affidavit shall be filed by the return day if the action is brought in the district court. It shall be filed with the complaint if the action is brought in the superior court.

Technically, §326 of chapter 1114, since it was enacted on November 30, 1973, will, as of July 1, 1974, repeal and replace §1(d) of chapter 629, which was enacted on August 14, 1973. However, the later act was intended to improve the procedure in civil trials and appeals, whereas the earlier act was designed to effect substantive changes in creditor's remedies upon default in consumer transactions. Moreover, the later act did not refer to the earlier 1973 legislation but rather it stated that "Section 13I of Chapter 255 of the General Laws, is hereby amended by striking out paragraph (d), as appearing in chapter 822 of the acts of 1967, and inserting in place thereof the following paragraph . . ." (emphasis added). The subject matter of the later act bears no relevance to the subject matter of §1(d) of chapter 629, however, it would be relevant to the procedures prescribed in chap-

of the default cannot be mailed or delivered to the debtor until ten days after default,³⁹ and such notice must allow the debtor at least twenty-one days in which to cure.⁴⁰ During this "notice period," and thereafter until the creditor either brings an action on the debt, proceeds against the collateral or notifies the debtor of his intention to accelerate the unpaid balance of the obligation, the debtor may cure his default by payment of the amount currently owing at the time of the default, without acceleration.⁴¹ Such payment will "restore the debtor to his rights under the agreement as though the [default had] not occurred . . ."⁴²

Through the establishment of this notice requirement and the prescription of acceleration during the notice period, the Legislature has in essence stated that, at a minimum, a thirty-one day delay in performance will be treated as a partial breach. Such treatment is of great value to the consumer, since, if a delay in performance enabled the creditor to accelerate the unpaid balance of the obligation, such delay would almost inevitably result in termination of the contract and repossession of the collateral. This would be the case because a consumer who experienced difficulty in making timely payment would certainly find it impossible to pay such a large sum at one time.

III. REPOSSESSION

The failure of the debtor to cure his default within the notice period triggers the creditor's right to repossess the collateral under the new

ter 822 of the Acts of 1967. It would appear, therefore, that the later act was drafted without knowledge of the amendments contained in chapter 629 of the Acts of 1973 and was not intended to affect the provisions of chapter 629. It is submitted that curative legislation should be enacted to incorporate both §1(d) of chapter 629 of the Acts of 1973 and §326 of chapter 1114 of the Acts of 1973 in chapter 255 of the General Laws. Until such curative legislation is enacted, the courts should interpret both of these sections as effective and should not allow an oversight to destroy the clear intent of the Legislature.

In the alternative, if the courts hold that the later act does invalidate G.L. c. 255, §13I(d), the protection which would have been provided by §13I(d) may still be implied from the provisions of G.L. c. 255, §§13I(b) and (c) which state in relevant part:

(b) After a default under a consumer credit transaction by a debtor the secured creditor may not bring an action against the debtor or proceed against the collateral until he gives the debtor the notice required by this section. . . .

(c) . . . If you do not cure your default by the date stated above, [date which is at least twenty-one days after notice is mailed] the said creditor may sue you to obtain a judgment for the amount of the debt or may take possession of the collateral.

³⁹ G.L. c. 255, §13I(c).

⁴⁰ G.L. c. 255, §13I(c).

⁴¹ G.L. c. 255, §§13I(d) and (e).

However, if the debtor cures his default after the twenty-one day notice period, but prior to any creditor action or notice of acceleration, he must pay any delinquency or deferral charges in addition to the amount due. G.L. c. 255, §13I(e).

