THE MAINTENANCE OF UNIFORM RESALE PRICES.

The decision of the Supreme Court of the United States in the case of *Bauer* v. *O'Donnell,*[1] more familiarly known as the Sanatogen Case, has occasioned much discussion of the subject of "price maintenance". This discussion has centered around the power of the producer of a patented, copyrighted, or trade-marked article legally and effectively to establish at successive stages the resale price of his product, even to the extent of naming the sum to be received by the retailer in the final transfer to the consumer.

In considering this question of resale price maintenance it is necessary to understand exactly what is meant by the various terms, "fixed prices", "price maintenance", "one price to all", "standardization of prices", *etc.,* freely and often indiscriminately used in discussions of this subject. As the "price maintenance" cause has been greatly harmed by the indiscriminate use of these terms to express the same idea—the right of a manufacturer to designate and control the resale prices of his article,—at the outset we should clearly distinguish between price fixing by a combination—whether of manufacturers or retailers is immaterial so far as the effect on the public is concerned—and *price maintenance by an individual producer in a competitive field.* The former is a violation of the Sherman Anti-Trust Law,[2] if it was not illegal at common law, and usually means monopoly. On the other hand those who believe the recent decisions of the Supreme Court[3] failed to interpret properly the business needs of the country, are insistent that the right to enforce uniform resale prices should be given only to the producer who is not allied with any competitor in the manufacture or vending of his particular line of goods. Recently the term "price standardization" has been substituted for "price maintenance" because the latter term

[1] 229 U. S. 1. (May 26, 1913).

[2] Act of July 2, 1890, c. 647, 26 Stat. 209.

[3] Bobbs-Merrill Co. v. Strauss, 210 U. S. 339 (1908); Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373 (1911); and Bauer v. O'Donnell, 229 U. S. 1 (1913).

sounds as though this system of marketing merchandise involved the holding up of prices, as though it meant high prices, when as a matter of fact combinations and "price cutting" mean high prices, while price maintenance means the lowest price consistent with a living profit to each agent in the system of distribution. And this standard price idea suggests the best purpose of uniform price advocates: their insistence upon *one price to all, all along the line.* This means that the producer shall sell to all jobbers at the same price per unit, regardless of the quantity bought; that the large and small retailer will buy on exactly the same terms; that the consumer can buy the article at a uniform price throughout the country. It is submitted that this system of merchandising completes the evolution of exchange from primitive barter to the certainty and safety of modern purchase.

The introduction of money as the medium of exchange was the first great advance in trading. But buying and selling remained a contest of wits; and the law looked on at the contest, declaring solemnly and ominously *"caveat emptor."* The courts said that reliance on "business talk" was unreasonable. The next step in the development of fair selling was the "one price store", with the price of each article plainly marked. But there was still no standard of quality, and the few standard articles were not sold at uniform prices; so the purchaser still had to rely on his own acumen, or put his trust in the retailer; and the individual manufacturer had little encouragement to establish or to maintain a reputation. The ever present danger of the retailer's abandoning their goods for inferior substitutes, to be sold at a greater profit, led manufacturers to label their goods with their trade names. Later the sale of trade-marked goods in their original packages gave a guarantee of quality; but the standard of value in retail trade was secured only when uniform retail prices for branded goods became the general rule. And a bill is now before Congress which, if passed, will put the stamp of legislative approval on the final step in this evolution; and the "one price" ideal will be realized.[4]

[4] H. R. 13305, introduced by Representative Stevens of New Hampshire, provides that contracts prescribing the sole uniform price at which a trade-

On account of the damaging effects of "price cutting",—that is, featuring a well known brand at a sacrifice, of which more will be said hereinafter,—manufacturers and publishers have sought to control the resale price of their product by notices attached to each article,[5] and by contracts with the trade. These contracts are mainly of two types. In contracts of the first type the manufacturer undertakes to maintain a uniform price by putting into effect what may be characterized as the "rebate plan", whereby the producer promises to refund to dealers maintaining the selling price fixed by him, a portion of the purchase price paid by them. This, while operating as an inducement to the dealer to resell only at the price named, in no way binds him to do so. Up to the present time this type of contracts has been uniformly upheld;[6] but judging from the recent decisions of the

