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# An Examination of Doric Simplicity: The Criteria of the Decision to Cease Business Relations

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not be true, however, in the case where the spouse proceeded and obtained a valid divorce decree, since the injunction would apply only to the procuring of an invalid decree. If the spouse then returns to the jurisdiction which issued the injunction and is prosecuted for contempt, he should be permitted to plead the presumptive validity of the decree.

In summary, this equitable remedy will continue to be of particular value in divorce situations. Today, with the changing attitudes of some jurisdictions towards a more liberal granting of divorces, equity jurisdiction to prevent fraudulent divorce litigation is of extreme importance.<sup>56</sup> A married spouse should not be obliged to follow her spouse at prohibitive expense to every state where a fictitious residence may be obtained. Although the courts should not seek to regulate the morals of their citizens by injunction, neither should they hesitate to protect a spouse in that status before the public.

*Robert M. Schwartz*

## AN EXAMINATION OF DORIC SIMPLICITY: THE CRITERIA OF THE DECISION TO CEASE BUSINESS RELATIONS

### I.

#### COLGATE: A NARROW CHANNEL

The Supreme Court has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise.<sup>1</sup>

#### A. *Introduction*

Early in the history of the Sherman Act,<sup>2</sup> the Supreme Court ruled that it "does not restrict the long-recognized right of trader or manufacturer . . . freely to exercise his own independent discretion as to parties with whom he will deal."<sup>3</sup> This right, though somewhat confined, remains

56. See 3 FREEDMAN, *LAW OF MARRIAGE AND DIVORCE IN PENNSYLVANIA* § 804 (1957), where it is stated:

. . . a small number of states have abandoned the generally strong social policy against divorce and opened their borders as a refuge for persons seeking an easy severance of their marriage ties. In these states, formal obeisance is rendered to requirements of domicile and jurisdiction and even of limited statutory grounds for divorce, but so loose is the practice and so certain the favorable decree, that the judgments of their courts are with good reason regarded by their sister states as the fruit of unfairness and untruth and to be credited with but the barest minimum of recognition.

1. *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787, 790 (2d Cir. 1960).

2. 26 Stat. 209 (1890), 15 U.S.C. § 1 (1955).

3. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

with us and continues to be recognized by our courts. It shall be the purpose of this Comment to chart that "narrow channel," noting the markers left by those captains of industry who have sailed it. Some markers are shipwrecks; others, beacons of hope. But it is settled that they exist, that *laissez faire* is extinct. Government regulation of business is an established fact recognized by all knowing men and accurately portrayed by William G. Whyte<sup>4</sup> as the "dominant partner" of business. "Whether or not business wants such a partner is academic."<sup>5</sup> But how an attorney is to pilot his client is not. When asked, "When may I still exercise my own discretion?," what advice should an attorney give?

### B. *The COLGATE Rule*

The 1919 litigation involving Colgate & Co. was far from inclusive in terms of business practices or latitude of discretion. The government, in a criminal indictment, charged the company with knowingly and unlawfully creating a combination with its wholesale and retail dealers to procure their adherence to resale prices set by the defendant, thereby suppressing competition among them, in violation of the Sherman Act. On Colgate's demurrer, Judge Waddill (District Judge for the Eastern District of Virginia) ruled that by his interpretation, "no averment [was] made of any contract or agreement"<sup>6</sup> between the manufacturer and its vendees, nor was there any suggestion that the defendant "attempted to reserve or retain any interest in the goods sold, or to restrain the vendee in his right to barter and sell the same without restriction."<sup>7</sup>

Because the case came to the Supreme Court on an interpretation of a criminal indictment to which a demurrer was sustained, the court was bound to accept that interpretation and confine their review "to the question of the construction of the statute involved."<sup>8</sup> And although that interpretation was "uncertain,"<sup>9</sup> the construction of the Sherman Act and the ruling thereunder was affirmed because the court felt that the very purpose of the act is "in a word, to preserve the right of freedom of trade."<sup>10</sup> To Judge Waddill's question whether Colgate was to be subject to criminal prosecution for setting a price and refusing to deal with those who sold below it, the court answered, "No." From that time to this the *Colgate* case has survived as a first guide: absent illegal purpose, *independent* exercise of discretion has not been proscribed.<sup>11</sup>

4. To conclude our metaphor, Mr. Whyte is the First Mate — "Vice President Washington" — of the United States Steel Corporation.

5. Greyser, *Business and Politics*, 1964, 42 HARV. BUS. REV. 22, 32 (Sept.-Oct., 1964).

6. *United States v. Colgate & Co.*, 253 Fed. 522, 527 (E.D. Va. 1918).