⁴² G.L. c. 255, §13I(e). See also G.L. c. 255, §13I(c).

statute. Chapter 255 provides for non-judicial as well as judicially authorized repossession; however, under both of these procedures the actual repossession is effected by the creditor *without the assistance of state agents*. Recent judicial decisions have rendered unenforceable the Massachusetts replevin procedure⁴³ under which the creditor could obtain, upon *ex parte* application, a writ of replevin directing state officers to seize property in possession of the defendant. Similarly, the validity of non-judicial (self-help) repossession has been called into question in Massachusetts by the decision of the United States District Court for the District of Massachusetts in *Boland v. Essex County Bank and Trust Company*.⁴⁴

The next section of this comment will briefly discuss the status of the Massachusetts replevin procedure. This discussion will lead to an examination of the procedures for non-judicial and judicially authorized repossession under chapter 255 and a consideration of the vitality of these procedures in light of recent judicial decisions.

A. Replevin

In *Sniadach v. Family Finance Corp.*,⁴⁵ the United States Supreme Court⁴⁶ held that the due process requirements of the Fourteenth Amendment were not satisfied by a Wisconsin wage garnishment statute,⁴⁷ which allowed a creditor to secure attachment of a debtor's wages prior to notice and an opportunity to be heard on the underlying claim. The emphasis of the Court in *Sniadach* on the fact that the debtors in that case had been deprived of necessities of life⁴⁸ left some doubt as to whether that decision would be construed narrowly and restricted to its facts, or applied broadly to stand for the proposition that, absent extraordinary circumstances, an individual has a right to be heard before he may be deprived by operation of law of any property interest.

The decision in *Sniadach* was extended and somewhat clarified in *Fuentes v. Shevin*,⁴⁹ where the Court found that the replevin statutes of Florida and Pennsylvania were violative of the due process clause of the Fourteenth Amendment since they did not provide debtors with notice and a meaningful opportunity to be heard *prior* to the seizure by state agents of property in the debtor's possession. The Court in *Fuentes* held that the due process rights of notice and hearing protected "any signifi-

⁴³ G.L. c. 247.

⁴⁴ 361 F. Supp. 917 (D. Mass. 1973).

⁴⁵ 395 U.S. 337 (1969).

⁴⁶ 395 U.S. at 342.

⁴⁷ Wis. Stat. §267.18(2)(a), c. 507, §1 (1965), as amended in Wis. Stat. §267.18(2) (Supp. 1972).

⁴⁸ 395 U.S. at 340-42.

⁴⁹ 407 U.S. 67 (1972).

cant property interest" including an interest in continued possession and use of goods under a conditional sales agreement, despite debtor's lack of full legal title.⁵⁰

The Massachusetts replevin statute is similar to the replevin statutes of Florida and Pennsylvania in that it does not provide debtors with notice or an opportunity for a hearing prior to issuance of the writ of replevin and seizure of debtor's property.⁵¹ Recognizing that, in light of *Fuentes*, the Massachusetts procedure was constitutionally deficient, Chief Justice Flaschner of the District Courts⁵² of Massachusetts immediately issued an order stating:

[As a result of the *Fuentes* decision] it would appear that the replevin procedure set forth in Sections 7 and 8 of Chapter 247 is unconstitutional. Until the General Court enacts a curative amendment, or possibly the SJC promulgates an emergency rule, replevin plaintiffs will have to become petitioners in equity.⁵³

Since neither the Legislature nor the Supreme Judicial Court has taken any action designed to cure the defective replevin procedure, it remains, at the present time, an inoperative statute.

B. Non-Judicial Repossession

The right of a secured creditor to retake collateral upon default without resort to judicial process, as long as such retaking can be accomplished peaceably, has long been recognized in the common law.⁵⁴ The Uniform Conditional Sales Act statutorily authorized non-judicial repossession where the collateral could be retaken without a breach of the peace⁵⁵ and such authorization has been continued in the Uniform Commercial Code (UCC), as adopted in Massachusetts.⁵⁶

⁵⁰ Id. at 86.

⁵¹ G.L. c. 247, §§7, 8.

⁵² Original jurisdiction of actions in replevin is vested in the Massachusetts district courts by G.L. c. 218, §19.

⁵³ District Courts of Massachusetts, Bulletin No. 2-72, Item 9 (July 11, 1972).

