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# Fifth and Fourteenth Amendments Still Protect the Right to Do Business in Cutting Prices or Selling below Cost

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THE FIFTH AND FOURTEENTH AMENDMENTS  
STILL PROTECT THE RIGHT TO DO BUSI-  
NESS IN CUTTING PRICES OR  
SELLING BELOW COST

Rugged individualism in business recently received a severe shock in a dissenting opinion of the Supreme Court. The opinion was given unusual publicity and struck such a harmonious note in certain high places of business management, that we will not hear the end of it, unless the price to pay for printer's ink gets into other hands.

Mr. Justice Brandeis' dissenting opinion in the recent case, *New State Ice Company v. Liebmann*,<sup>1</sup> wherein the Supreme Court rebuked the State of Oklahoma for attempting to limit by statute the number of persons who may engage in the manufacture and sale of ice, said:

"The people of the United States are now confronted with an emergency more serious than war. Misery is widespread, in a time not of scarcity but of over-abundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices. . . . Some people believe that the existing conditions threaten even the stability of our capitalistic system."

Mr. Justice Brandeis said we should experiment with such statutes in times like these. He appears to confess that our present economic system has broken down and the time has come to try a new system, even if it be unconstitutional. In times of war, all business becomes subordinate to the main purpose of winning the war. He sees a worse condition in present times.

In colors of black despair, Justice Brandeis, who with President Wilson, championed the small business men of our country in 1912, paints a picture with the brush and paint of those who see in monopolies, licensed agreements

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<sup>1</sup> 52 S. Ct. 371 (1932).

to regulate production and prices and forced co-operative business, some kind of a new system better than that of our revolutionary fathers. He justifies his opinion by reference to editorials in trade association journals, speeches by presidents of large corporations against the competitive system, plans of national and international bankers to eliminate competitive production and articles such as the "Menace of Overproduction," and "The Vices of Free Competition." These and many others of the same kind of organized business propaganda found a place for the first time in judicial history in even a dissenting opinion of the Supreme Court.

Upon such reasoning, Justices Brandeis and Stone found ground to disagree with the lower court's decision which was affirmed by Justice Sutherland's opinion, speaking for the majority, and which held that restricting the business of the manufacture and sale of ice was void, unconstitutional and not justified under the guise of protecting the public interest, even in times of depression. The fact that the curtailment of production and limitation of competition, resulting from the law, advanced the price of ice, did not alone sway the court. "The principle," said Justice Sutherland, "is embedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments."<sup>2</sup>

The court found the scheme one to promote and foster monopolies and to discourage competition. "Plainly," continued the court, "a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business . . . cannot be upheld as consistent with the 14th amendment." The court concluded that there was no difference in principle between Oklahoma's unconstitutional law attempting to prevent competition in the ice business and "to prevent a shoemaker from

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<sup>2</sup> Citing *Dorchy v. Kansas*, 264 U. S. 286 (1923) and other cases.

making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed."

The sorry plight of our Government Farm Board with its millions of dollars of wheat and cotton bought in an artificial non-competing market, resulting in enormous losses of taxpayers' money on account of sympathy for one class of our citizens, the farmer, should be an example sufficient to stay the hand of Congress from making laws violative of the Constitution on the ground of sympathy for the few. It seems harsh to put law above sympathy, but it is logical and wise to do so. *Salus populi est suprema lex*—The welfare of the whole people is the supreme law.

The propaganda of those who seek to eliminate competition and to overthrow the fundamentals of our competitive system which is founded upon the greatest amount of freedom possible in the right to do business, has been so persistent that not only Supreme Court judges but governmental departments as well are declaring that it is against the law for one to buy and sell personal property on terms agreeable to himself. Selling below cost or price-cutting is dubbed a vicious practice and one that should be prevented by law. In the light of the demand for laws to further nullify our Anti-Trust Laws and laws which are aimed to keep the channels of interstate and intrastate commerce wide open to individual enterprise, it might be interesting to re-examine several of the fundamental principles of justice protecting our competitive system.

When we understand the rules and reasons underlying the constitutional principles requiring a competitive system in trading, we find no difficulty in rising to defend the assault on the fundamentals that have so effectively woven the fabric of our magnificent structure of government. It is plainly organized interference with these constitutional principles that caused the depression and its continuation,

rather than the permitting of the natural laws of supply and demand to have full and free opportunity to level supplies and prices to the pocketbooks of buyers.

The following is an endeavor to outline briefly the development of the right to buy and sell personal property whether the right be coupled with a public or a private interest, and to definitely establish the point that it is not against the law to cut prices, sell below cost or to dispose of personal property in a manner agreeable to the owner, just so long as that right does not interfere with the right of others or where the paramount interest of the public is not involved.

