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The Attorney-Client Privilege and Its Application to Patent Attorneys

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post-1938 policy of federal-state conformity in matters of substantive law. However, differentiating between substantive and procedural rules and the effect that rules, traditionally regarded as procedural, may have on a litigant's substantive rights, raises a question as to whether the federal rules may encroach on the area set aside to state law. Professor Louisell argues that ". . . privileged relations are institutions of the states resulting in substantive rights under state law which cannot be undermined by federal mandate merely because the holder of the privilege may be involved in federal litigation. . .".¹¹¹

Nevertheless, absent challenge, most courts have regarded evidentiary questions as procedural. For one reason or another, in non-diversity cases, evidence which would otherwise be privileged under state law, has generally been admitted under Federal Rule 43(a) without appreciation of the problems thereby engendered.

THE ATTORNEY-CLIENT PRIVILEGE AND ITS APPLICATION TO PATENT ATTORNEYS

Frequently in litigation in the federal courts, discovery of papers, documents and the like in the possession of the opposing client or his attorney is requested. Just as frequently, discovery of much of the requested materials is resisted on the grounds that it is privileged. The Federal Rules of Civil Procedure, while permitting liberal discovery of evidence, recognize privileged material as an exception.¹ What is or is not privileged within the meaning of that term as used in Rule 34 of the Federal Rules of Civil Procedure, is to be determined by the law of evidence.² One of the notable privileges recognized in the law of evidence concerns communications between an attorney and his client.

Historically, the attorney-client privilege developed in the courts of England.³ The privilege originally belonged to the attorney;

111. *Supra* note 104, at 120.

1. Fed. R. Civ. P. 34 allows discovery of ". . . any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, not privileged, which constitute or contain evidence. . . ."

2. *Wild v. Payson*, 7 F.R.D. 495 (S.D.N.Y. 1946). At 499 the court stated: "The word 'privileged' as used in Rule 26(b) relating to depositions and in Rule 34 dealing with discovery and production of documents, etc., should be interpreted as it is in the law of evidence."

3. 8 WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961) (hereinafter cited as Wigmore).

however, later courts interpreted the privilege as belonging to the client.⁴

The privilege, being a part of the common law, was recognized in an early United States Supreme Court case,⁵ wherein Justice Story stated:

Whatever facts, therefore, are communicated by a client to counsel, solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent.⁶

In a later United States Supreme Court decision⁷ which acknowledged the statement by Justice Story, the court added that neither the payment of a fee nor pendency of litigation was necessary to entitle a client to the privilege.⁸

The modern requirements for the attorney-client privilege have been set out by Professor Wigmore as follows:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.⁹

Although the attorney-client privilege is deeply embedded in the law of this country, and is recognized by statute in numerous states,¹⁰ certain legal scholars have criticized the attorney-client privilege as an anachronism.¹¹ However, the momentum of its past or the sound logic behind the privilege, or a combination of these factors, has sustained its presence in the law. The voice of the critics, however, appears to have reached the ears of the courts as they evince a reluctance to allow any expansions of the attorney-client privilege to kindred professionals having frequent occasion to have confidential discussions with clients.¹²

4. *Ibid.*

5. *Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280 (1826).

6. *Id.* at 294.

7. *Alexander v. U.S.*, 138 U.S. 353 (1891).

8. *Id.* at 358.

9. 8 WIGMORE § 2292.

10. See listing of statutes in 8 WIGMORE § 2292.

11. See e.g., Radin, *Privilege of Confidential Communications Between Lawyer and Client*, 16 CALIF. L. REV. 487 (1928) and MORGAN, *MODEL CODE OF EVIDENCE* 28 (1942).

12. See 8 WIGMORE § 2286 and *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962).

It is perhaps for this reason, and because of the confusion of the courts concerning legal qualifications and functions of patent attorneys, that clients of patent attorneys have been frequently denied the privilege.¹³ In the often cited case of *United States v. United Shoe Mach. Corp.*,¹⁴ Judge Wyzanski based his rejection of the privilege in patent litigation upon (1) the fact that many people in patent practice are not members of the bar of any court, (2) that many patent department attorneys are not members of the bar of the jurisdiction in which they practice, and (3) patent attorneys function less as legal advisors and more as advisors of a branch of an enterprise founded on patents.¹⁵

The court cited *Brungger v. Smith*¹⁶ as authority for denying privilege to members of the patent department who were not members of the bar of any court. As to thirteen other members of the patent department who were members of the bar, but not of the jurisdiction in which they were employed, the court held that because they were not members of the bar of the local jurisdiction that they could not be acting as attorneys.