marked or branded article may be resold are legal provided: (1) the producer does not have a monopoly in the same general class of merchandise as the article covered by the contract, and is not a party to any combination or agreement in regard to the sale prices of an article of the same class; (2) the uniform retail price of such article is plainly marked thereon; (3) the manufacturer files with the Bureau of Corporations a statement of the prices to wholesalers, retailers, and consumers; and provided further that there shall be no discrimination in favor of any vendee by way of allowance, discount, concession, rebate, or commission for any cause; (4) an article protected by such contract may be sold below the standard price (*a*) when a dealer is retiring from business, or has become bankrupt, or when his business is in the hands of a receiver, provided the vendor was given an opportunity to repurchase the same at the price paid by the dealer; or (*b*) if the article had become damaged or soiled, and the maker had declined the offer to repurchase the goods; but in this case the goods must be plainly marked damaged goods.

A somewhat similar bill was introduced by Representative Metz to apply only to patented or copyrighted articles. But the Metz bill falls far short of the one price to all ideal in that it allows a "quantity price" to the large purchaser. Thus it would foster the mail order and chain store concerns, who can buy in large quantities, with no corresponding benefit to the consuming public.

[5] In Bobbs-Merrill Co. v. Strauss, 210 U. S. 339 (1908), there was no contract between the complainant and the defendants, but the latter, trading as R. H. Macy & Co., purchased the novels with notice of the condition of sale printed in each book, which provided that it could be resold only at a stipulated price. The Court held that such notice was ineffectual as against one not bound by contract or license agreement.

In Waltham Watch Co. v. Keene, 202 Fed. Rep. 225 (1913), the patentee attached a similar notice to each watch movement. But Judge Ray held that the complainant could not limit by contract or notice the resale price of its product, because on the first sale of the article it received its full consideration. On March 2, 1914, the Supreme Court refused a writ of *certiorari* in this case (232 U. S. 724).

[6] *In re* Greene, 52 Fed. Rep. 104 (1894); Clark v. Frank, 17 Mo. App. 602 (1885); Walsh v. Dwight, 58 N. Y. Supp. 91 (1899); Park & Sons Co. v. Nat. Wholesale Druggists' Assn., 175 N. Y. 1 (1903).

Supreme Court, it would seem that all forms of contracts having for their object the regulation of resale prices, will be declared illegal and unenforceable. And it is at once apparent that the rebate plan is only feasible where the manufacturer sells direct to the retailer and on short terms of credit. Of the second type are the various kinds of contracts employed in what may be described as the "contract system". The wholesaler may agree with the producer to supply the trade at a stipulated price; or the contract may require the jobber to sell only to dealers approved by the manufacturer, with whom the manufacturer contracts directly that, in consideration of their being supplied with his product, they will not sell below the standard retail price. In another form, which, however, has been held only colorable,[7] the contract with the wholesaler purports to make him a distributing agent for the producer.

Before considering the arguments for and against standard prices, it may be well to examine the authorities briefly, in order to ascertain when and why this system of merchandising, which has become so general and which meets the approval of ninety-eight per cent. of all retail dealers[8] and has won favor with the purchasing public, was condemned by our highest judicial tribunal. Prior to the decisions of the late Justice Lurton, then Circuit Judge, in *Park* v. *Hartman*,[9] and *Dr. Miles Medical Company*

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[7] See Dr. Miles Medical Co. v. Park & Sons Co., 164 Fed. Rep. 803 (C. C. A. 1908). However, the decisions so far seem to except from the general prohibition of price maintenance the establishment of genuine selling agencies whereby the sale of the article is controlled by the producer until it reaches the ultimate user. Waltham Watch Co. v. Keene, 202 Fed. Rep. 225 (1913). But if future decisions follow the line along which the law in reference to price maintenance has developed during the past three years, it is thought that this exception will soon be brought within the general prohibition.

[8] In answer to the query whether dealers favored price standardization, the Eastman Kodak Co. and A. J. Reach Co. received answers from over ninety per cent. of the retailers carrying their goods, and in each case ninety-eight per cent. voted for price maintenance. A similar census taken by the Waterman Fountain Pen Co. showed ninety-eight and five-tenths per cent. favoring that form of merchandising. Out of fourteen hundred and five replies received by the Kellogg Toasted Corn Flake Co., to the same question, only eight dealers were against the maintenance of uniform prices. And out of six thousand votes cast by retail jewelers in the Hamilton Watch Co. poll, there were only three opposed to the enforcement of standard prices.