⁵⁴ See Annot., 36 A.L.R. 853 (1925); 3 W. Blackstone, Commentaries *4.

⁵⁵ Section 16 of the Uniform Conditional Sales Act provides:

When the buyer shall be in default in the payment of any sum due under the contract, or in the performance of any other condition which the contract requires him to perform in order to obtain the property in the goods, or in the performance of any promise the breach of which is by the contract expressly made a ground for the retaking of the goods, the seller may retake possession thereof. Unless the goods can be retaken without breach of the peace, they shall be retaken by legal process; but nothing herein shall be construed to authorize a violation of the criminal law.

⁵⁶ G.L. c. 106, §9-503 provides in pertinent part:

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed

The UCC, however, does not define breach of the peace, and courts, as a result, have disagreed as to what constitutes a breach of the peace in the context of repossession.⁵⁷ This divergence of opinion has created some uncertainty about the permissible scope of creditor action in effecting repossession. Most courts, it appears, have accepted the definition formulated in the criminal law that an act constitutes a breach of the peace if it "unreasonably disturbs the public peace and tranquility, or tends strongly to cause such a disturbance"⁵⁸ Some courts, however, have found a breach of the peace in a commercial setting when the creditor commits a simple trespass or obtains the collateral through "fraud, deception, trick or artifice."⁵⁹

Under the former chapter 255, Massachusetts adhered to the majority view, permitting non-judicial repossession in consumer credit transactions where the collateral could be obtained "without the use of force."⁶⁰ The new statute, however, severely limits the availability of non-judicial repossession by restricting its use to those situations in which the repossession can be effected "without use of force, without a breach of peace *and*, unless the debtor consents to an entry, at the time of such entry, without entry upon property owned by, or rented to the debtor."⁶¹ The extent to which non-judicial repossession will be limited by the new statute is in large part dependent upon judicial interpretation of the consent requirement. While it is clear that consent cannot be obtained in advance of the time of repossession and that the consent need not be in writing, it is unclear whether affirmative consent is mandated by the statute or whether passive acquiescence by the debtor is sufficient to satisfy the consent requirement.⁶² It is submitted that the statute is best read as requiring affirmative consent, given voluntarily, intelligently and knowingly by the debtor. Such a construction would minimize the possibility that the debtor would succumb to the subtle intimidation inherent in the situation where he is confronted by a creditor demanding payment, and would be in accord with the meaning of express consent⁶³ as it is commonly used in the law.

without judicial process if this can be done without breach of the peace or may proceed by action.

⁵⁷ See Comment, 11 B.C. Ind. & Com. L. Rev. 435, 440-49 (1970) for an analysis of the divergent views on the breach of the peace limitation in non-judicial repossession. See also Annot., 99 A.L.R.2d 358 (1965).

⁵⁸ R. Perkins, Criminal Law 400-01 (2d ed. 1969). See, e.g., *Cherno v. Bank of Babylon*, 54 Misc. 2d 277, 282 N.Y.S.2d 114, aff'd, 29 A.D.2d 767, 288 N.Y.S.2d 862 (1968).

⁵⁹ See, e.g., *McCarty-Greene Motor Co. v. House*, 216 Ala. 666, 667, 114 So. 2d 60, 62 (1927); *Malone v. Darr*, 178 Okla. 443, 446, 62 P.2d 1254, 1257 (1936).

⁶⁰ Acts of 1967, c. 822, §13I(a).

⁶¹ G.L. c. 255, §13J(a) (emphasis added).

⁶² See Queenan, *The New Consumer Repossession Law*, 58 Mass. Law. Q. 412, 414 (1973).