7. *Ibid.*

8. 250 U.S. at 301.

9. *Id.* at 302.

10. *Id.* at 307.

11. The precise language (often quoted) states: "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal." *Ibid.*

### C. *The Foundation for the Rule*

Since the Supreme Court expressed "some serious doubts"<sup>12</sup> as to the judge's interpretation and since his view forms the basis of the *Colgate* rule, it is pertinent to examine his analysis. For this, it is necessary to make reference to what was then the prevailing law. It is embodied in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,<sup>13</sup> a civil action, in which the complainant sought injunctive relief to restrain the defendant from interfering with its "carefully devised" system of price maintenance.<sup>14</sup> This system consisted of elaborate restrictive agreements which the court, in denying the injunction, found to be solely for the destruction of competition, injurious to the public interest and void.<sup>15</sup> These agreements were sham consignments on the one hand and retail "agency" contracts on the other.<sup>16</sup> They were found to be sales contracts in substance, the gravamen of which was to retain in the vendor absolute control over the products. For this reason, the court based its denial of the injunction on the common law ground which makes a general restraint upon alienation invalid<sup>17</sup> as well as upon the Sherman Act.<sup>18</sup>

On the other hand, Judge Waddill took pains in the lower *Colgate* decision to point out the failure of the government to aver *any* agreement, proscribed on either ground, whereby the vendee was restricted in his right to bargain and sell his products. One author, Donald F. Turner,<sup>19</sup> has found fault with the distinction drawn between the explicit and involved agreements of the *Dr. Miles* decision and the tacit agreements supposedly not recognized by the court in *Colgate*. His argument is based on the fact that *Colgate* continued business dealings only with those vendees who *agreed* to maintain the minimum prices.<sup>20</sup>

The judge, however, based his distinction not on the presence or absence of an *agreement*, but rather on the presence or absence of an *agreement giving the defendant an unlawful restraint of trade* as contem-

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12. *Id.* at 306.

13. 220 U.S. 373 (1911). It is noteworthy that the *Dr. Miles* opinion was written by Charles Evans Hughes, the attorney for the defendant in the subsequent *Colgate* case.

14. *Id.* at 394.

15. *Id.* at 408.

16. *Id.* at 395-96.

17. The court noted that the claimant's argument appeared based on the "liberty of the producer," that is, since the "manufacturer may make and sell, or not, as he chooses, he may affix conditions as to the use of the article or as to the prices at which purchasers may dispose of it." The answer of the court was that although the manufacturer is not bound to make or sell, "it does not follow in case of sales actually made he may impose upon purchasers every sort of restrictions." *Id.* at 404.

18. *Id.* at 409.

19. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

20. After exploring the question in great depth, the author concludes that, "any substantive legal distinction between vertical agreement and acquiescence resulting from refusals to deal should be wiped out, and *Colgate* to that extent overruled." *Id.* at 695. Extended analysis of Professor Turner's article or comment upon it is irrelevant at this point except to note that his "should" aside, *Colgate* has not in fact been overruled.

plated by the Sherman Act. He recognized that Colgate "agrees with [its] wholesale and retail customers"<sup>21</sup> as to the resale prices but concluded that such agreement between vendor and vendee was not an *unlawful* combination. Since the vendee has unfettered control over the property sold it by Colgate, the sales agreement with its resale price understanding was not in "restraint of [such] trade."<sup>22</sup> This was Judge Waddill's view.

This writer submits that this distinction was vindicated by the Supreme Court in the case following *Colgate (United States v. A. Schrader's Son, Inc.)*.<sup>23</sup> There the court stated that in *Colgate* it had "no intention to overrule or modify" *Dr. Miles* where the purpose of the system under review was to "destroy the dealers' independent discretion through *restrictive* agreements."<sup>24</sup> It further explained that the *Colgate* indictment failed to charge "agreements . . . which undertook to obligate vendees to observe specified resale prices."<sup>25</sup> As the court indicated,

[I]t seems unnecessary to dwell upon the obvious differences between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, [surely Judge Waddill and the *Schrader* court realized that those who *did* observe them were in *agreement* with the manufacturer] and one where he enters into agreements . . . *which undertake to bind* [the vendees] to observe fixed resale prices.<sup>26</sup>

Thus independent action on the part of a manufacturer — action without the aid of vendees and without the element of unlawful restraint (whether of alienation or trade) — though assented to by those vendees who wish to comply on their part was not to be proscribed. It remains for us to examine the current status of the rule.