[9] 153 Fed. Rep. 24 (C. C. A. 1907).

v. *Park*,[10] the courts uniformly sanctioned price maintenance, upholding agreements to attain that end in law,[11] and enforcing them by injunctive relief against the recalcitrant price cutter in equity.[12] This right was not limited to articles protected by the copyright, patent, or trade-mark laws; it extended probably to all articles,[13] and certainly to "trade secret" products sold under a trade name.[14]

The first case decided by the Supreme Court which questioned the right of a producer to control the resale price of his article was *Bobbs-Merrill Company* v. *Strauss*,[15] in which the Court held that the publisher of a copyrighted book could not control the retail price thereof by licensing it to be sold only at a certain price: that selling the book below the price set by the publishers was not an infringement of his copyright. In this case the Supreme Court made a distinction between the patent statute and the copyright act; and held that the right to vend given the holder of a copyright did not include the right to determine the price at which the future sales of the article could be made. This distinction was wiped out in the recent case of *Bauer* v. *O'Donnell*,[16] in which a majority of the Court held that where the pat-

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[10] 164 Fed. Rep. 803 (C. C. A. 1908).

[11] Garst v. Harris, 177 Mass. 72 (1900); Grogan v. Chaffee, 156 Cal. 611 (1909).

[12] Miles v. Jayne, 149 Fed. Rep. 838 (1906); Dr. Miles Medical Co. v. Platt, 142 Fed. Rep. 606 (1906); Garst v. Charles, 187 Mass. 144 (1905); Fowle v. Park, 131 U. S. 88 (1889).

And in Com. v. Grinstead, 63 S. W. Rep. 427 (1901), the Court of Appeals of Kentucky held that price maintenance agreements did not violate the criminal provisions of the so-called conspiracy or anti-trust statute.

[13] In Ice Co. v. Parker, 21 How. Pr. 302 (N. Y. 1861), the manufacturer of ice was permitted to control the resale price of his product.

And see Hartman v. Park, 145 Fed. Rep. 358 (1906).

[14] Jayne v. Loder, 149 Fed. Rep. 21 (C. C. A., 3d Cir., 1906); Garst v. Hall, 179 Mass. 588 (1901); Park & Sons Co. v. Nat. Wholesale Druggists' Assn., 67 N. E. Rep. 136 (N. Y. 1903); and cases cited in notes 11 and 12, *supra*.

[15] 210 U. S. 339 (1908). It is interesting to notice that this action for an infringement of a copyright was against R. H. Macy & Co., which firm is now one of the leaders in the fight against standard prices. The position of the large department stores, which are opposing the Stevens Bill, is set forth in the statement of Mr. Percy Strauss of this firm, reported in the Hearings before the Committee on the Judiciary of the House of Representatives, 63d Congress, Second Session, on Trust Legislation, Serial 7, Part 25, page 1117 *et seq.*

[16] 229 U. S. 1 (1913).

entee received the full consideration for his article in the sale to the jobber, a retail "cut price" sale did not violate any rights given the inventor by the patent laws; and that the manufacturer could not control the resale price of his product by notice attached thereto, nor by contract, such contracts being an illegal restraint of trade, and therefore void, at common law and under the Sherman Act. It is submitted that in reaching this conclusion the majority of the Court overruled the unanimous decision of the Supreme Court in the case of *Bement* v. *National Harrow Company*,[17] and the spirit of the decision in *Henry* v. *Dick*.[18] Although the Bement Case has been distinguished in the recent decisions upon the ground that the Court was there passing upon a license to manufacture and sell, and that the sale-price agreement was intended to preserve the patentee's royalty, there can be little doubt that at the time the case was decided it purported to legalize general price maintenance contracts on patented articles. That it was so interpreted by the courts and the profession generally

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[17] 186 U. S. 70 (1902). In delivering the opinion of the Court, Mr. Justice Peckham uses this language, at page 93:

"The provision in regard to the price at which the licensee would sell the article manufactured under the license, was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in and providing for its value as far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

[18] 224 U. S. 1 (1912). This case involved the right of a patentee to restrict the make of articles that should be used with the machine sold. A majority of the Court held the restriction valid on the ground that the patentee had parted with a qualified property right in the article, although it was conceded that except for the notice limiting the use to be made thereof, the patentee had made an unconditional sale of the machine.