As to the remaining members of the patent department who were members of the bar of the local jurisdiction, the court, using guilt by association reasoning, concluded that inasmuch as these patent department attorneys did the same work as the non-attorneys that they likewise were not attorneys within the privilege.¹⁷ In drawing such a conclusion the court, although it did not do so expressly, actually extended the principle of *Brungger v. Smith*, a case involving a solicitor who was not an attorney-at-law, to a situation unquestionably involving attorneys-at-law, i.e., the patent department attorneys who were members of the bar of the local jurisdiction.

The unfortunate extension of the principle of *Brungger v. Smith* to the situation in the *United Shoe case*¹⁸ has set forth a standard which has caused consternation to clients of patent attorneys. Although subsequent decisions have, to some extent, mitigated the harshness of Judge Wyzanski's test as applied to patent attorneys,

13. See e.g., *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 85 U.S.P.Q. 5 (D.Mass. 1950); *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792, 101 U.S.P.Q. 316 (D.Del. 1954); *American Cyanamid Co. v. Hercules Powder Co.* 211 F. Supp. 85, 135 U.S.P.Q. 235 (D.Del. 1962).

14. 89 F. Supp. 357, 85 U.S.P.Q. 5 (D.Mass. 1950).

15. *Id.* at 360.

16. 49 Fed. 124 (C.C. Mass. 1892).

17. 89 F. Supp. 357, 85 U.S.P.Q. 5 (D.Mass. 1950).

18. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 85 U.S.P.Q. 5 (D. Mass. 1950).

the specter of *United Shoe* continues to hover over each patent litigation.¹⁹

It is the purpose, therefore, of this article to examine the client-patent attorney relationship and to present a rationale suggesting the application of the same standard in applying the privileged communications doctrine in matters of patent law as exists in other areas of the law.²⁰

The reason for allowing clients of patent attorneys to claim the privilege would seem to be just as cogent as that which permits clients of general law practitioners to assert the privilege. The presently accepted policy for retaining the attorney-client privilege in the law lies in the fact that clients are believed to more readily reveal all the details known to them when they know that such disclosure is exempt from discovery should litigation result.²¹ This reason would seem to exist as much in the case of a patent attorney-client relationship as in any other client-attorney relationship inasmuch as each is seeking advice on a matter of law.

A client of a patent attorney is usually an inventor, a patentee or a putative infringer, each seeking advice as to his rights. For example, an inventor in bringing facts known only to himself would be seeking advice from the attorney as to the patentability of his invention and advice as to the best means of protecting his invention. The attorney in giving advice would be relying upon statutes of the United States²² and upon case law which has developed in the patent area. Furthermore, the attorney with his knowledge of the rules of evidence and of the law of trade secrets,²³ might advise his client that

19. Approximately ten cases of patent litigation subsequent to *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 85 U.S.P.Q. 5 (D.Mass. 1950), have cited that case. Shepard's Fed. Rep. Citations.

20. Discussion of the mechanics to be adopted by a patent attorney in preserving a privileged communication has been excluded from the scope of this comment. Such procedures would be similar to those practiced by any attorney and have been adequately discussed elsewhere. See, e.g., Haight, *Keeping the Privilege Inside the Corporation*, 18 BUS. LAW. 551 (1963); Carson, *Privilege and the Work Product Rule in Corporate Law Departments*, 14 BUS. LAW. 771 (1959); Hunt, *Corporate Law Department Communications—Privilege and Discovery*, 13 VAND. L. REV. 287 (1959); Reedy, *Practical Guides for the Preservation of Attorney-Client Privilege Within a Corporation*, Proc. 1st. Annual Inst. on Corp. Counsel FORDHAM U., 74 (1959).

21. 8 WIGMORE § 2291.

22. 35 U.S.C. §§ 101-103 (1959) set forth the standards for determining the patentability of inventions.

