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Restraint of Trade -- Requirements Contracts -- Violation of North Carolina Anti-Trust Statute

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is subject to the three-year statute of limitations,[33] whereas ejectment is apparently available for at least twenty years from the date of entry.[34] Although the remedies available to the owner of the fee in case of a misuse of a right of way may appear to be in the nature of a windfall, the inherent right of a landowner to have land which is taken for the public use restricted to that use seems to justify his right to relief.

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[33] N. C. GEN. STAT. §1-52(3) (1943) provides that when there is a continuing trespass upon real property, the action shall be commenced within three years from the original trespass, and not thereafter. Teeter v. Postal Telegraph Cable Co., 172 N. C. 783, 90 S. E. 941 (1916).

[34] Sparrow v. Dixie Leaf Tobacco Co., 232 N. C. 589, 61 S. E. 2d 700 (1950).

Restraint of Trade—Requirements Contracts—Violation of North Carolina Anti-Trust Statute

A North Carolina anti-trust statute[1] makes it unlawful for any person to make a sale, or to contract to make a sale "of any goods . . . in North Carolina, whether directly or indirectly . . . upon the condition that the purchaser thereof shall not deal in the goods . . . of a competitor or rival in the business of the person . . . making such sales."

In *Grubb Oil Co. v. Garner*,[2] the court held that a filling station lessor's covenant not to sell any petroleum products other than those of the lessee from the demised premises or from any other premises within a radius of two thousand feet constituted a "permissible restriction in a lease rather than a forbidden condition in a sales contract."[3] The court said the lessor apparently had no right to sell or deal with anything on the premises while under demise but, however this might be,[4] there was no allegation that the lessor agreed to purchase petroleum products from anyone—"a necessary averment to attract the provisions

[1] N. C. GEN. STAT. §75-5 (1943): "In addition to the matters and things hereinbefore declared to be illegal, the following acts are declared to be unlawful, that is, for any person, firm, corporation, or association directly or indirectly to do or to have any contract, express or knowingly implied, to do any of the acts or things specified in any of the subsections of this section. (2) To make a sale of any goods, wares, merchandise, articles or things of value whatsoever in North Carolina, whether directly or indirectly, or through any agent or employee, upon the condition that the purchaser thereof shall not deal in the goods, wares, merchandise, articles or things of value of a competitor or rival in the business of the person, firm, corporation or association making such sales." For the original enactment of the North Carolina statute to this effect see N. C. Pub. Laws 1907, c. 218, §1(a).

[2] 230 N. C. 499, 53 S. E. 2d 441 (1949).

[3] *Id.* at 501, 53 S. E. 2d at 443.

[4] Because of confusion in pleading it did not clearly appear by what arrangement the lessor was in possession of the premises. Although a lease-sublease arrangement was referred to, it was not properly alleged and therefore not considered by the court. *Id.* at 501, 53 S. E. 2d at 442.

of"[5] the statute set out above. However, by way of dictum the court added, "of course, if it should appear . . . that the demise of the premises to the lessee and its immediate subletting to the lessor, for purposes of operation, were but parts of a single transaction, though separately stated, a different situation might arise. . . ."[6]

Such a situation was presented to the court in the recent case of *Arey v. Lemons.*[7] There the parties executed a single instrument whereby the owners of lands leased to an oil company rent free, and the oil company subleased the property back to the owner for the same term rent free, upon the agreement that the owners operate a filling station thereon for the duration of the lease and that only the petroleum products of the oil company be sold at the station. The court held the instrument void. It said that the only consideration, if any, to support the provisions of the writing was the mutual promises of the parties, and that "any condsideration inherent in these mutual promises is necessarily illegal; for the agreement has as its object the violation of"[8] the anti-trust statute.

In only two decisions[9] prior to the *Arey* case has the court found such a violation. In each instance a contract of sale of merchandise for resale by the buyer which provided that the buyer would not sell or permit to be sold on his premises similar merchandise of competitors was held illegal.

The court refused to apply the statute in *Lewis v. Archbell*[10] where it did not clearly appear that the sale was "upon the condition" that the purchaser was not to buy from a competitor. The court stressed the fact that a seller would have the right to contract to sell his entire output to any single purchaser, and that such purchaser would have the right to purchase from only one seller if he chose, pointing out the fact that the statute condemns the contract of sale only if the sale is made on the prohibited condition. In *Mar-Hof v. Rosenbacker,*[11] the court distinguished between requirements contracts and contracts of exclusive representation, holding in effect that while the statute forbids the buyer to contract exclusively with the seller, this prohibition does not extend to contracts in which the seller binds himself to sell exclusively to the buyer.