The majority was composed of Justices Lurton, McKenna, Holmes, and Vandeventer; a strong dissent was written by Mr. Chief Justice White, in which Justices Hughes and Lamar concurred. This case was argued after the death of Mr. Justice Harlan, and during the absence of Mr. Justice Day. After this decision, the case of Bauer v. O'Donnell was argued before a full bench, Mr. Justice Pitney having been appointed to succeed Mr. Justice Harlan. He and Mr. Justice Day concurred in the views expressed by the Chief Justice in his dissenting opinion in the Dick case, and they with the minority in the earlier case now became the majority, and the four Justices who had prevailed in the Dick decision became the dissenters in the Sanatogen Case. Thus it will be seen that the vote of one Justice made contracts for price maintenance on patented articles illegal.

is evidenced by all the cases which raised the question,[19] until the decision in the Sanatogen Case.

One other decision of the Supreme Court should be noted to get the Sanatogen Case in its proper setting. In 1911, in the case of *Dr. Miles Medical Company* v. *Park and Sons Company*,[20] the Court held that a system of contracts to maintain a uniform price on a "trade secret" article, sold under a trade-mark, was in violation of the Sherman Law, and that such contracts were in restraint of trade and illegal at common law. The idea underlying this decision seems to be that such contracts were an unwarranted restraint upon alienation. But the true test by which the legality of a contract requiring the purchaser to resell at a standard price is to be determined is (1) whether the stipulation is of an ancillary nature; (2) whether it affords only a reasonable protection to the business of the convenantee; and (3) whether such a stipulation, considered with reference to the benefit to the public arising from the production of the article, as well as the detriment to the public in being deprived of the benefit of free competition as to the selling price, is, upon the whole, against public interest.[21] It is not the fact of restraint, but the degree of the restriction and the reasonableness thereof, which will control;[22] and in the last analysis the question as to the validity of a particular contract or system of contracts will be found to be largely one of expediency.[23] These common law principles are not peculiar to "trade-secret" articles, but are equally applicable to any chattel property.

[19] Victor Talking Machine Co. v. The Fair, 123 Fed. Rep. 424 (C. C. A., 7th Cir., 1903); Winchester Arms Co. v. Buengar, 199 Fed. Rep. 786 (D. C., Wis., 1912); National Phonograph Co. v. Schlegel, 128 Fed. Rep. 733 (C. C. A., 8th Cir., 1904); Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Fed. Rep. 358 (C. C. A., 7th Cir., 1907); Indiana Mfg. Co. v. Nichols & Shepard Co., 190 Fed. Rep. 579 (C. C., Mich., 1911); Automatic Pencil Sharpener Co. v. Goldsmith Bros., 190 Fed. Rep. 205 (C. C., N. Y., 1911); and see also Park v. Hartman, 153 Fed. Rep. 24, at page 27, mentioned *supra*.

[20] 220 U. S. 373.

[21] Edgar Lumber Co. v. Cormie, 130 S. W. Rep. 452 (Ark. 1910); Hubbard v. Miller, 27 Mich. 15 (1873); Roberts v. Lamont, 102 N. W. Rep. 770 (Neb. 1905); Merriman v. Cover, 51 S. E. Rep. 817 (Va. 1905); Horner v. Graves, 7 Bing. 735 (Eng. 1831); Mandeville v. Harman, 7 Atl. Rep. 37 (N. J. Eq. 1886).

[22] Nordenfelt v. Maxim Nordenfelt & Co. [1904] A. C. 565; Standard Oil Co. v. United States, 221 U. S. 1 (1911); Diamond Match Co. v. Roeber, 13 N. E. Rep. 419 (N. Y. 1887).

[23] Gibbs v. Consolidated Gas Co., 130 U. S. 396 (1889).