23. A trade secret has been defined as a process, compound, device, etc., known only to the owner of it and to such employees of his to whom it must be made known in order to be able to use it. CYCLOPEDIA OF LAW DICTIONARY (3rd ed. 1940).

even though his invention would probably be patentable, that because of the nature of the invention and the difficulty of proving infringement thereof, the invention would be better practiced as a trade secret. All of this is possible legal advice which an inventor impliedly expects, and may expressly request, when he consults a patent attorney about his invention.

That full disclosure by an inventor may serve the ends of justice may be illustrated by the following hypothetical situation: An inventor has used his invention one year prior to his consultation with patent attorney X concerning patentability of the invention. The inventor, fearing that the use is a bar to patentability,²⁴ conceals the facts of the use from attorney X. Without the information concerning the use, patent attorney X applies for letters patent and obtains patent coverage for the inventor. This patent could result in needless litigation, for full disclosure of the facts to attorney X would have resulted in a determination of unpatentability if the use was actually a bar. However, if the inventor knew that his disclosure concerning the use were free from discovery from attorney X, then he would readily disclose. Whether or not a use is a public use and therefore a bar to patentability is a question of law.²⁵ Should attorney X advise the inventor that the use was a bar, then the inventor would still feel free to consult attorney B on the same question, knowing that attorney X could not disclose. These consultations could certainly be good faith consultations for different attorneys might differ in their interpretation of certain facts and whether or not they constitute a public use which would be a bar to patenting of an invention. That attorneys do disagree on the legal significance of facts is amply attested to by our adversary system. From this hypothetical situation it should be evident that the privilege rule serves the same admirable purpose when applied to patent attorneys as when applied to general practitioners.

24. 35 U.S.C. § 102(b) (1954) provides: "A person shall be entitled to a patent unless the invention was patented or described in a printed publication in this or a foreign country or in *public use* or on sale in this country, more than one year prior to the date of the application for patent in the United States." (Emphasis added).

25. See, e.g., *Armour Research Foundation v. C. K. Williams & Co.*, 280 F. 2d 499, 126 U.S.P.Q. 218 (7th Cir. 1960). The issue in that case being: Was the use of ten pounds of a ferromagnetic iron oxide material some fifteen months prior to an application for letters patent a public use within the meaning of 35 U.S.C. § 102(b)? At 505 the court stated, "The question is not without difficulty. While a public use more than a year prior to the application date would defeat a patent, an experimental use would not. Whether the use by 3M was experimental, poses a very close question." For additional cases on this subject, see, e.g., *Piet v. United States*, 176 F. Supp. 576, 123 U.S.P.Q. 21 (S.D. Calif. 1959); *Hantan v. Kearney & Trecker Corp.*, 191 F. Supp. 420, 129 U.S.P.Q. 161 (E.D. Mich. 1961).

A possible infringer, on the other hand, is seeking advice as to whether or not certain acts committed or contemplated by him constitute infringement of existing patents. While some courts have intimated that infringement studies are not privileged as the studies are performed upon public documents,²⁶ it is suggested that the studies are made in reference to certain facts disclosed by the client, therefore, the reason for the privilege exists here to the same extent as in other legal [consultations]. For example, in a comparable situation, a client possessed of facts concerning his activities might seek advice as to the legality of his acts under state statutes, such as stream pollution; yet this would be a privileged communication even though the attorney's advice would be based upon a public document, that is, the state statutes.

From consideration of the above situations, it is submitted that the reason for permitting clients of patent attorneys to claim exemption from discovery based on the attorney-client privilege is just as great as in other cases wherein the consultations meet the standards set forth for the privilege. This conclusion is supported by judicial authority.

Judicial determinations following the *United Shoe*²⁷ decision have tended to establish the attorney-client privilege in patent matters upon a more rational basis although its influence is still evident. In an important case following *United Shoe*,²⁸ *Zenith Corp. v. Radio Corp. of America*,²⁹ Judge Leahy extended the attorney-client privilege to corporate patent attorneys who were not members of the local bar, but only when they were *not* working in typical patent matters, thus deviating slightly from Judge Wyzanski's strict standard.

The extension of the application of the privilege doctrine was a qualified one in that the majority of consultations of clients and patent attorneys concerns the preparation of patent applications and the prosecution thereof in the Post Office, infringement studies, validity studies and the like. In denying privilege to these consultations, Judge Leahy restricted the application of the privileged communications doctrine to patent attorneys to a narrow area.