Sir Matthew Hale, in 1670, so excellently outlined man's rights in personal property and the times when his rights are subordinate to the public interest, that his statement of the law was approved as recently as 1927 in *Tyson & Bros. v. Banton*.<sup>3</sup> But centuries before Lord Hale wrote his remarkable discussion, the King, localities, and finally, Parliament, regulated the resale prices of many commodities and fixed their place of manufacture when the public interest was at stake. Parliament established the crimes of forestalling, forebarring, regrating and engrossing, which were all aimed to prevent the seller from charging exorbitantly for his wares.<sup>4</sup>

At the time of the American Revolution, at least eight of the thirteen colonies had price-fixing statutes governing almost every commodity in the market.<sup>5</sup> Mr. Breck P. McAllister says that the removal of the restriction on the right to fix the price upon your own property and get what you can (when it was not coupled with a public interest) was due to the writings of Adam Smith, who first led owners of

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<sup>3</sup> 273 U. S. 418 (1927).

<sup>4</sup> Edward A. Adler, *Business Jurisprudence* (1914) 28 HAR. L. REV. 135; MONOPOLIES, 41 C. J. 84.

<sup>5</sup> See 33 HAR. L. REV. 838, 839, footnotes, for a list.

property to demand a change and to think that way. But nowadays, under our Constitution, one does not devote his property or business to the public merely because one engaged in common callings makes commodities for, and sells to the public.<sup>6</sup>

Justice Taft in *Wolff Packing Co. v. Court of Industrial Relations*,<sup>7</sup> discussing the question of price regulation in the public interest, divided regulations into three classes: (1) Public grants of privileges; (2) certain exceptional occupations; and (3) those kinds of businesses impressed by their nature with a public interest. "But never," he said, "has the regulation of food preparation been extended to fixing wages or the prices to the public."<sup>8</sup>

When your personal property is burdened with a public interest in such a manner as to justify the state in fixing what it believes to be the fair price for you to ask, the price is not determined by a definite standard of competition and is not viewed and examined in such a way as to maintain the competitive system guaranteed under the Fifth and Fourteenth Amendments. Monopoly grants and public convenience play the principal part in arriving at the price or rate. Even a state may not brand a business as being coupled with the public interest if, in fact, it is not, as was so recently decided in *New State Ice Company v. Liebmann*,<sup>9</sup> which re-stated the law found in the theatre ticket case of *Tyson v. Banton*<sup>10</sup> as follows:

"The right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself."<sup>11</sup>

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<sup>6</sup> Breck P. McAllister, *Lord Hale and Business Affected with a Public Interest* (1930) 43 HAR. L. REV. 759.

<sup>7</sup> 262 U. S. 522 (1922).

<sup>8</sup> *Op. cit. supra* note 7, at p. 538.

<sup>9</sup> *Op. cit. supra* note 1.

<sup>10</sup> *Op. cit. supra* note 3.

<sup>11</sup> *Op. cit. supra* note 3, at p. 429, citing *State Freight Tax*, 15 Wall. 232, 278 (1872).

Such a right is within the protection of the Fifth and Fourteenth Amendments.

There is a deep-seated public interest for the preservation of society, as we know it today, to see to it, that every man carrying on a business, whether it be little or big, shall be free from public and private interference. The following has been the correct view of the law for several hundred years, among English-speaking countries:

"All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void."<sup>12</sup>

It has been the purpose of Society for many generations to permit the owner to give away or sell freely, his whole interest in personalty, and to fully protect him in that right, with the same force as it gives a man the right to buy at a price agreeable to him alone.

To circumvent or to destroy this common law, and inalienable rights, has been the profitable pastime of many schemers, inside and outside of the legal profession. The tempting bait held out to the gullible merchant by most trade association organizers, is some artful plan, which they claim will enable them to outwit the courts and prohibit the exercise of the full right to sell that which is the owner's, upon his own terms, whether they be sensible or whimsical. Our English sovereign was accustomed to recite in the preamble of royal grants of monopolies, that the aim was to reduce prices, effect economies in the public interest, and this is even now a common defense used by most of the law violators when caught. But our Supreme Court has continuously and consistently brushed aside such defenses as inconsistent with our laws of trade.<sup>13</sup>

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<sup>12</sup> *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 406 (1910).

<sup>13</sup> *Standard Oil Co. v. United States*, 221 U. S. 1 (1910); *United States v. American Tobacco Co.*, 221 U. S. 106 (1910).

The deadly enemies of groups who work openly or under cover upon price maintenance agreements, are the men who refuse to make the sacrifice of their individuality and who, at times, not only cut the agreed price of an organized group, but who actually sell their own personal property upon terms agreeable to themselves, and who do, at times, without concerted action or consent of others, positively sell at a price below the cost, or go so far as to give their goods away.

This "price-cutter" type of tradesman has been cursed and damned in at least a thousand trade association meetings in a thousand different ways. There appears to be no limit to the ability of human inventiveness to create devices to whip the alleged rascal "price-cutter" into line. Make him suffer somehow or completely destroy him as a business rival, whether by foul means, which are described in numerous United States and State cases, some of which are mentioned later, or by propaganda and public agitation for laws to break down the right to sell at prices agreeable to the owner.