#### D. COLGATE Today

The decisions after *Colgate* have on the whole distinguished that case and opened another avenue of inquiry. In the course of its opinion in *Frey & Son v. Cudahy Packing Co.*,<sup>27</sup> the case immediately following the *Schrader* decision,<sup>28</sup> the court explained that the *Schrader* decision stood for the proposition that "essential agreement, combination, or conspiracy might be implied from a course of dealing."<sup>29</sup> The court, in order to give greater effect to the intent of Congress, opened this additional avenue. By indicating its approval of the practice in the *Schrader* case, the court impliedly authorized the admission of testimony of implied agreements and, more importantly, it has instructed judges hearing future antitrust cases

21. 253 Fed. at 525.

22. *Ibid.*

23. 252 U.S. 85 (1920).

24. *Id.* at 99. [Emphasis added.]

25. *Ibid.*

26. *Ibid.*

27. 256 U.S. 208 (1921).

28. 252 U.S. 85 (1920).

29. 256 U.S. at 210.

to bear this interpretation of the trade regulation acts in mind when ruling on the sufficiency of the government's cases. Such a case involving implied agreements followed *Cudahy* by less than a year. In *FTC v. Beech-Nut Packing Co.*,<sup>30</sup> the court condemned Beech-Nut's refusal to deal with price-cutting vendees because the company utilized code numbers on its products and instituted a system of reporting by cooperating wholesalers and jobbers.<sup>31</sup> *Colgate* did not apply since in the court's view the "specific facts found show suppression of the freedom of competition by methods [securing] the cooperation of its distributors and customers, which are quite as effectual as agreements . . . intended to accomplish the same purpose."<sup>32</sup> Such a system, said the court, "goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices."<sup>33</sup>

These and later cases<sup>34</sup> have led to the conclusion<sup>35</sup> that resale price maintenance is to be condemned as contrary to congressionally established public policy, and so, will be struck down when employed by other than a single trader.<sup>36</sup> The court has made it clear that the specific intent of Congress is to "prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete."<sup>37</sup> "Group" tactics produce profits hardly attributable to "individual enterprise and sagacity." Such iniquitous victory, insists the court, "can only be attributed to that which really makes it possible — the collective power of an unlawful combination."<sup>38</sup>

30. 257 U.S. 441 (1922).

31. *Id.* at 445-46.

32. *Id.* at 455.

33. *Id.* at 454.

34. Notably *Simpson v. Union Oil Co.*, . . . U.S. . . ., 84 S.Ct. 1051 (1964); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944).

35. This is the conclusion of the courts and is expressed in many ways. Two authors have stated it as follows:

"The vice of conspiracies to fix prices, it would seem, is that they strike directly at the heart of competition. Agreements to fix prices are, indeed, nothing other than agreements to eliminate competition" and as such are "illegal per se. . . . This is now established doctrine." Rifkind, *Division of Territories*, ANTITRUST LAW SYMPOSIUM 1953, as reported in 2 HOFFMAN & WINARD, ANTITRUST LAW AND TECHNIQUES 57 (1963).

"Ever since *Dr. Miles* . . . in 1911, resale price-maintenance contracts between a manufacturer and his distributors have been unlawful per se." Turner, *supra* note 19, at 684-85.

36. Mr. Justice Douglas, speaking for the court in the *Socony-Vacuum* case left no doubt as to the permanent interment of agreements for resale price maintenance. "Any combination," reads the opinion, "which tampers with price structures is engaged in an unlawful activity. . . . The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price fixing schemes are wise or unwise, healthy or destructive. . . . If [any] shift is to be made, it must be done by the Congress. Certainly Congress has not left us any choice. . . . the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." 310 U.S. 150, 221-22 (1940). (Emphasis added.)

37. *Associated Press v. United States*, 326 U.S. 1, 15 (1945).

38. *Ibid.*

The rule, then, far from being demised, is bolstered.<sup>39</sup> It is admittedly more rigidly applied and, through exacting examination, more clearly understood. It is, indeed, of "Doric simplicity" and applicable to facts which are "somewhat rare in this day of complex business enterprise."<sup>40</sup> But it does maintain its vigilance as our first guide: absent illegal purpose, independent exercise of discretion *will* not be proscribed.

## II.

### THE PURPOSE AND EFFECT OF REFUSALS TO DEAL

From the preceding, we have answered one question and raised another. Accepting *Colgate*, businessmen want to know under what conditions may they exercise their discretion "absent illegal purpose." To answer a question such as this, one old adage would have you ask another. This is perhaps the only possible answer, for to guide a client properly, to give the most reasoned advice, an attorney must inquire what the client wants to do; what he wants to accomplish.