In spite of the fact that these earlier cases dealt only with contracts

[5] *Id.* at 500, 53 S. E. 2d at 442.
[6] *Id.* at 501, 53 S. E. 2d at 443.
[7] 232 N. C. 531, 61 S. E. 2d 596 (1950).
[8] *Id.* at 536, 61 S. E. 2d at 600.
[9] Florsheim Shoe Co. v. Leader Dept. Store, 212 N. C. 75, 193 S. E. 9 (1937); Standard Fashion Co. v. Grant, 165 N. C. 463, 81 S. E. 606 (1914).
[10] 199 N. C. 205, 154 S. E. 11 (1930).
[11] 176 N. C. 330, 97 S. E. 169 (1918).

of sale, the court by its dictum in the *Grubb* case, had clearly indicated that it would extend the application to lease-sublease arrangements; and although in the *Arey* case, there was talk of the absence, or illegality, of consideration to support the provisions of the lease, the opinion also states that the statute would apply even where such leases are founded on legal consideration.[12]

As a practical matter this type of lease-sublease arrangement is nothing more than a requirements contract. Thus if the statute outlawing requirements contracts is actually beneficial, it seems that the court is justified in extending its application to other arrangements by which the same result is effected. Such an extension seems to be in line with the view taken by the United States Supreme Court in the recent case of *Standard Oil Co. of California v. United States.*[13] There, in construing Section 3 of the Clayton Act[14] which prohibits requirements contracts, but only in the event that their effect "may be to substantially lessen competition or tend to create a monopoly," the court declared these contracts illegal if used by a defendant-seller doing a quantitatively substantial volume of business.[15]

Although this decision may be justified it is generally agreed that requirements contracts may well be of economic advantage to buyers as well as to sellers.[16] Probably the principal objective inducing a buyer to enter into such a contract is the desire to obtain an assured, reliable source of supply and thereby relieve himself of the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand. Requirements contracts benefit the seller in that they assure him of an exclusive outlet in so far as the particular retailer is concerned. At the same time they effectively limit the field in which he must meet the competition of his rivals, thereby enabling him to reduce

[12] Arey v. Lemons, 232 N. C. 531, 536, 61 S. E. 2d 596, 600 (1950).

[13] 337 U. S. 293 (1949).

[14] 38 STAT. 731 (1914), 15 U. S. C. §14 (1946). This section declares, *inter alia,* that "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor . . . of the lessor or seller, where the effect of such lease, sale, or contract for sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

[15] Prior to this decision nothing less than the inference of a substantial lessening of competition, arising out of the employment of such contracts by companies dominant in their industry would satisfy the requirement of section 3 of the Clayton Act. Fashion Originators Guild of America v. Federal Trade Commission, 312 U. S. 457 (1940); Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346 (1922). For a brief discussion of requirements contracts under section 3 of the Clayton Act see Note, 28 N. C. L. REV. 188 (1950).

[16] Stockhausen, *The Commercial and Anti-Trust Aspects of Term Requirements Contracts,* 23 N. Y. U. L. Q. REV. 412 (1948).

selling expenses to a minimum. To the newcomer in the field, such contracts offer the possibility of a predictable market on the basis of which he may estimate what capital expenditures are necessary. Still more important to the newcomer is the opportunity these contracts may provide to establish a foothold against the counter-attacks of entrenched competitors. However, requirements contracts deny retailers the opportunity to deal in the products of competing suppliers. Since these suppliers are excluded from access to the outlets subject to such contracts, the new supplier may find himself foreclosed from any substantial market.

Whatever the commercial merits and demerits of the contract involved, the North Carolina statute in making requirements contracts illegal, *per se*, precludes any rule of reason which might otherwise be applied. The statute leaves no room for evidence as to a defendant's competitive position in the industry nor for testimony as to commercial justification of the contract in the particular case. While such a situation may seem undesirable, it must be remembered that the test of reasonableness places a tremendous burden on the courts to interpret complicated economic data—an undertaking for which courts are not particularly well suited.[17]

If all lease-sublease arrangements are held within the purview of the statute, suppliers might turn to the use of ordinary long-term contracts in which the purchaser agrees to buy a denominated amount of goods rather than his specific requirements.[18] Or, the supplier might simply refuse to deal with any retailer who has not shown a willingness to deal exclusively in the supplier's product.

On the other hand, there is a strong possibility that in so far as oil companies are concerned, prohibition of the lease-sublease arrangement would force them to resort to agency arrangements or to the outright acquisition of filling stations, either of which means increasing control over the retail field and forcing the independent owner to exchange his status for that of employee. Regardless of the possible consequences, this most recent decision on the point by the North Carolina court indicates that such lease-sublease contracts will be held illegal.

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Taxation—Alimony Payments—State and Federal Income Tax Consequences

No attorney can properly settle a separation or divorce case involving alimony or payments under a separation agreement, without con-

[17] See Standard Oil Co. of Calif. v. United States, 337 U. S. 293, 310 (1949).

[18] Some courts find this method less objectionable than requirements contracts. *Ibid.*