Sales of personal property below cost are not unlawful, unjust, dishonest or inequitable practices and can never be made so without nullifying the Fifth and Fourteenth Amendments to the Constitution. The importance of this fundamental right to keep such a power of alienation free from interference is axiomatic. Selling below cost or giving away "free goods," all with and for the deliberate and declared purpose of putting a man's competitor right out of business, is not, at the present time, against any Constitutional, State or Federal law, nor is such a practice unfair competition, nor an unfair method of competition, as defined by Section 5 of the Federal Trade Act, which is designed to make unlawful all unfair methods of competition in interstate commerce.



The justness of the proposition is at once clear. Furthermore, the intention to put a man's business rival out of business, by sales below cost or cutting below the other fellow's price, is not material. The exercise of a lawful right with wicked intentions is never a violation of another man's right.<sup>14</sup>

Therefore, the question of making a price in "good faith," to meet competition where nothing more appears, is not the test to find a violation of law.

The foundation of the fundamental right to sell what you own, whether it be services or commodities, at a price agreeable to yourself, find the light of day at a time in English history, when men other than Kings, could claim ownership in property and serfdom was abolished. Much might be developed, showing the growth of the ancient right to alienate personal property and to fix the price of your own day's work, but adjudicated cases in law courts can be found protecting this right beginning with the *School Masters* case as early as 1410.<sup>15</sup> In this case,<sup>16</sup> the plaintiffs were the only school teachers in a town. The defendant started a competing school and cut the price for teaching. The plaintiffs' writ of trespass was dismissed, the court holding the price the defendant had fixed was fair and that there was no ground to maintain the action. The court said that competition under the circumstances was "an ease to the people."

"In *Commonwealth v. Hunt*, Chief Justice Shaw imagines this case: Suppose a new baker sets up against an old baker. Prices are reduced; the old baker is damaged; he therefore sues. The Chief Justice says: No legal wrong is done; the same thing may be said of all competition in every branch of trade and industry; and yet it is through that competition

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<sup>14</sup> *Globe-Wernicke Co. v. Fred Macey Co.*, 119 Fed. 696 (1902).

<sup>15</sup> Y. B. 11 Hen. IV. 47

<sup>16</sup> This case is discussed by Bruce Wyman in *Competition and the Law*, 15 HAR. L. REV. (1902) 427, 428, 429.

that the best interests of trade and industry are promoted; of this competition there are a thousand modern instances." <sup>17</sup>

Note this oft-cited piano case, *Ajello v. Worsley*.<sup>18</sup> Ajello made pianos and sold them to Worsley, a dealer in furniture, whose policy was to sell pianos below cost, in order to induce the sale of furniture, which frequently happened. Ajello sued Worsley for damages, but the court dismissed the suit, holding no cause, saying that Worsley's act was lawful regardless of the loss to Ajello.<sup>19</sup>

The *Globe-Wernicke Co. v. Fred Macey*<sup>20</sup> case explains that bad motive, i. e., wilful desire and successful achievement in putting a competitor out of business by sales below cost, is not in itself such a tort that may be enjoined because the act lawful in itself cannot be converted by a malicious or bad motive into an unlawful method of competition. An old case, *Jenkins v. Fowler*,<sup>21</sup> says:

"As long as a man keeps himself within the law by doing no *act* which violates it, we must leave his motive to Him who search the heart." <sup>22</sup>

There appears at first sight, a variety of adverse opinions to the above citations and statements, but the adverseness vanishes when the philosophy of the right to do business is carefully examined.

The paramount interest of the public sometimes forces the individual to subordinate his rights, such as in cases involving the police and taxing powers. Other exceptions are found when the nature of business is coupled with a public interest. But as steadfastly as did the courts in an-

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<sup>17</sup> Bruce Wyman, *op. cit. supra* note 16, at p. 430.

<sup>18</sup> [1898] 1 Ch. 274.

<sup>19</sup> See also *Passaic Print Work v. Ely & Walker Dry-Goods Co.*, 105 Fed. 163 (1900).

<sup>20</sup> *Op. cit. supra* note 14.

<sup>21</sup> 24 Pa. St. 308, 310 (1855).

<sup>22</sup> See also 2 COOLEY ON TORTS, 3rd ed., p. 1505; *Federal Trade Commission v. Raymond Bro.-Clark Co.*, 263 U. S. 565 (1923).

cient times, our Supreme Court will brook no interference with a business, whether by the nation or state.

In *Adams v. Tanner*<sup>23</sup> we have an excellent statement of the point:

"You take my house when you do take the prop that doth sustain my house; you take my life when you do take the means whereby I live."<sup>24</sup>

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"Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."<sup>25</sup>

A few cases that are often cited as authorities for the statement that it positively is against the law to sell below cost, might be examined with interest. Instead of these cases disproving the statement, they illustrate the truth of the first proposition, by proving that the sale below cost was not the thing that was condemned in the cases, but a group of acts aimed directly at a violation of one of the first principles of justice defining the limitations upon man's exercise of a legal right over that which is his.

*"Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man."*—Spencer.