From the *Colgate* decision and the cases thereafter, we have seen that concerted action in restraint of trade is prohibited; that by the trade regulation acts, Congress has forbidden any conspiracy in commerce which destroys individual effort and enterprise. We have examined such combined refusal to deal with particular reference to resale price-maintenance. But what of individual action? What test will serve as our second marker?

At one time it was thought that every individual when acting as such, had an absolute right "to deal with or refuse to deal with, any man, or class of men, as he sees fit, whatever his *motive*, or whatever the *resulting injury*, without being held in any way accountable therefor."<sup>41</sup> But this is not accurate today. Section 2 of the Sherman Act is just one example. It provides that "every person who shall monopolize, or attempt to monopolize . . . shall be deemed guilty of a misdemeanor."<sup>42</sup> The cases dealing with such refusals under the federal antitrust acts have been examined by Charles F. Barber<sup>43</sup> and found to range from "situations of inherent antitrust interest<sup>44</sup> . . . to situations where the reason for the

39. The court in the *Associated Press* case, as in many other cases, reaffirmed the *Colgate* doctrine: One who has something of value has general dominion over it and may consult his own discretion as to its disposal. But, added the court, "this right of ownership is measured by the limitations of law, and the Sherman Act which obviously restricts the free and untrammelled use of property, in the public interest, is a clear and pointed instance of the non-absolute character of property rights. An argument to the contrary was expressly rejected in *Fashion Originator's Guild v. FTC* (312 U.S. 457 (1941))." *Id.* at 14.

40. See text at footnote 1.

41. Note, 68 L. Ed. 448 (1924). The authorities cited in support of that statement include *Colgate*, *Beech-Nut* and the following state cases: *State v. Glidden*, 55 Conn. 46, 8 Atl. 890 (1887); *Alfred W. Booth & Bro. v. Burgess*, 72 N.J. Eq. 181, 65 Atl. 226 (1906); *Matthews v. Shankland*, 25 Misc. 604, 56 N.Y. Supp. 123 (1898); *Patterson & Co. v. Building Trades Council*, 11 Pa. Dist. 500 (1902). (Emphasis added.)

42. 26 Stat. 209 (1890), 15 U.S.C. § 2 (1955).

43. Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955).

44. Examples of such inherent antitrust problems are price-fixing (as already examined), exclusive dealing and territorial restrictions.

refusal suggested less well-established categories of antitrust problems or where the reason was obscure"<sup>45</sup> as when a dealer is cut-off for unsatisfactory promotion of the vendor's product. And although he adds that the reason for the refusal is unimportant,<sup>46</sup> we shall see in the next section cases where this factor appeared important if not paramount in the court's mind. And a later authority on the same subject (Stanley D. Robinson)<sup>47</sup> suggests that inquiry of purpose is as important to the court as the presence or absence of concert of action. He notes that:

While the Supreme Court has pointed out that the right of customer selection is 'neither absolute nor exempt from regulation,' [Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 625 (1953)] it has, thus far, imposed only two qualifications: the refusal to deal must be the product of independent decision by a single trader not acting in concert with others; and the refusal may not be employed to achieve, maintain or extend monopoly power [Lorain Journal Co. v. United States, 342 U.S. 143 (1951)].<sup>48</sup>

Thus the refusal to deal which has for its purpose the effect or enhancement of a monopoly is indictable. And such a refusal becomes illegal no matter what its purpose when it produces an unreasonable restraint on trade.<sup>49</sup>

Robinson further states that a general rule abolishing inquiry of purpose<sup>50</sup> may be of little planning value to the business man because "the question of intent looms large in importance in a Section 3 proceeding when the government endeavors to prove an agreement by evidence of [refusal] or threats of [refusal]."<sup>51</sup> So while purpose may be said by some to be immaterial, it can be seen that it sometimes plays a vital role in determining the outcome of "refusal" litigation.<sup>52</sup> Admittedly, purpose alone is not always determinative, nor is it always a factor. Effect is its correlative. But both elements are examined by the courts in refusal litigation. As stated above, a refusal to deal which produces an unreasonable restraint on trade is illegal regardless of the reason for its instigation. And action

45. *Supra*, note 43, at 857-58.