26. See, *e.g.*, *Zenith Corp. v. Radio Corp. of America*, 121 F. Supp. 792, 101 U.S.P.Q. 316 (D.Del. 1954); *American Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85, 135 U.S.P.Q. 235 (D.Del. 1962).

27. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 85 U.S.P.Q. 5 (D.Mass.1950).

28. *Ibid.*

29. 121 F. Supp. 792, 101 U.S.P.Q. 316 (D.Del. 1954).

While Judge Leahy's test³⁰ has been followed in certain instances,³¹ some recent cases have further extended the privilege to client-patent attorney communications involving typical patent matters. In *International Minerals v. Golding-Keane*³² the court held that the privilege applied to correspondence between attorneys and between counsel and inventor referring to legal advice, which was never effectuated, in an application for letters patent; said application having matured into a patent and being involved in litigation.³³

Another case which extended the application of privilege in patent matters was *Ellis-Foster v. Union Carbide Corp.*³⁴ There the court held that although the attorney performed tasks which could have been performed by non-attorneys, nonetheless the privilege should apply to an attorney when employed as an attorney and that the admission of non-lawyers in the field of patent practice should not be considered sufficient reason for breaking down well recognized and soundly based rules affecting a claim of privilege.³⁵

In *Garrison v. General Motors Corp.*,³⁶ the court greatly extended the application of privilege to patent matters as the court refused to follow Judge Leahy's test in determining what constitutes the practice of law. The court held that a patent attorney is engaged in the practice of law when in a certain matter the client believes legal advice to be necessary, such as inquiry made in reference to a certain patent or application therefor, with respect to litigation, infringement, validity or purchase.³⁷ In reaching its conclusion, the court

30. *Id.* at 794. Judge Leahy stated that patent attorneys do not act as lawyers ". . . [W]hen not primarily engaged in legal activities; when largely concerned with technical aspects of a business or engineering character, or competitive considerations in their companies constant race for patent proficiency, or the scope of public patents, or even the general application of patent law to developments of their companies and competitors; when making initial office preparatory determinations of patentability based on inventor's information, prior art or legal tests for invention and novelty; when drafting or comparing patent specifications and claims; when preparing the application for letters patent or amendments thereto and prosecuting same in the Patent Office; when handling interference proceedings in the Patent Office concerning patent applications."

31. See, e.g., *American Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85, 135 U.S.P.Q. 235 (D.Del. 1962).

32. 162 F. Supp. 137, 118 U.S.P.Q. 501 (W.D.N.Y. 1958).

33. *Id.* at 141.

34. 159 F. Supp. 917, 116 U.S.P.Q. 576 (D.N.J. 1958).

35. *Id.* at 920.

36. 213 F. Supp. 515; 136 U.S.P.Q. 343 (S.D.Calif. 1963).

37. *Id.* at 520.

cited *State of Florida, The Florida Bar v. Sperry*³⁸ and *Chicago Bar Ass'n. v. Kellogg*³⁹ as authority for the proposition that advice on patentability, especially in regard to infringement and enforcement of patents, involves the practice of law.

In another recent case involving privilege, *Paper Converting Machine Co. v. Patterson*,⁴⁰ the court held that (1) membership in the bar is not a necessity if other attributes are present, (2) the corporate patent attorney is not denied privilege merely because of his capacity, and (3) privilege attaches where a client seeks a patent attorney's advice on a legal matter such as alleged infringement.⁴¹ As to this last point, the court concluded that privilege does not attach if the facts communicated to the attorney are publicly known.⁴² In his case the defendant was manufacturing and selling to the public a mechanical device which plaintiff contended was infringing plaintiff's patent. Inasmuch as the alleged infringing device was publicly known, the court evidently felt that there were no confidential facts to be disclosed by defendant to his attorney and that there was, therefore, no basis for applying the attorney-client privilege.