*"Sic utere tuo ut alienum non laedas."* The breach of man's duty or obligation to society is defined in primitive law, later developed in ancient common law and finds ex-

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<sup>23</sup> 244 U. S. 590 (1916).

<sup>24</sup> *Op. cit. supra* note 23, at p. 593.

<sup>25</sup> *Op. cit. supra* note 23, at pp. 594, 595.

pression in this maxim. When it is written into statutes, it always contemplates the greatest amount of freedom of use of one's own property.

"This is a measuring of justice with liberty," said Mr. Justice Cardozo, in his brilliant discussion of "The Paradoxes of Legal Science."

Let us look at the frequently-cited barber shop case of *Tuttle v. Buck*,<sup>26</sup> quoted as authority for the proposition that a man may not sell below cost. Tuttle owned a prosperous barber shop. Buck, a banker, fitted up an opposition shop, hired two barbers, gave them free rent, so that they could cut prices. Buck threatened to ruin Tuttle and destroy his business by circulating false reports among Tuttle's customers in order to induce them to no longer go to Tuttle's shop, but to go to his (Buck's) shop. The following quotation from the barber shop case is an excellent statement of the limitation on the right to cut prices:

"To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort. In such a case, he would not be exercising his legal right, or doing an act which can be judged separately from the motive which actuated him. To call such conduct competition is a perversion of terms. It is simply the application of force without legal justification, which, in its moral quality, may be no better than highway robbery."<sup>27</sup>

So the principle that a man may use his own property according to his own needs, while true in the abstract, is subject to many limitations in the concrete.

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<sup>26</sup> 119 N. W. 946 (Minn. 1909).

<sup>27</sup> *Op. cit. supra* note 26, at p. 948.

The Supreme Court of Iowa, in *Dunshee v. Standard Oil Co.*,<sup>28</sup> clearly re-stated the rule of law, when malicious price-cutting became a legal wrong. The Standard Oil Company, which was engaged solely in the wholesale business of selling kerosene, in the course of a conspiracy, secretly entered the retail business in order to eliminate a retailer who refused to buy from Standard Oil and who chose to buy from Standard's competitors. When Standard began a series of vicious acts to drive the retailer out of business, the court failed to excuse its conduct. Its most effective weapon against the retailer was predatory price-cutting. The lawyers for Standard, defending the conspirators, contended that they were within their rights to sell below cost, even though malicious motives inspired the act, citing *Raycroft v. TAYNTOR*,<sup>29</sup> *Jenkins v. Fowler*,<sup>30</sup> and others of that class of cases. The court said, examining the cases at hand, and conceding the point that one may cut prices with malicious motives and intent, and not violate the law:

"If, however, there was no real purpose or desire to establish a competing business, but, under the guise or pretense of competition, to accomplish a malicious purpose to ruin the Crystal Company or drive it out of business, intending themselves to retire therefrom when their ends had been secured, then they can claim no immunity under the rules of law which recognize and protect competition between dealers in the same line of business seeking in good faith, the patronage of the same people."<sup>31</sup>

Here, said the court in conclusion, was a wanton assault upon the business of another who had given offense to the Standard Oil Company. The court further pointed out that the law does not protect a man against fair competition and if he cannot meet it, he must make way for those who can. But competition does not mean "war," in which everything is fair.

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<sup>28</sup> 132 N. W. 371 (1911).

<sup>29</sup> 68 Vt. 219, 54 Am. St. Rep. 882, 33 L. R. A. 225 (1896).

<sup>30</sup> *Op. cit. supra* note 21.

<sup>31</sup> *Op. cit. supra* note 28, at p. 375.

In *Virtue v. Creamery Package Mfg. Co.*<sup>32</sup> Judge Hallam said:

"The language of the Massachusetts court in *Martell v. White*, 185 Mass. 255, 260, 69 N. E. 1085, 1087, 64 L. R. A. 260, 263, 102 Am. St. Rep. 341, 346 (1904), is applicable here. Hammond, J., said: 'The trader is not a free lance. Fight he may, but as a soldier, not as a guerilla. The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when the trader is allowed in his business to make free use of these laws. . . . But . . . the weapons used by the trader who relies upon this right for justification must be those furnished by the laws of trade, or at least must not be inconsistent with their free operation . . .'"<sup>33</sup>

Our Government bureaus, by reason of "skillfully directed agitation" against the Fourteenth and Fifth Amendments have at times in various forms overstepped lawful authority, in an effort to prevent sales below cost.

In *Sears Roebuck v. Federal Trade*<sup>34</sup> the respondent falsely advertised the sale of sugar below cost, in this fashion:

"'You save from 2 to 4 cents on every pound.'"

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"'We can afford to give this guarantee of a "less than wholesale price" because we are among the largest distributors of sugar wholesale or retail in the world. We sell every year thirty-five million pounds of sugar. And, buying in such vast quantities, and buying directly from the refineries, we naturally get our sugar for less money than other dealers.'"<sup>35</sup>

When in truth and fact, it paid as much as its competitors for the same sugar. That part of the Commission's order directing the respondent to cease lying about its sugar and resorting to other devices outside of its right to sell the sugar below cost, was upheld by the Circuit Court of Ap-

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<sup>32</sup> 142 N. W. 930 (1913).