46. *Id.* at 858. He offers that the crucial factor in these cases (*Id.* at 857, n.42) "was the failure of the plaintiff to allege or prove the requisite contract, conspiracy, monopoly or unlawful sales-on-condition" as proscribed by Sherman. *Id.* at 858.

47. Robinson, *Restraints on Trade and the Orderly Marketing of Goods*, 45 CORNELL L.Q. 254 (1960).

48. *Id.* at 282. (Citations substituted for footnotes in original text.)

49. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

50. The author notes that the "prevailing attitude" grants a manufacturer immunity from *private actions* brought by disfranchised dealers. This, because "even if the manufacturer entered into unlawful exclusive dealing arrangements with others, the plaintiff was not injured as a proximate result of those agreements, but rather because of a refusal to deal; and the refusal to deal is lawful irrespective of its purpose." *Id.* at 283. He adds, however, that the "single trader doctrine provides small comfort to a businessman bent on achieving exclusive representation if it merely absolves him of treble damages but does not insulate against suit by the government." *Id.* at 284.

51. *Ibid.*

52. To return to the introductory metaphor when it so serves the author's wishes, "purpose" or "effect" may be viewed not as single buoys in the channel but rather as two *types* of markers, pointing the way most usefully by their ease of recognition. As will be seen, equity courts especially lean on "defendant's intent" to help exonerate or implicate as seems fit.



taken expressly to bring about a monopoly will be condemned whether or not effective. These and other factors which are present or not as the facts dictate are best analyzed by their application.

### III.

#### CASES: SHIPS IN THE CHANNEL

##### A. *A Study of Contrasts*

In order to study the role played by inquiry of purpose as well as to reach a better understanding of all the factors considered by the courts in allowing or denying recovery in a refusal case, two cases will be examined in depth. Both were decided in 1962 in the federal circuit courts. Both involved termination of business relationships after institution of private anti-trust action. There, basically, the similarity ends. It helps us not only that the results were different, but also that they were based on different reasons.

##### 1. *House of Materials, Inc. v. Simplicity Pattern Co.*<sup>53</sup>

Following the procurement of a cease and desist order by the FTC against the Simplicity Pattern Company,<sup>54</sup> (Simplicity), three of Simplicity's customers brought a private action against it under Section 4 of the Clayton Act.<sup>55</sup> House of Materials, Inc. (Materials) intervened in the action and, as had the original plaintiffs, received notice<sup>56</sup> from Simplicity "that it intended to terminate business relations with them at the approaching expiration of their contracts."<sup>57</sup> The plaintiffs, with Materials and two other intervening plaintiffs applied for a preliminary injunction to prevent Simplicity from ending their contracts. The District Court found that the "sole reason for cancellation of their contracts and the refusal to deal with them"<sup>58</sup> was retaliation for bringing the action and that "defendants' purpose in so doing was to deter them by economic coercion from

53. 298 F.2d 867 (2d Cir. 1962).

54. *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959).

55. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1914). The section provides for private recovery for injury caused by "anything forbidden in the antitrust laws."

56. The notice of termination as reported in *P. W. Husserl, Inc. v. Simplicity Pattern Co.*, 191 F. Supp. 55, 57-58 (S.D.N.Y. 1961), was couched in the following terms:

You have instituted an action in the [District Court] alleging that the terms and conditions of said contract are in violation of Section 13(e) of Title 15 of the United States Code and you contend that the continuing performance of the terms of that agreement . . . entitles you to continuing treble damages. . . .

In order to obviate any further issue with respect thereto, we hereby agree [to settle the litigation on specific conditions and in the event the conditions are not met] we hereby give you notice that in order to prevent the possible further accrual of damages we now terminate our contract with you effective as of March 10, 1960.

57. 298 F.2d at 869, n.5. The contract provided that the "order is to remain in force for a term of five years from date of acceptance at New York and from term to term thereafter, unless terminated by either party by written notice served sixty days prior to the expiration of the initial or any succeeding term." (Emphasis added by the court.)

58. *Supra*, note 56, at 59.

pursuing their legal remedies under the anti-trust (*sic*) laws."<sup>59</sup> It concluded that these and other considerations were good reasons why "the court *in the exercise of its discretion* should preserve the status quo"<sup>60</sup> pending a decision on the merits. The injunction was granted.