The court in the *Paper Converting Machine Co.* case while appearing to apply an enlightened standard of privilege to patent attorneys, held that correspondence from a patent attorney to the United States

38. Fla., 140 So.2d 587, 133 U.S.P.Q. 157 (1962). The Supreme Court of Florida held that a patent attorney not admitted to practice law in Florida nor in any other state who held himself out to the public in Florida as qualified to advise as to patentability and did so advise, was engaging in the practice of law, and that was true if the act of advising concerned the infringement of patent rights. (Although the Supreme Court termed Sperry a patent attorney, he was not a member of the bar of any jurisdiction and under present Patent Office regulations would not qualify as a patent attorney but as a patent agent; Rules of Practice, U.S. Patent Office, Rule 341 (1960). The confusion in terminology resulted because Sperry was registered to practice before the Patent Office prior to November 15, 1938, at which time all registrants were listed as a patent attorney whether they were attorney at law or not.) The case was heard on certiorari by the U.S. Supreme Court, 373 U.S. 379 (1963), and reversed; however, the court did not contradict the Florida Supreme Court's determination of what constituted the practice of law, but held that as a patent agent Sperry had certain privileges bestowed by Federal law which pre-empted state authority. Modified below, Fla., 159 S 2d 229 (1963).

39. 338 Ill. App. 618, 88 N.E. 2d 519, 83 U.S.P.Q. 269 (1949). In this case the court held the following to be the practice of law: preparing, drafting and construing patent licenses and deeds, assignments and other evidences of transfer of title to or interest in patents; rendering legal opinions relating to title and validity, infringement and enforcement of patents and trademarks.

40. 215 F. Supp. 249, 136 U.S.P.Q. 549 (E.D.Wis. 1963).

41. *Id.* at 251.

42. *Id.* at 252.

Patent Office is not privileged.⁴³ While this holding is supported by case law,⁴⁴ it is criticized as a general holding inasmuch as such correspondence should be privileged when it is based upon confidential communications by a client to his attorney. Although the Patent Office is a third party, disclosure to it should not be considered a waiver of the privilege⁴⁵ inasmuch as communications received by the Patent Office are treated with confidence⁴⁶ and are unavailable to the public until the application matures into a patent. If the application fails to mature into a patent, then the application is relegated to secrecy as an abandoned application.⁴⁷ The courts, however, have held that Patent Office regulations do not bind a court of law.⁴⁸

Although the courts attempt to protect any trade secrets contained in applications discovered from the Patent Office⁴⁹, the practice is criticized as not affording a client of an attorney-at-law the full measure of the attorney-client privileged communications doctrine.

By analogy, many aspects of the practice of patent law are obviously as entitled to the attorney-client privilege as are areas of law where the privilege is conventionally recognized, for example, in will drafting. In will drafting, the attorney-client privilege has been historically applied where discovery of the will or communications relevant thereto were attempted to be discovered prior to the tes-

43. *Ibid.*

44. See *e.g.*, *Edison Electric Light Co. v. U.S. Electric Light Co.*, 44 Fed. 294 (2d Cir. 1890); *Utah Radio Products Co. v. Delco Appliance Corp.*, 19 F. Supp. 143, 32 U.S.P.Q. 115 (W.D.N.Y. 1937).

45. 8 WIGMORE § 2325. At 633 it is provided: "Since the attorney has implied authority to make admissions and otherwise to act in all that concerns the management of the cause, all disclosures (oral or written) *voluntarily* made to . . . third persons in the course of negotiations for settlement, or in the course of taking adverse steps in litigation . . . , are receivable as being made under an implied waiver of privilege, . . ."

46. 35 U.S.C. § 122, Rules of Practice U.S. Patent Office, Rule 14(a) (1960). Maintenance of pending patent applications in secrecy should maintain the confidentiality requirement of the attorney-client privilege even though the Patent Office is a third party. In *United States v. Fouts*, 166 F. Supp. 38 (S.D. Ohio 1958) it was held that a letter written by a prisoner's attorney to the prisoner in the penitentiary was a privileged communication between prisoner and his attorney even though it was read and censored by officers of the penitentiary.

47. 35 U.S.C. § 122, Rules of Practice, U.S. Patent Office, Rule 14(b) (1960).

48. *Edison Electric Light Co. v. U.S. Electric Light Co.*, 44 Fed. 294 (2d Cir. 1890).

49. *Utah Radio Products Co. v. Delco Appliance Corp.*, 19 F. Supp. 143, 32 U.S.P.Q. 115 (W.D.N.Y. 1937). The court held that pending patent applications may be disclosed under certain conditions; however, the court will provide for protection of trade secrets contained therein.

tator's death.⁵⁰ The privilege has even been held to apply to un-executed wills after the decease of the client.⁵¹

The analogous situation of an attorney drafting a patent would appear to require the same right of privilege as an attorney drafting a will. In each situation the client has possession of certain facts and is seeking legal advice relevant thereto. In the case of a will the client seeks advice on how to dispose of his property in the manner he desires, while in the case of a patent application, the client desires advice on the protection of an invention which he possesses. Furthermore, in each instance, the client desires confidentiality until the happening of a certain event; in the case of a will the event is the death of the testator while in the case of an inventor it is the issuance of letters patent upon his invention.