<sup>33</sup> *Op. cit. supra* note 32, at p. 935.

<sup>34</sup> 258 Fed. 307 (1919).

<sup>35</sup> *Op. cit. supra* note 34, at pp. 308, 309.

peals for the Seventh Circuit, but the section of the order that flatly prohibited sales of sugar below cost was decisively overruled. You will see from the following quotation that it is not the sale below cost but the added act of deception to induce the sale that is declared illegal:

"In the second paragraph of the order petitioner is commanded to cease selling sugar below cost. *We find in the statute no intent on the part of Congress, even if it has the power, to restrain an owner of property from selling it any price that is acceptable to him or from giving it away.* But manifestly in making such a sale or gift the owner may put forward representations and commit acts which have a capacity or a tendency to injure or to discredit competitors and to deceive purchasers as to the real character of the transaction. That paragraph should therefore be modified by adding to it 'by means of or in connection with the representations prohibited in the first paragraph of this order, or similar representation.' " <sup>36</sup>

Trade groups under the guiding hands of alleged experts on the law of keeping up prices to buyers, have not as yet found a successful method to circumvent the Constitution when their schemes are judicially examined.

The widely-advertised *Eddy* plan, which he claimed would legally keep up prices and prevent sales below cost, was declared illegal by the Supreme court in *United States v. American Linseed Oil Co.*<sup>37</sup> Mr. Justice McReynolds said about this gentleman's scheme to punish price-cutters:

"Their [defendants, who were producers of linseed oil, cake, and meal] manifest purpose was to defeat the Sherman Act without subjecting themselves to its penalties. The challenged plan is unlawful . . ." <sup>38</sup>

Mr. Gadd, another gentleman with a scheme to punish price-cutters, also met with defeat in *American Column & Lumber Co. v. United States*.<sup>39</sup> His plan was bragged about in this fashion:

"All those who have access to your reports bring their prices to the top.

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<sup>36</sup> *Op. cit. supra* note 34, at p. 312.

<sup>37</sup> 262 U. S. 371 (1922).

<sup>38</sup> *Op. cit. supra* note 37, at p. 390.

<sup>39</sup> 257 U. S. 377 (1921).

"There seems to be a friendly rivalry among members to see who can get the best prices; whereas, under the old plan, it was cutthroat competition." <sup>40</sup>

The Court, referring to previously defeated plans, said:

"The 'Plan' is, essentially, simply an expansion of the gentleman's agreement of former days, skilfully devised to evade the law." <sup>41</sup>

Even though there was no written agreement to punish price-cutters who refused to maintain the agreed high prices to the consuming public, nevertheless, the Court said it was the sellers' plan against the buyers' rights and would not be tolerated as a means to break down competition in interstate commerce.

A more recent scheme to prevent sales below cost is the use of agency contracts, so drawn that the line of demarcation between a contract of sale and one of agency cannot be seen without the aid of quite unusual legal vision. Where the owner of personalty fears that his idea of a re-sale price will not be maintained by the man to whom he sells, or if he is one who believes that his magnificent campaign of advertising will be nullified and the article in question is so puffed that the retailer either must have it or go out of business, agency contracts are submitted for wholesale jobbers and retailers with only the dotted line exposed for signature. From thence on, the buyers are in bondage under the agreement. Terms of agency contracts to maintain prices are generally as drastic and arbitrary as is the public demand for the goods. The lawyer will note in these contracts that hardly enough of the title seems to remain in the seller to make it a genuine agency contract instead of an outright sale. For many years after the *Dr. Miles Med. Co.* case <sup>42</sup> the inventions of the legal mind to thwart the intentions of the Constitution met with little success.

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<sup>40</sup> *Op. cit. supra* note 39, at p. 408.

<sup>41</sup> *Op. cit. supra* note 39, at pp. 410, 411.

<sup>42</sup> *Op. cit. supra* note 12.



Of recent years, however, contracts of agency in one form or another have become a popular method of preventing sales below cost and keeping up prices. A noteworthy example of the best type of agency contract is found in the case of *United States v. General Electric Co., Westinghouse Electric & Manufacturing Co., and Westinghouse Lamp Co.*,<sup>43</sup> where the Supreme Court went the limit to save a price-fixing scheme, when it held the facts presented to be an agency contract and not a sale in disguise. This case illustrates how far ownership may be extended by alleged assignments, in order to keep up prices and yet not violate the law against restraints of trade and the alienation of personal property. The contract declared, in part, as follows: "To sell lamps from the stock to any consumer to the extent of his requirements for immediate delivery at prices specified by the company;" "the agent is to pay all expenses in the storage, cartage, transportation, handling, sale and distribution of lamps . . . and to the collection of accounts created." "The agent guarantees the return to the company of all unsold lamps . . ." "The agent is to pay over to the company not later than the 15th of each month an amount equal to the total sales value, less the agent's compensation, of all the company's lamps sold by him. . . ." "The agent is to pay to the company the value of all the company's lamps lost or missing from or damaged in the stock in his custody . . . The company . . . carries whatever insurance is carried on the stocks . . . in the hands of its agents . . . he (the agent) guarantees the account when made . . ." <sup>44</sup> The court recognized that the scheme was "to avoid . . . and prevent sale . . . to consumers at different and competing prices." <sup>45</sup>

Getting the retailer to admit he is not the owner, casting all the burden of finding the customer and guaranteeing the

<sup>43</sup> 272 U. S. 476 (1926).