In reversing, the Second Circuit commended Judge Bryan's attempt to prevent what he believed was an attempt to impede enforcement of the antitrust laws but noted that "appellant has done nothing except exercise its right to terminate the contract in accordance with its terms."<sup>61</sup> They found no indication that it "employed 'other means' to effect" a combination,<sup>62</sup> or that it exacted any contract<sup>63</sup> "express or implied,"<sup>64</sup> or that it "engaged in conduct tantamount to an agreement"<sup>65</sup> or conspiracy.<sup>66</sup> Applying *Colgate* (as interpreted in the quote which introduced this comment) the court expressed the belief "that in the instant case [these] facts are of such 'Doric simplicity' "<sup>67</sup> as to pass that "narrow channel."

But the court did not rest its decision on that factor alone. It went on to rule that, *Colgate* aside,<sup>68</sup> it could not be said "that a refusal to deal under the circumstances present here amounts to an undue restraint of trade"<sup>69</sup> as the bringing of a law suit may well be a "sound business reason" to end a relationship which is no longer harmonious.<sup>70</sup> Nor would the court proscribe the refusal under Section 2 of the Sherman Act as no monopoly or attempt at monopolization was alleged.<sup>71</sup>

Beyond the possible Sherman Act violations, the court added two general grounds for its reversal. Granting that in an appropriate case the general equity power of the court could "restrain a defendant from attempting to coerce a plaintiff into discontinuing a lawsuit,"<sup>72</sup> its use here would not have been warranted. Material maintained it suffered injury

59. *Ibid.*

60. *Id.* at 64. (Emphasis added.)

61. 298 F.2d at 870.

62. *Ibid.* (For authority, the court cited *Parke, Davis.*)

63. It should be noted that the appellant's offer of settlement in its termination notice contained no opening for continued dealings. It merely offered to re-purchase the merchandise and display cases then owned by the plaintiffs which were the bases of the discrimination suit brought by the FTC. 191 F. Supp. at 58.

64. 298 F.2d at 870, citing *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920).

65. *Ibid.* Here the court cited the *Beech-Nut* case.

66. *Ibid.* Citing *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944).

67. *Ibid.*

68. The court was willing to reverse on the independent ground of an assumption that "the *Colgate* rule does not extend to the present facts, or that *Colgate* no longer represents the controlling law, and that *Simplicity's* conduct amounted to a 'contract, combination, . . . or conspiracy.'" *Id.* at 870-71.

69. *Id.* at 871.

70. *Ibid.* Noting that the appellee cited no case holding such refusal to constitute an unreasonable restraint of trade, the court found this "not astonishing, for the relationship between a manufacturer and his customer should be reasonably harmonious."

71. *Ibid.* The court noted, in fact, that "*Simplicity's* action in terminating the contracts of a number of its customers necessarily created an added market for its competitors."

72. *Ibid.*

under the contract and sought treble damage recovery as compensation. The telling fact<sup>73</sup> was that "Simplicity's refusal to deal after the original contract term expired did not have the legal effect of depriving Materials of a remedy for past injury."<sup>74</sup> The effect of issuance of an injunction in such circumstances would have the effect of extending Materials' contract rights without benefit of bargain.<sup>75</sup> This, courts are universally wont to do.

The final ground of reversal was a brief discussion of the law of Torts on this subject. The court recognized that the intentional infliction of injury is a "prima facie" tort, but even assuming proof of this, it held that the fundamental assumptions of free enterprise, including the belief that "each business enterprise must be free to select its business relations in its own interest," justified one in Simplicity's present position<sup>76</sup> in refusing to deal.

The *Simplicity* case, then, has served its purpose here, for in addition to the primary *Colgate* ground of individual action, the court went wide afield, discussing many factors which we must consider in guiding our clients: Will the individual refusal to deal unreasonably restrain trade or tend toward monopoly? Will it breach a contract, commit a tort or destroy competition? May equity enjoin it; or must it? These and other factors may be seen recurring in the refusal cases. And here, in examining our other example, these factors can be focused by contrast.

## 2. *Bergen Drug Co. v. Parke, Davis & Co.*<sup>77</sup>

As previously indicated, this case also arose during a private action to enforce the provisions of the federal antitrust laws. The appeal here, however, is from a *denial* of a motion for an injunction pendente lite to prohibit the defendant company from refusing to deal further with the plaintiff. Although the opinion of the district court is not officially reported, its denial of the motion was based on the conclusion that no statutory or other legal basis existed for granting such an injunction.<sup>78</sup> As before, the court reversed, thereby producing the opposite result. Since both courts acknowledged that the courts do have the general equity power to

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73. Additional factors considered by the court were the lack of a refusal-to-deal controversy in the main action and the fact that Materials sought only monetary (non-injunctive) relief for the alleged Section 2(e) violations. This, said the court made it apparent that "temporary injunctive relief is singularly inappropriate." *Id.* at 872.