In deciding these price maintenance cases, therefore, the courts are dealing with an economic rather than a legal question; they are determining a question of public policy. That being the case, it is worthy of notice that in England[24] and Germany[25]—the leading commercial countries of Europe—contracts having for their purpose the maintenance of uniform selling prices are sustained and enforced by the courts. In Denmark[26] a section of the statute dealing with unfair trade expressly forbids price cutting; and in this country the highest courts of two States[27] have refused to follow the Supreme Court decisions; while in at least one other State the Legislature has dealt with unfair competition in terms broad enough to cover price cutting.[28] And the Trade Commission Act, recently passed by Congress, gives the Commission power to deal with this business evil.[29] It would seem,

[24] Elliman Sons & Co. v. Carrington & Sons [1901] 2 Ch. Div. 275; National Phonograph Co. v. Edison-Bell Co. [1908] 1 Ch. Div. 335. In Ford Motor Co. v. Armstrong, before Mr. Justice Atkin in the King's Bench Div. at Manchester, not yet reported, the right of the plaintiff to maintain its resale price was fully sustained; but only nominal damages were awarded, as the court held that the stipulated damages were in the nature of a penalty rather than liquidated damages. In a similar case, Dunlap Tire Co. v. New Garage Co., not yet reported, decided July 1, 1914, the House of Lords fully sustained the liquidated damage clause.

[25] Jandorf v. Incorporated Assn. of Manufacturers of Branded Articles, Berlin Geschaftsummer 73.0, 179.05, 48 vi. 489.06.

[26] Section 13 of an Act (No. 137) approved by King Christian X, June 8, 1912, provides: "It shall also be unlawful to sell or offer for sale at lower prices goods in original packages . . . upon which goods their fixed prices for retail sale are stated, unless the sale falls under the provisions of section 6." Section 6 refers to clearance sales of damaged goods, removal sales, and the like; the condition being similar to the provisions of paragraph D of the Stevens Bill now before Congress. See note 4, *supra,* clause (4).

[27] Ghirardelli Co. v. Hunsicker, 128 Pac. Rep. 1041 (Cal. 1912); Fisher Flour Milling Co. v. Swanson, 137 Pac. Rep. 144 (Wash. 1913).

[28] A New Jersey statute approved Apr. 1, 1913 (Chapter No. 210, Laws of 1913), makes it unlawful "for any merchant, firm or corporation, for the purpose of attracting trade for other goods, to appropriate for his or their own ends a name, brand, trade-mark, reputation, or good will of any maker . . . or to discriminate against the same, by depreciating the value of such products in the public mind, or by misrepresentation as to value or quality, or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever; except in cases where said goods do not carry any notice prohibiting such practice, and excepting in case of a receiver's sale, or a sale by a concern going out of business."

[29] Section 5 of the Federal Trade Commission Act provides: "That unfair methods of competition in commerce are hereby declared unlawful." The Commission is given power to prevent unfair competition, and no attempt is made to define the term; so the Act is broad enough to make illegal price cutting that amounts to unfair trade.

therefore, to be entirely proper to examine the reasons and the principles of trade expediency on which the decisions are based, to see if they agree with our ideas of commercial justice and fair dealing.

The principal argument of those opposed to price maintenance among retailers, in legislative committees, and on the bench, is that after one has parted with title to an article, he should not be allowed further to control it. That idea seems to underlie the recent enunciations of the Supreme Court, and has several times been expressed by Chairman Clayton and Ex-Judge Floyd of the Judiciary Committee of the Federal House of Representatives. The fallacy in this argument is that the manufacturer's interest in his product does not end with the transfer of title to the dealer, but follows the article into the hands of the ultimate consumer or user. His business life is dependent upon the public's being able to buy his article everywhere at a uniform price, and always of the same quality. Cut price sales will speedily and surely decrease the sale of his product; and if he is able to survive the loss of business, the manufacturer will be forced to reduce the quality of his article. One dealer advertising a so-called "cut price" sale invariably causes other dealers to cut below him in retaliation, with the result that all dealers in the community are forced to sell the particular article at a price which yields no profit. It hardly need be said they will not long continue to handle an article at a loss; so the market for the article is killed in that community, not because the people want the "just-as-good" substitute, nor because the quality of the article has been lowered, nor because the standard price is exorbitant, but because a business parasite used the good name of a popular article to deceive the public into believing he sold everything below cost. It is to protect themselves against the disastrous consequences of such predatory price-cutting, which is little short of unfair trade,[30] that the producers, wholesalers, and retailers of trade-marked articles seek legisla-

[30] In an interesting article in a recent issue of the Harvard Law Review (Vol. 27, p. 139, December, 1913), Mr. Edward S. Rogers suggests that in the extension of the law of unfair competition to include the suppression of all deceptive artifices by which one trader's customers are transferred to another, predatory price cutting ought to be included in that class of cases

tive or judicial condemnation of such practices and the legalization of resale price maintenance.