<sup>44</sup> *Op. cit. supra* note 43, at pp. 482, 483, 484.

<sup>45</sup> *Op. cit. supra* note 43, at p. 483.

collectibility of his customers' accounts, while the defendant held title by an agency device that practical men should see through immediately, especially when the purpose is to keep up prices, raises the proper question,—Why was the Supreme Court so gullible in this *Lamp Co.* case as not to read between the lines? The defendant here seems to have taken literally the advice of Mr. Justice Holmes, in *Dr. Miles Med. Co. v. John Park & Sons Co.*,<sup>46</sup> where he said in his dissenting opinion, examining the agency contract before him:

"In the first place, by a slight change in the form of the contract the plaintiff can accomplish the result in a way that would be beyond successful attack."<sup>47</sup>

The Supreme Court is likely to find that it has struck a false note in sanctioning these agency lamp contracts because many and sundry will be the devices to fit the decision into price maintenance ways of selling. In this case, millions of dollars of electrical lamps on the shelves of nearly twenty-five thousand little and big dealers located all over the United States, awaiting sales to customers, that have been actually paid for by the retailers, or their payment guaranteed, are held not to be owned by the retailer so that the company could be licensed to regulate the price of lamps to prevent sales below cost and price cutting to the retailers' customers. This is a clear case of having your pie after eating it.

The owner of extensively advertised movables has been repeatedly protected in his right as a trader, to refuse to deal with price-cutters.<sup>48</sup> No one should find fault with the right to refuse to sell as defined by the Supreme Court in these cases. It is selling it and having authority over it, that is objectionable.

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<sup>46</sup> *Op. cit. supra* note 12.

<sup>47</sup> *Op. cit. supra* note 12, at p. 411.

<sup>48</sup> *United States v. Colgate Co.*, 250 U. S. 300 (1918); *United States v. A. Schrader's Son*, 252 U. S. 85 (1919).

The desire is to get the goods into the price-cutter's store because of his large means of distribution, and to compel him to resell at the price agreeable to the owner of the advertised merchandise. If the trader acts alone in this practice and does not use the force of cooperative assistance, he will find the agents of the government standing by his side to protect him in the title and distribution of his property.<sup>49</sup>

All questions of patents and copyrights being out of the way, the excellent definition of Justice Hughes, in *Dr. Miles Med. Co. v. John D. Park & Sons Co.*,<sup>50</sup> remains the law of today:

"But because a 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 restriction. Thus, a general restraint upon alienation is ordinarily invalid. 'The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. "If a man," says Lord Coke, in 2 Coke on Littleton, § 360, "be possessed . . . of a horse or any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him, so as he hath no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man." ' ' 51

Congress enacted Section 2 of the Clayton Act not for the purpose of preventing sales below cost *per se*, as was thought by many, but for the purpose of preventing sales of property in commerce in those cases where traders did

<sup>49</sup> *Federal Trade Com. v. Beech-Nut Packing Co.*, 257 U. S. 441 (1921); *Frey & Son v. Cudahy Packing Co.*, 256 U. S. 208 (1920).

<sup>50</sup> *Op. cit. supra* note 12.

<sup>51</sup> *Op. cit. supra* note 12, at p. 405. See also *John D. Parks & Sons Co. v. Hartman*, 153 Fed. 24 (1907); GRAY, RESTRAINTS ON ALIENATION OF PROPERTY, §§ 27, 28.

more than merely sell below cost or sell at different prices to different customers.

The additional wrongful act, as found in *Tuttle v. Buck*<sup>52</sup> and *Dunshee v. Standard Oil*,<sup>53</sup> done in interstate commerce, was the thing sought to be punished by Section 2 of the Clayton Act, providing that

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination of price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."<sup>54</sup>

In *S. S. Kresge Co. v. Champion Spark Plug Co.*<sup>55</sup> the Spark Plug manufacturer sold his plugs for less than cost; profits were not earned on the original sale, but were earned upon the increased price obtained on the renewal orders. It was contended that this practice of selling below cost was a direct violation of Section 2, because there was discrimination in price between those who bought under the original plan of large sales to manufacturers of automobiles, as against another plan which was to sell for replacement purposes to retail distributors who were not manufacturers. The Spark Plug Company in its sales was in open competition with other manufacturers. The court, after holding

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<sup>52</sup> *Op. cit. supra* note 26.

<sup>53</sup> *Op. cit. supra* note 28.

<sup>54</sup> 38 STAT. 730.