⁶³ Express consent has been defined as "[t]hat directly given, either *viva voce* or in

The inability of the creditor to enter property owned by or rented to the debtor without consent will have a marked effect upon the usefulness of non-judicial repossession. Automobiles, which have been the most frequently repossessed collateral because of their availability for non-judicial repossession and their substantial resale market, will now be difficult to seize non-judicially. As one commentator has noted:

[t]here is no reason to think that the courts will treat a car reposessor's unconsented to entry into the debtor's garage or onto his driveway as being beyond the statute's scope. And even the driveway of a multi-family building in which the debtor rents an apartment may well be treated as property "rented to the debtor." This should be the result under the doctrine that a lease transfers to the lessee not only the right to exclusive possession of the demised premises but also, by implication, an appurtenant easement for certain necessary uses. The statute may also protect a defaulting car owner who has the exclusive right to an assigned space in a public parking lot or public garage. Such an arrangement can be construed as a lease rather than license.⁶⁴

Apparently, however, in circumstances presenting no immediate threat of violence, the statute would permit repossession from a public street or a public parking area, where the debtor has no assigned space. It is submitted that this situation could result in a form of tactical "brinkmanship" by encouraging creditors to keep debtors under constant surveillance, awaiting an opportunity to effect the repossession when favorable circumstances arise. The determination of whether the creditor's conduct complied with the requirements of the statute would be made after the fact and would be dependent upon the accuracy of the reposessor's judgment in the particular instance.

Finally, it should be remembered that the creditor can proceed against the collateral without a prior hearing only when the default is "material" or upon the "occurrence of an event which substantially impairs the value of the collateral."⁶⁵ As noted previously, there is no absolute test to determine when a default is "material" and the question of whether an event "substantially impairs" the collateral should be one for the jury.⁶⁶ While, over a period of time, judicial decisions may provide guidelines helpful in making these determinations, a secured creditor desiring to repossess collateral without a prior hearing must first make a subjective determination of the materiality of a default for himself

writing. It is positive, direct, unequivocal consent, requiring no inference or implication for its meaning." Black's Law Dictionary 377 (Revised 4th ed. 1968).

⁶⁴ 58 Mass. Law. Q. at 414 (citations omitted).

⁶⁵ See text at note 17 *supra*.

⁶⁶ See note 19 and text at notes 32-33 *supra*.

in each situation. The uncertainty involved in making such a determination, and the risk of possible liability if the repossession is later found to be unlawful,⁶⁷ should induce the cautious creditor to proceed judicially until sufficiently precise guidelines are formulated. At the very least, the secured creditor will be forced to balance the risk involved in proceeding non-judicially with the benefit to be gained by obtaining immediate possession of the collateral.

C. Constitutional Challenges to Non-Judicial Repossession

Non-judicial repossession has, in recent years, been the subject of numerous constitutional attacks alleging that the deprivation of a possessory interest in secured collateral without notice or an opportunity to be heard on the underlying claim is violative of the due process clause of the Fourteenth Amendment.⁶⁸ While these attacks emanate from the rationale of the *Sniadach* and *Fuentes* cases, the extension of the due process rights enunciated in those cases to self-help procedures is, of course, dependent upon a finding of "state action" since the Fourteenth Amendment guarantee of due process applies only where it is the action of a state which is being challenged constitutionally.⁶⁹ Thus, the primary question presented by these challenges is whether the statutory authorization of non-judicial repossession sufficiently involves the state in the retaking to constitute action taken under color of state law. A finding of state action would bring non-judicial repossession within the scope of the Fourteenth Amendment and would seem to compel a finding that such repossession constitutes a denial of due process.⁷⁰

In *Boland v. Essex County Bank & Trust Company*,⁷¹ the Federal District Court for the District of Massachusetts joined the minority of courts which have considered the constitutionality of non-judicial repossession⁷² and which have found that the summary repossession au-

⁶⁷ See note 37 *supra*.

⁶⁸ See, e.g., *Adams v. Egle*, 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd sub nom. Adams v. Southern California First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973); *Gibbs v. Titelman*, 13 U.C.C. Rep. Serv. 401 (E.D. Pa. 1973), *rev'd*, Nos. 74-1062 to 74-1067 (3d Cir. Aug. 1, 1974).