74. *Ibid.*

75. To be thorough, the reader should direct his attention to the *caveat* contained in n.12a by the court:

In this developing area of law we cannot say that there will never be circumstances in which the court will exercise its equity power to prevent duress committed under color of legal right. See Dawson, *Economic Duress — An Essay in Perspective*, 45 MICH. L. REV. 253-90 (1947). But we do hold that in this case Simplicity's exercise of its right to terminate the contract did not justify the intervention of the court. Cf. 62 COLUM. L. REV. 181, 186 (1962). *Ibid.*

76. *Ibid.* The quote is by the court from 4 RESTATEMENT, TORTS, § 762, and comments a, b and c.

77. 307 F.2d-725 (3d Cir. 1962).

78. *Id.* at 726.

compel the parties to continue their relationship pending disposition of the main claim,<sup>79</sup> we must examine the factors which led the court to determine that they should be exercised in this case though not in *Simplicity*.

The main action is similar to the one in *Simplicity* where the vendee commenced a treble damages action against the manufacturer for discriminatory selling practices. Both plaintiffs sought treble damages but Bergen added a prayer for a permanent injunction to enjoin the defendant "from refusing to sell its products to plaintiff upon the same terms as they sold to other purchasers."<sup>80</sup> Less than a month after the action was commenced, Parke, Davis served notice of termination<sup>81</sup> on Bergen whereupon it filed a motion for the temporary injunction.

In deciding to use the injunctive power<sup>82</sup> here, it lay heavily in the court's mind that the motion before it asked for a temporary injunction identical to the permanent relief requested.<sup>83</sup> "True enough," said the court, "the defendant can choose customers, *but it should not be permitted to do so in order to stifle the main action*,<sup>84</sup> especially where it is apparent that such conduct will further the monopoly . . . which, if proved, would entitle plaintiff to permanent relief (emphasis added)."<sup>85</sup> This is the crucial element not present in *Simplicity*. It will be recalled that the *Simplicity* court realized that *Simplicity's* refusal "did not have the legal effect of depriving Materials of a remedy."<sup>86</sup> Here, the result of the refusal on the main case would be devastating.<sup>87</sup> In reversing with directions to issue

79. There is some significance in the fact that the present court cited the *Simplicity* case as an authority for its existence. Since both courts under review here, and indeed, most courts, recognize the general equity power, there seems to be no necessity to discuss its existence. As the *Bergen* opinion states, "the instances where it has been applied are many," giving the following cases as examples: *Porter v. Lee*, 328 U.S. 246 (1946); *Texas & New Orleans R.R. Co. v. Northside Belt Ry. Co.*, 276 U.S. 475 (1928); *B. W. Photo Utilities v. Republic Molding Corp.*, 280 F.2d 806 (9th Cir. 1960).

80. 307 F.2d at 726.

81. Parke, Davis' notice read as follows:

We have concluded that we do not wish to make further use of the distribution facilities of Bergen Drug Company, Inc.

We are, therefore, closing your account permanently, effective immediately. *Ibid.*

82. *Supra*, note 78 and the text thereat.

83. *Ibid.*

84. Here is the vertex of the most serious divergence of the cases. In its complaint, Bergen alleged that the defendant's discriminatory pricing policies were illegal and that it was therefore entitled to an injunction permanently enjoining Parke, Davis & Co., to cease discriminating against it. (Such relief is provided by the Clayton Act, 38 Stat. 737, 15 U.S.C. § 26.) By ceasing to deal altogether, then, Parke, Davis & Co., would remove the discrimination and eliminate Bergen's ground for injunctive relief, leaving damages as the only open avenue of recovery. House of Materials on the other hand sought only damages in its main case, basing its claim on existing and past contracts. Therefore, the injunction it sought would have no practical effect on the outcome of its main case.

85. 307 F.2d at 727.

86. 298 F.2d at 872 discussed *supra*, n.72.

87. Aside from the damage caused plaintiff's case by removal of the cause of action for injunctive relief, the plaintiff alleged that without the injunction, it would be impossible for it to successfully prosecute either claim (whether for damages or for permanent injunction). The argument (agreed to by the court) being that the fear of similar retaliatory action will result in plaintiff's inability to obtain cooperation of other wholesalers and retailers as witnesses. "Certainly, a court can act where a party's conduct is calculated to frustrate litigation." *Id.* at 728.

the injunction rather than "to remand the case to the district court so that it might first exercise its discretion"<sup>88</sup> the court underlined the policy of the law which gives equity the power to maintain the status quo until a decision is reached on the merits. For this reason alone, the injunction clearly should have been issued.