<sup>55</sup> 3 Fed. (2d) 415 (1925).

that the field was open to fair competition, in spite of the sales below cost, said of Section 2 of the Clayton Act that the scheme of the Spark Plug manufacturer was a clever means of advertising and stated that:

"That act—rightly interpreted—forbids discrimination in price between purchasers only where the effect may be unreasonably to lessen competition or tend to create a monopoly, which we think is not shown to be the case here. The price of the car to the original purchasers is presumably lessened by the low prices paid for factory equipment. The replacement price is not necessarily thereby increased above the normal from the mere fact that the loss incurred in providing factory equipment must be overcome by replacement prices. The field is open to all fair competitors. No doubt the immense quantities of plugs which plaintiff has been able to supply as factory equipment has enabled it to manufacture and market at much less cost than it otherwise could. The furnishing of factory equipment at less than cost seems to present a not unfair analogy to cost of advertising."<sup>56</sup>

Myron W. Watkins, in the *Columbia Law Review*,<sup>57</sup> after showing that no less than 521 out of 573 proceedings before the Commission or a total of 91% were concerned with the prevention of false and misleading advertising and trade names, submits that there is a startling shift from the Federal Trade Commission's function as directed by Congress. On the other hand, it is noticeable that its price maintenance and prohibition against sales below cost policy of the Commission, which is so deliberately contrary to its authority under Sections 5 of the Federal Trade Act and 2 of the Clayton Act, would give rise to the reasons for much of the agitation against our anti-trust laws. The daily press continuously records the applause of a certain type of corporate lawyer in high places who encourages the Commission in its endeavors against false advertising and urges a complete abandonment of prosecution against price discrimination and monopolizing. However, enough has happened in the courts recently which should direct the Commission's atten-

<sup>56</sup> *Op. cit. supra* note 55, at p. 420.

<sup>57</sup> Myron W. Watkins, *An Appraisal of the Work of the Federal Trade Commission* (1932) 32 *Col. L. Rev.* 272.

tion to what courts understand "Unfair methods in competition" to mean when price discrimination and sales below cost are involved in agreements to destroy business and property of competitors.<sup>58</sup>

Organized big business by "skillfully directed agitation" says little business gives its goods away by means of sales below cost. One of the big fellows who keeps up the prices to the public becomes the leader of high prices and offers to agree to let the little fellow see its cost books if all agree to exchange cost figures so that comparisons may be freely made, the ostensible purpose being to train the little fellow to charge more to the public. The most stupid senators in Washington ought to see the reason for wanting to legalize exchanging cost data among competitors. Pressure on the bureaus at Washington, by those believing in keeping up prices, has met with considerable encouragement. Exchange of cost price data is said to be the only thing that is needed to keep up prices to unorganized buyers. To know your competitor's cost price is to know where to begin to fix a price that will be all the traffic can stand.

Emanating out of group conferences of basic industries, organized by the Federal Trade Commission which are presided over by a Commissioner, are many rules to keep up prices to the consuming public and to eliminate price competition among the groups. The rules are found in subtle disguises. Two of the favorite ones now alleged to be sanctioned by the Federal Trade Act are found in Group 2, Rule A, Subdivision B, Steel furniture, and Rule K, formerly 17, Petroleum industry, which are, respectively:

"The industry approves the practice of making the terms of sale a part of all published price schedules."

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<sup>58</sup> *VanCamp & Sons Co. v. American Can Co.*, 278 U. S. 245 (1928); *American Can Co. v. Ladoga Canning Co.*, 44 Fed. (2d) 763 (1930); *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 Fed. (2d) 234 (1929); *Stary Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555 (1930).

"No seller shall make any deviation from his posted prices (whether wholesale or retail) by means of secret rebates, allowances, bonuses, concessions, benefits, unusual credits, scrip books, or any plan, device or other scheme which may directly or indirectly permit the buyer to obtain gasoline or kerosene at a lower net cost to him."

In this last rule, it is safe to say that it never has been illegal except in times of war for an owner of personal property to obtain as much for his goods as he can get and to keep from his competitor any of his methods of doing business, whether they be by one or all of the methods above outlined. The most attractive thing in the excitement of doing business and trading is that of arriving at a common understanding by processes agreeable only to both parties to the transaction.<sup>59</sup>

Professor Frank Albert Fetter's recent book, "The Masquerade of Monopoly," reveals, from the standpoint of a practical long experienced economist, many of the subtle disguises and schemes to thwart the laws of fair trade, that our government has failed to discover.

At page 428 he says of our present day competitive system:

"A great burden of proof is on those who would substitute for the competition of efficient independent operating units of industry in our capitalistic system, networks of artificial price agreements, and the ideal and practice of the vast financial consolidations, mergers of mergers far beyond the point justified by technical efficiency. Almost, by conspiracy of reiteration from powerful influences, this burden of proof has been artfully shifted. Unified control of prices under the attractive alias of 'cooperation' is to take the place of orderly, regulated competition as the rule of the market. A chorus of self-interested propagandists has tried and almost succeeded for a time in making us believe that in this 'new era' monopoly and not competition is the life of trade. In economics that is a midsummer night's madness."