A later result of general price cutting is deterioration in the quality of the slaughtered article. To get dealers to handle his product, the manufacturer must lower the price to the trade. Actual or potential competition prevents the uniform price from being excessive, so a lower price to the jobber forces the maker to lower the quality. Furthermore a reduction in the volume of business, resulting from the loss of sales in localities where cut price wars have been waged, increases the unit cost of production. So the public suffers: either from not being able to buy this standard article, which it has tried and found satisfactory; or if the article is still on the market, the quality is not there. In the final analysis, therefore, price cutting of branded articles and price maintenance vitally concern each one of us as a customer.

Another answer to this argument of the opponents of standard prices is that the first real sale is to the consumer. A manufacturer has not really sold his product when he has only transferred it to wholesalers, who have delivered it to retailers. If the article goes no further, the manufacturer's business will be short lived. The product of the maker's genius and enterprise is *sold* for the first time when it is purchased by the consumer and *stays sold*. The jobber and retailer, whether they work on commissions or price differentials, are really agents of the manufacturer —the channels of distribution from the work shop to the user. The manufacturer's *mark* on the article is evidence that he stands

in which the courts have begun to enjoin acts of unfair trade not involving the element of deception. Mr. Rogers shows that the essence of the injury in unfair trade cases is not the deception of the public, but the damage to the business of the producer, and the diversion of the fruits of his good will from the creator of it to one who seeks to utilize it for his own benefit.

The injury to the fair name of an article and to the good will of the business of its producer, resulting from price cutting, being clear, it is submitted that the courts should grant relief against the dealer who slaughters a standard price article for an ulterior purpose—to foist upon an over-credulous public the unknown substitute, or to fool the public into believing that he undersells his competitors on all lines because he *advertises* a dollar watch for sixty-nine cents. "Advertises" is used advisedly, for the cut-price parasite usually has only a few of the standard articles used as a decoy. Nevertheless the injury to the manufacturer and other dealers is complete, for the value of the sacrificed article is lowered in the mind of the purchasing public to the cut price, and legitimate dealers can no longer sell it at its regular price.

back of his product:[31] it is the purchaser's guarantee of quality and service.[32] This surely is not sold to the middle man.

Back of the recent decisions forbidding price maintenance contracts is the assumption that to allow producers to control resale prices would mean high prices, and the further assumption that the public is benefited by price cutting. But, as suggested above, when an individual manufacturer in a competitive market establishes the price of his product, he does it at his peril—"the peril that if he sets it too high, either the consumer will not buy or, if the article is, nevertheless, popular, the high profits will invite even more competition".[33] This assumption seems to arise from the confusion of price fixing by a monopoly, and price maintenance by an individual producer in a competitive field, discussed above.

The assumption that the public gains by price cutting is overwhelmingly negatived by our commercial experience. It is a matter of common knowledge that the Oil and Tobacco Trusts were intrenched by price cutting, used to kill off competitors;[34]

[31] "It will not do to say that the manufacturer has not interests to protect by contract in the goods after he has sold them. They are personally identified and morally guaranteed by his mark and his advertisement." Ellis, J., in Fisher Flouring Mills Co. v. Swanson, 137 Pac. Rep. 144 (Wash. 1913).

[32] To insure his customers getting what is commonly known as "service"—which, on account of the impracticability of returning an article to the factory to have a small defect corrected, must be furnished by the local dealer, and for which the retailer is compensated by part of his profit,—manufacturers should be allowed to control the resale price; for if a dealer has not made a living profit on an article, he cannot afford to, and hence will not, give this service which the maker guarantees.

[33] See an interesting article from the pen of Mr. Louis D. Brandeis entitled "Cut-throat Prices—The Competition That Kills" in Harper's Weekly for November 15, 1913.

[34] "One of the most effective means employed by the Standard Oil Company to secure and maintain the large degree of monopoly which it possesses, is the cut in prices to the particular customers, or in the particular markets of its competitors, while maintaining them at a higher level elsewhere." From the Report of Commissioner Herbert Knox Smith of the Federal Bureau of Corporations.