Neither court, however, was content to rest on one ground alone. As the *Simplicity* court examined the antitrust, contract and tort aspects, the *Bergen* court chose two important policy arguments to give additional weight to its decision.

One of the additional reasons given for the issuance of the injunction is based on the indicated failure of the action without it. It is the intent of Congress that private parties aid the government in enforcing its anti-trust laws.<sup>89</sup> This is evidenced by the special provisions for treble damages and attorneys' fees. "That indeed [weighed] heavily with this court in considering whether equity jurisdiction should be exercised."<sup>90</sup> To allow Parke, Davis to bring about a cessation of litigation without complying with the antitrust laws and without sanction for their infraction would, in effect, allow it to flaunt Congress and to individually repeal the private suit sections that body so carefully formulated and enacted.

The final policy argument of the court is a combination of public interests: one in the procurement of the defendant's type of merchandise and the other in the general free economy of the country. As they are both based on plaintiff's position as a "full-line, full service wholesaler," they may both be explained by an understanding of that concept.

The most important single fact involved is that many of the products are "specified in physicians' prescriptions, and under law substitution is forbidden."<sup>91</sup> An average of 25% of the orders received by the plaintiff require at least one of these items. If plaintiff is rendered unable to fill his orders, the druggists, and the consumers in turn, will trade with those who can supply their entire needs. As was seen by the court, "it would be impossible to estimate or compute plaintiff's loss of good will which it will suffer"<sup>92</sup> if it is unable to provide service on a par with its competitors. And it has been held unreasonable per se to foreclose any substantial part

88. 307 F.2d at 727.

89. The conclusion of an unsigned article in 61 *YALE L.J.* 1010 (1952), states this most succinctly at page 1061:

Significantly, however, the effects of private enforcement extend far beyond immediate parties in government and private suits [for] while private suits usually follow government activity, they do more than duplicate government work. Thus, for example, private suits after government actions frequently adjudicate practices not covered by government decrees, or, in some instances, serve partially to fill the breach left open by inadequate government policing of decrees. And of course, to the extent that private suits do occur, they augment the financial impact and consequently the deterrent value of both civil and criminal government actions. . . . In fact, private enforcement has introduced a prophylactic note of caution into business practice. . . .

90. 307 F.2d at 728.

91. *Ibid.*

92. *Ibid.*

of any market to one of the businesses competing therein.<sup>93</sup> In the face of all these reasons for granting the injunction proscribing defendant's right to refuse, defendant has failed to show any inconveniences it will suffer or any difficulty of enforcement. The right "freely to exercise [one's] own independent discretion as to the parties with whom [one] will deal" cannot stand over these paramount interests. In these circumstances, it is outside the channel.

### B. *Summary*

There the cases stand: not in conflict but in harmony. Neither is a case which will be remembered as the "*Bergen* rule" or "*Simplicity* rule." But they serve to illustrate the factors to be considered when contemplating a refusal to deal. Indeed, it is offered that few other cases could be found which would illustrate so many of the keys used by the courts to judge any individual refusal to deal.

While there are certainly other reasons for such refusals and other situations in which these refusals come before the courts, these two cases adequately present the prevailing opinions as to when such acts will be allowed and when struck down. It is at least clear from them that the courts do have the power to circumscribe the "long recognized" right of freedom of business association and that the courts will examine the purpose and the result of an intended refusal as well as the context in which it arises. And exercising their discretion, judges will weigh these factors and balance that ancient and well established right with the infringement it produces on the public interest.

## IV.

### CONCLUSION

The *Colgate* rule is not obsolete: *United States v. Colgate & Co.* has never been overruled. It is still cited by court and counsel; it is condemned, distinguished and, in cases within its "narrow channel," applied; it stands as a bastion of free enterprise. With it as a shield, the captains of industry — honest businesses and businessmen — are free to make sound business judgments regarding their association with their brotherhood.

It should be clear that all forms of "concert of action" are outside its protection. And the courts are sophisticated in their view. They are free and willing to look behind a façade; to see through the schemes of men who would avoid the law and place their individual interest above that of the public. The very history of our antitrust laws — Sherman, Clayton, and Robinson-Patman — indicate strong backing of the courts by Congress. It has sought to determine and protect that public interest and those who have been clever enough to subject that interest to their own benefit with impunity have seen their efforts result in better, more comprehensive

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93. *International Salt Co. v. United States*, 332 U.S. 392 (1947).