⁶⁹ The Fourteenth Amendment provides, in relevant part: [n]or shall any State deprive any person of life, liberty, or property, without due process of law U.S. Const. amend. XIV (emphasis added).

⁷⁰ See, e.g., *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972).

⁷¹ 361 F. Supp. 917 (D. Mass. 1973).

⁷² At present, five circuit courts of appeals have considered the question of whether non-judicial repossession, as authorized by section 9-503 of the UCC or analogous state statutes, constitutes action "under color of state law" and have uniformly concluded that it does not. See *Shirley v. State Nat'l Bank*, 493 F.2d 739 (2d Cir. 1974); *Gibbs v. Titelman*, Nos. 74-1062 to 74-1067 (3d Cir., filed Aug. 1, 1974); *James v. Pinnix*, No. 73-1866 (5th Cir., filed June 10, 1974); *Nichols v. Tower Grove Bank*,

thorized by section 9-503 of the UCC constituted action taken "under color of state law" within the meaning of 42 U.S.C. §1983.⁷³

Plaintiffs in that consolidated action had purchased automobiles from the defendant-automobile dealers under retail installment contracts which had been assigned to the defendant-sales finance companies. The sales finance companies had taken possession of the automobiles, upon default by the plaintiffs, without providing the plaintiffs with notice or an opportunity to be heard on the underlying claim. Plaintiffs brought suit under 42 U.S.C. §1983, alleging that such summary repossession constituted a deprivation of property in violation of their rights to due process under the Fourteenth Amendment. The court, rejecting defendants' contention that the repossessions were not actions taken under color of state law, found sufficient state involvement in the repossessions to allow the plaintiffs to proceed with the merits of their case. While the court did not reach the issue of whether repossession without notice and an opportunity to be heard constitutes a denial of due process, it seems clear that, once state action is found, the application of the principles enunciated in *Fuentes* would require notice and an opportunity to be heard prior to such taking.⁷⁴

The continued vitality of the *Boland* case is questionable, however, since that decision clearly reflects the minority view and since the United States Supreme Court, which has indicated a retreat from *Fuentes* in the recent decision in *Mitchell v. W.T. Grant Co.*,⁷⁵ will ultimately resolve

No. 73-1621 (8th Cir., filed May 13, 1974); *Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank*, 487 F.2d 906 (8th Cir. 1973); *Adams v. Southern California First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973). Additionally, the First Circuit found no "state action" in *Fletcher v. Rhode Island Hosp. Trust Nat'l Bank*, No. 73-1372, 42 U.S.L.W. 2601 (1st Cir., May 9, 1974), dealing with the analogous self-help remedy of bank set off.

⁷³ 361 F. Supp. at 919-20. 42 U.S.C. §1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Original jurisdiction for actions predicated upon 42 U.S.C. §1983 (1970) is placed in the federal courts by 28 U.S.C. §1343 (1970), which provides, in pertinent part:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

...

(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

⁷⁴ See *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972).

⁷⁵ — U.S. —, 94 S. Ct. 1895 (1974).

the issue. The final resolution of this question may, in any event, have little effect in Massachusetts since chapter 255 requires that notice and an opportunity to cure a default be given to the debtor prior to any creditor actions. Since *Fuentes* requires only an *opportunity* to be heard prior to repossession, it is possible that, even if the *Boland* case is followed in the future, the "notice period" incorporated in chapter 255 will be found to present such an opportunity and thus satisfy the requirements of due process.

D. Judicially Authorized Repossession

A secured creditor who is either unable to effect non-judicial repossession or who desires to avoid the risks of proceeding non-judicially may, under chapter 255, have his right to the collateral determined at a hearing at which the debtor will have an opportunity to be heard.⁷⁶ Prior to the initiation of judicial action, the debtor must have received notice of his default and of his rights upon default, and he must have been allowed at least twenty-one days to cure his default.⁷⁷ Additionally, the creditor must provide the debtor with at least seven days notice of the hearing.⁷⁸

While it is clear that expiration of the notice period is a condition precedent to a judicial determination of the creditor's right to repossess,⁷⁹ it is not clear whether notice of the hearing may be sent to the debtor during the twenty-one day notice period. The statute would seem to imply, however, that notice of the hearing cannot be sent prior to the expiration of the notice period.⁸⁰ Such a reading of the statute would be in accord with the underlying policy of the notice requirement, which is to provide the debtor with an opportunity to cure his default without *any* action on the part of the creditor.