In the article referred to in the last note Mr. Brandeis lays bare the pit-falls of general price cutting in these words: "It [price cutting] has been the most potent weapon of monopoly—a means of killing the small rival to which the great trusts have resorted most frequently. It is so simple, so effective. Far-seeing organized capital secures by this means the co-operation of the short-sighted unorganized consumer to his own undoing. Thoughtless or weak, he yields to the temptation of trifling immediate gain; and selling his birthright for a mess of pottage, becomes himself an instrument of monopoly."

just as the mail order houses and chain stores are killing the small merchants today. The result is clearly stated in the annual report of Secretary of Commerce Redfield thus:

> "Others say that the refusal to permit the fixing of retail prices tends to monopoly, because in the cut-throat competition certain to follow, obviously the stronger competitor will survive and may eventually have the business in his own hands, for the law forbids the making of agreements to maintain prices, and under these circumstances the weakest must go to the wall."

But do not purchasers gain by the operations of a single cut price dealer? In the language of the Supreme Court of Washington, "it is a fallacy to assume that the price cutter assumes and pockets the loss. The public makes it up on other purchases".[35] The price cutter is not a philanthropist, he is a robber, stealing the advertising and filching the good will of another's product; and like all thieves he does not share his booty with the public. "I cannot believe", said Mr. Justice Holmes in his strong dissent in the Dr. Miles Case, "that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own, and thus to impair, if not destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get".[36]

It is sometimes contended that to allow manufacturers to control the resale prices of their brands would mean less competition. But the competition we need in this country is competition among manufacturers in the quality and price of their products;

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[35] Fisher Flouring Mills Co. v. Swanson, 137 Pac. Rep. 144 (Wash. 1913), at page 151.

See also the statement of Mr. John Wanamaker before the Industrial Commission: "I want to keep away from the store that tries to catch me with that kind of a fish-hook. If they lose on one thing, they will put it on something else you don't know of. There are things purchasers don't know anything about." Report of Industrial Commission, Vol. 7, p. 465.

The evils of price cutting and the advantages of price standardization to the consumer were forcefully stated before a Congressional Committee last February by Mrs. Christine Frederick, consulting household editor of the Ladies' Home Journal, Philadelphia Public Ledger, and New York Sun, and representative of the Housewives' League. See Report of Hearings before the Committee on the Judiciary of the House of Representatives, 62d Congress, 2d Session, on Trust Legislation, Serial 7, Part 18, p. 725, for Mrs. Frederick's statement.

[36] Dr. Miles Med. Co. v. Park, 220 U. S. 373 (1911), at page 412.

not the cut-throat competition among retailers, which the prohibition of price maintenance has stimulated. A standard price and national advertising tend to raise the quality of an article, and to encourage competition. This fact seems to have been overlooked by the Supreme Court, but it was emphasized by the Washington State Court in a well considered case[37] upholding price maintenance agreements on a special brand of flour. In its recent decisions the Supreme Court has shown a desire to foster retail competition. If this is the purpose of the Court, it is submitted that price cutting will have just the opposite effect. In the past few years the mail order houses and chain stores have eliminated many thousands of retailers.[38] And when they have completed their work of killing off the small independent dealers, experience has taught us that the prices *fixed* by these gigantic combinations of capital will be high, for they will have no competitors. It would seem, therefore, that the public has little to hope for from the present developments of retail competition. And it is a healthy sign to see the large manufacturers of standard brands fighting the battle of the small retailers for their very existence.

Charles L. Miller.

Lancaster, Pa.

[37] Fisher Flouring Mills Co. v. Swanson, 137 Pac. Rep. 144 (1913).

[38] In a recent speech in the United States Senate Senator Lippitt, of Rhode Island, quoted figures to show the astonishing growth of the business of these enterprises, until today one Chicago mail order house does an annual business of close to $100,000,000; and last year the sales of a chain of five-and-ten-cent stores reached the amazing total of $66,000,000. "Where has that business come from? It has come from the small storekeepers and the people engaged in moderate-sized business all over the United States." Extract from Congressional Record of August 5, 1914.

In Philadelphia statistics show that the grocery business is being speedily monopolized by chain stores. Notwithstanding the growth of the city, there are today less than one-half the number of grocery stores that there were five years ago. It is believed that statistics in all the principal cities would show a similar decrease in the number of retail drug, cigar, and grocery stores.