Nowhere in the Federal Trade Act do we find the Commission receiving the power to organize trades or to adopt a code for a whole industry that will control prices either

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<sup>59</sup> American Column & Lumber Co. v. United States, *op. cit. supra* note 39.

directly or indirectly, but so popular among trade organizations has its Trade Conference Division become since its reorganization on June 5, 1926, that more than 150 trades have been organized and codes of practice for each trade's business adopted.

Selling below cost has been declared to be an unfair method in competition and is now officially frowned upon. A quite popular rule of practice among trade organizations, desiring to keep up prices, bearing different numbers in the Commission's listings, is:

"The selling of goods below own cost for the purpose of injuring a competitor and/or with the effect of lessening competition is an unfair trade practice."

To the independent trader this rule can only have one effect and object; i. e., to prevent sales below cost and to make him keep up his price. The sale of a bill of goods below cost where there is competition, injures and lessens competition, but does so lawfully as found in the above cited cases.

The rule, as agreed to by the Commission's organized combines, is not only inherently bad law, "but strikes down those essential rights of private property protected by the Constitution against undue governmental interference."<sup>60</sup>

It is a direct violation of the Fifth and Fourteenth Amendments and against the interest of the purchasing public of the country, who support the Commission by taxation. On examination of *Commonwealth v. O'Brien*,<sup>61</sup> and illustrating it further with the following example, it will appear that the Government prohibition is at least a doubtful practice in restraint of trade. Jones and Smith each have a horse to sell. McCarthy wants to buy a horse. Jones determined to make the sale, sells it to McCarthy below

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<sup>60</sup> *Commonwealth v. O'Brien*, 12 Cush. 84-90 (1853).

<sup>61</sup> *Op. cit. supra* note 60.



cost. Smith was injured by the loss of profit on the sale of the horse and competition between him and Jones was not only lessened but lawfully destroyed. Nothing done by Jones was unfair and could not be made so without an amendment to the Constitution. "Skillfully directed agitation" has brought about such loose statements of the law as to master the minds of some whose duty it is to protect the public.

Congress has left "Unfair Methods of Competition" to be undefined so that each state of facts as between contending traders can be settled only upon the issuance of a complaint by the Commission, findings of fact and judicial supervision of the matter before the process of Government against the right to do business is put in motion.

If it is not against the law or good morals to sell below cost, and it is against the law to exchange cost information, both of which cannot help but result in keeping up prices, the Commission cannot declare such acts of independent trades contrary to law, in spite of what bad names the groups call them or wish the law to be.

In *Federal Trade Commission v. Raymond Bros.-Clark Company*<sup>62</sup> the court said:

"The words 'unfair method of competition,' as used in the act, 'are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.' *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427 . . . *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441, 453. . . . If real competition is to continue the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved. *Federal Trade Commission v. Gratz*. . . ."

The Commission is not even a subordinate judicial tribunal or legislative court endowed with the power of ren-

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<sup>62</sup> 263 U. S. 565, 572 (1923).

dering advisory opinions or declaratory judgments in advance of issuing its complaints.<sup>63</sup>

Impatient with its lack of power to heed the voice of organized business, many doubtful legal rights have been given to business and put into the Trade Practice Conferences which will ultimately cause it considerable grief. Already reactions are developing in the oil, sugar, and copper industries.

There is a wide distinction between the power of a bureau and the power of a court to regulate the sale of personal property.<sup>64</sup>

No legal proposition is on clearer or more definite ground than that which defines the free right to pass title to personal property. It is treason to the Constitution for Congress or States to in any manner circumvent a trader's free exercise of the right to fix a price for his wares agreeable to himself, or to prevent buying in open competitive markets. If legislatures or commissions may foster schemes that result in keeping up prices by artificial regulations of the law of supply, for industries that can make the loudest protest against consumer's rights, even though these schemes are masqueraded so that the honest official cannot see through the purpose, it logically follows that the protection of the Fifth and Fourteenth Amendments is purely a matter of favor depending only upon the whim of official fiat.

State or Congressional statutes or governmental agencies directly or indirectly suspending the natural right to do business, which is preserved in all its ancient plenitude by the Constitution, cannot be justified on any reasonable ground.

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<sup>63</sup> *Op. cit. supra* note 57.

<sup>64</sup> Thurman Arnold, *The Role of Substantive Law and Procedure in the Legal Process* (1932) 45 HAR. L. REV. 617.

In Spinoza's "Tractus Politicus," after a long discussion of the "Rights of States," "Rights of Individualism and Liberty," he sums up thusly:

"The last end of a state is not to dominate men nor to restrain them by fear. Rather it is to free each man from fear that he may live and act with full security and without injury to himself or his neighbor. The end of the state, I repeat, is not to make rational being into brute beasts and machines—it is to enable their bodies and their minds to function safely. It is to lead men to live by and to exercise a free reason, that they may not waste their strength in hatred, anger and guile, nor act unfairly toward one another. Thus the end of the state is really liberty."

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