The creditor, in filing a petition for a hearing in the District Court of Massachusetts, must provide the court with

⁷⁶ G.L. c. 255, §13J(b).

⁷⁷ G.L. c. 255, §§13I(b), (c) and (d).

⁷⁸ G.L. c. 255, §13J(b).

⁷⁹ G.L. c. 255, §13I(b) and (d). See also Rule 23A of the District Courts of Massachusetts which provides that

[b]efore making a determination that the creditor has a right of repossession the court must be satisfied that the conditions of this Rule and the statutory conditions relative to the nature of the default, the notice of the default and all other statutory prerequisites have been met.

Dist. Ct. Mass. R. 23A, reprinted in 2 Mass. Lawyers' Weekly 186 (1974).

⁸⁰ G.L. c. 255, §13I(d). §13I(d) provides: "During the twenty-one day period after delivery of the notice required by this Section the creditor may *not* because of that default accelerate the unpaid balance of the obligation, *bring action against the debtor*, or proceed against the collateral." (Emphasis added).

(a) a description of the parties, of the property involved and the place where the property is believed to be located, (b) a detailed statement of facts upon which the creditor claims a right of repossession, including facts as to compliance with statutory prerequisites, and (c) a copy of the contract under which the claim of a right of repossession is made.⁸¹

This petition must be verified by the creditor, under oath, and, in the event the debtor does not challenge the creditor's claim, it will be the sole basis for determination of the creditor's right to repossess. The failure of the debtor to appear, however, will not result in an automatic judgment for the creditor since compliance with the statutory prerequisites and the materiality of the default must, nevertheless, be shown.⁸²

Finally, it is important to note that under chapter 255 the court is asked to determine the right of the creditor to take possession of the collateral.⁸³ Unlike an action in replevin, which, if successful, entitles a creditor to have agents of the state seize the goods, the judicial repossession procedure set forth in chapter 629 merely allows the creditor to seek the blessing of the court before he himself seizes the goods.

IV. REDEMPTION, DISPOSITION, AND DEFICIENCY JUDGMENTS

Once the creditor has regained possession of the collateral, he must allow the debtor at least twenty days in which to redeem.⁸⁴ The right of the debtor to redeem, however, is not automatically terminated upon expiration of the redemption period, but rather it continues until the creditor has either "disposed of the collateral, entered into a contract for its disposition, or gained the right to retain the collateral."⁸⁵ During the redemption period, the debtor may retrieve the goods by tendering the "full amount of the debt" in addition to any expenses reasonably incurred by the creditor.⁸⁶

The existence of an acceleration clause will usually cause the "full amount of the debt" to be the equivalent of the entire unpaid balance, which is defined in the statute as "that amount which the debtor would have been required to pay upon prepayment."⁸⁷ Under section 9-506 of

⁸¹ Dist. Ct. Mass. R. 23A, reprinted in 2 Mass. Lawyers' Weekly 186 (1974).

⁸² Id. See note 79 *supra*.

⁸³ G.L. c. 255, §13J(b) provides in pertinent part: "no court shall allow a *secured creditor to take possession of collateral* until the right of the creditor to take possession has been determined at a hearing . . ." (emphasis added). See also Dist. Ct. Mass. R. 23A and Admin. Reg. No. 3-74.

⁸⁴ G.L. c. 255, §13J(c).

⁸⁵ G.L. c. 255, §13J(c).

⁸⁶ G.L. c. 255, §13I(c).