In arguing support by analogy, the comparison must be as parallel as possible in all material respects to prevent a false conclusion. For example, the analogy between a will drafter and a patent attorney seems more appropriate than does an analogy of the latter with a drafter of conveyances of property. Historically, the United States courts have held that where no legal problem has been expressly brought forward by the client, his communications concerning the mere drafting of an instrument conveying property have commonly been admitted as evidence.⁵² However, in the drafting of a patent, the situation is entirely different. First, until the client has disclosed certain facts, the attorney cannot decide if any property rights exist. The patent attorney must consider the facts communicated by the client to determine if under the statutes and existing case law⁵³ a patentable invention exists. Secondly, the attorney must advise his client as to the best means of protecting his invention, that is, by seeking patent protection or by practicing the invention as a trade secret. Such advice would be legal advice and not business advice as the attorney would be basing his advice upon his knowledge of statutes and case law concerning patents, trade secrets, rules of evidence and the like.

50. 8 WIGMORE § 2314. 58 Am. Jur. *Witnesses* § 505 (1948).

51. 58 Am. Jur. *Witnesses* § 505 (1948).

52. 8 WIGMORE § 2297.

53. The frequent review by appellate courts of the issue of patentability indicates that at least for the purposes of review, the question of patentability is considered one of law. In *Great A. & P. Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147 (1950), the Supreme Court held unpatentable a device which had been concluded as patentable by two lower courts. In a concurring opinion, Mr. Justice Douglas, at 155 stated, "The standard of patentability is a constitutional standard; and the question of validity of a patent is a question of law."

The fitting analogy between a drafter of wills and a patent attorney, and the hypothetical situations posed hereinabove, indicate that decisions such as *Garrison v. General Motors Corp.* properly apply the attorney-client privilege as readily to patent attorneys and their clients as to any other attorney-client relationship. This complete recognition of the attorney-client privilege in patent matters is not an extension of the privilege as patent attorneys are attorneys-at-law and thus qualify as proper subjects under any theory defining the attorney-client privileged communications doctrine. The only consideration which should be before a court in determining the applicability of the attorney-client privilege in a certain situation should be the requisities of the privilege⁵⁴ and not the label on the attorney involved.

THE DEMISE OF FAIR TRADE IN PENNSYLVANIA: A STUDY OF JUDICIAL DISENCHANTMENT*

INTRODUCTION

In a 5-2 decision handed down on March 26, 1964,¹ the Pennsylvania Supreme Court declared unconstitutional the nonsigner provision of the state's Fair Trade Act.² Thus Pennsylvania joins the

54. 8 WIGMORE § 2292. Set forth in the text, *supra* at note 9.

* It is not the purpose of this article to discuss the history of Fair Trade nor to define it. The reader is cited to a representative cross-section of material both pro and con. Weston, *Fair Trade, Alias "Quality Stabilization": Status, Problems and Prospects*, 22 A.B.A. ANTI-TRUST SECTION 76 (1963); Conant, *Resale Price Maintenance: Constitutionality of Nonsigner Clauses*, 109 U. OF PA. L. REV. 539 (1961); Herman, *Fair Trade: Origins, Purposes and Competitive Effects*, 27 GEO. WASH. LAW REV. 621 (1958); Note, *Fair Trade and The State Constitution*, 10 VAND. L. REV. 415 (1957); Van Mell, *The Case for Fair Trade*, 44 ILL. BAR J. 40 (May 1955); Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175 (1954); Schachtman, *Resale Price Maintenance and the Fair Trade Laws*, 11 U. OF PITT. L. R. 562 (1950); Shulman, *The Fair Trade Acts and The Law of Restrictive Agreements Affecting Chattels*, 49 YALE L. J. 607 (1940).

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

2. "Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale, or selling is, or is not, a party to such contract, is unfair competition and is actionable at the suit of such vendor, buyer, or purchaser of such commodity. . . ." 73 P.S. § 8