⁸⁷ G.L. c. 255, §13J(d).

the UCC, which remains applicable because it is not displaced by chapter 255,⁸⁸ reasonable expenses include those incurred by the creditor "in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses."⁸⁹

It would appear, therefore, that unless the default and repossession occur late in the term of the contract and the goods are still of considerable value, the debtor will often be unwilling to redeem. Moreover, it is likely that a debtor who has defaulted and failed to cure within the period provided by the statute will often be unable to redeem. However, this would not appear to work an undue hardship on debtors since the combination of a material breach with a failure to cure within the notice period would be indicative of either an inability to continue with the transaction or a lack of good faith on the part of the debtor. The failure of the debtor to redeem gives rise to the creditor's right to dispose of or retain the collateral as provided in the UCC.⁹⁰ The disposition of the collateral must be conducted in a commercially reasonable manner⁹¹ and the proceeds of the disposition must be applied in the order prescribed by Section 9-504(1) of the UCC.⁹²

Chapter 255 does, however, effect a profound change in eliminating the deficiency judgment in consumer loans and automobile retail installment contracts where the unpaid balance of the obligation is \$2,000 or less at the time of repossession⁹³ and in consumer installment sales

⁸⁸ G.L. c. 255, §13J(d) provides in part:

Unless displaced by the provisions of this section and section thirteen I, the rights and obligations of the parties, including redemption and disposition of the collateral shall be governed by the provisions of Part 5 of Article 9 of the Uniform Commercial Code.

⁸⁹ G.L. c. 106, §9-506.

⁹⁰ G.L. c. 106, §§9-504 and 9-505 prescribe the procedure for disposition of the collateral by the creditor. These sections apply under chapter 255 by virtue of G.L. c. 255J(d).

⁹¹ G.L. c. 106, §9-504(3).

⁹² G.L. c. 106, §9-504(1) provides in relevant part:

(1) . . . The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

⁹³ G.L. c. 255, §13J(d) and G.L. c. 255B, §20B(d). The statute is unclear as to

involving goods other than automobiles where the unpaid balance of the obligation is \$1,000 or less at the time of repossession.⁹⁴ The debtor continues to be entitled to any surplus received by the creditor upon disposition of the collateral.⁹⁵ Additionally, under the new statute, the fair market value of the collateral is presumed to be that value ascribed to the goods by "periodically published trade estimates."⁹⁶ This presumption will eliminate the practice of selling the collateral to a buyer related to the creditor for a price below that which could be obtained on the open market. The result of such a sale would be to decrease any surplus to which the debtor might be entitled, or increase any deficiency to which the creditor might be entitled, while, at the same time, increasing the profit acquired by the creditor upon resale.

While chapter 255 will certainly aid the consumer who experiences difficulty with a credit transaction, the extent to which this Act will strengthen the consumer's position is dependent upon the interpretation given the Act's provisions by the courts. It is hoped that the courts will give full effect to the materiality and substantial impairment requirements in determining default, that the notice requirements and limitations on non-judicial repossession will be strictly enforced, and that judicial determination of the existence of an enforceable default will be encouraged. Only through such interpretation will the protections which the statute provides for the consumer be truly meaningful.

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whether the debtor is liable for a deficiency when the unpaid balance of the obligation is exactly \$2,000, providing in section 13J(d) that the debtor is not liable for any deficiency when the unpaid balance is \$2,000 or less, and providing in section 13J(e)(1) that the creditor is entitled to recover a deficiency when the unpaid balance is \$2,000 or more.

⁹⁴ G.L. c. 255D, §22(d). The statute is unclear as to whether the debtor is liable for a deficiency when the unpaid balance of the obligation is exactly \$1,000, providing in section 22(d) that the debtor is not liable for any deficiency when the unpaid balance is \$1,000 or less, and providing in section 22(e)(1) that the creditor is entitled to recover a deficiency when the unpaid balance is \$1,000 or more.

⁹⁵ G.L. c. 106, §9-504(2).

⁹⁶ G.L. c. 255, §13J(e)(2).