

RESALE PRICE MAINTENANCE

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I

THE RULE

“Resale price maintenance,” as it is commonly known, means, in trade practice, precisely what it says, the maintenance by a trader of prices named by him for the resale of the articles he makes or in which he deals, however effected.¹

In the absence of controlling statute the general federal law upon the subject, with which alone we are here concerned, is defined in the cases arising under the anti-trust acts and hitherto adjudged by the Supreme Court of the United States.² It may be shortly and concisely stated, *viz.*:

1. Neither the Sherman Act³ nor the supplemental Federal Trade Commission Act⁴ deprives a trader of the right freely to pursue the announced plan of simply refusing to sell the articles he owns to those who do not sell them at his stated prices or sell to others who do not sell them at such prices, albeit he pursues this plan with the purpose and effect of thus maintaining his stated prices, provided he acts alone⁵ in the course of a private⁶ business wholly free from unlawful monopoly.⁷ Such a simple refusal to sell, made within the broad limitations

* *Resale price maintenance* is essentially an *economic* problem. We undertake here but to state the general federal *law* upon the subject.

¹ It is originally and customarily a manufacturer's trade practice designed to market standard merchandise, identified and distinguished by trademark, brand or name, at standard prices. It is a common practice today. The mere statement and recommendation of a resale price may be effective to maintain it.

² The law of the several states must await future consideration. Likewise the application of the patent and copyright laws.

³ Act of July 2, 1890 (26 Stat. at L. 209).

⁴ Act of Sept. 26, 1914 (38 Stat. at L. 717).

⁵ “An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.” *Grenada Lumber Co. v. Mississippi* (1910) 217 U. S. 433, 440-441, 30 Sup. Ct. 535, 538.

⁶ As distinguished from a public service or quasi-public service business.

⁷ *United States v. Colgate & Co.* (1918) 250 U. S. 300, 39 Sup. Ct. 465; *Federal Trade Commission v. Beech-Nut Packing Co.* (1922) 257 U. S. 441, 42 Sup. Ct. 150. See also *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.* (1915, C. C. A. 2d) 227 Fed. 46, affirming same case (1915, S. D. N. Y.) 224 Fed. 566.

It is needless to remark that the freedom of a trader to refuse to buy is coextensive with his freedom to refuse to sell. “That any one of the persons engaged in the retail lumber business,” said the court in the *Grenada Lumber Company*

defined, involves but and no more than the exercise of a clear legal right, than the assertion of the liberty secured by the Constitution of the United States. And, of course, a trader may announce his intention to do what he has the legal right to do. Hence the pursuit of this plan under the circumstances described involves neither a "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" within the meaning and condemnation of the anti-trust act nor the "unfair methods of competition in commerce" declared to be unlawful in the said commission act supplemental to it. In short: within the broad limitations indicated a trader may, at least, simply (a) name, suggest, and recommend resale prices for his products to those who buy and deal in them; (b) state to his dealers the asserted fair and reasonable character and intrinsic economic value of such prices and the benefit derived from their use; (c) announce his intention to refuse sales to all who sell at other prices or to those who sell at other prices; and (d) refuse sales to them.

2. But a trader may not, consistently with the Sherman Act, sell the articles he makes or in which he deals to others and yet by contract with them fix the price of future sales.⁸ It matters not whether the contracts are oral or written, are express or implied from a course of dealing or other circumstances.⁹ They are effective to create a combination for the prohibited purposes and involve a restraint of trade invalid at common law and under the act, wherefore they are void and

case, *supra*, note 1, at p. 440, 30 Sup. Ct. at p. 538, "might have made a fixed rule of conduct not to buy his stock from a producer or wholesaler who should sell to consumers in competition with himself, is plain. No law which would infringe his freedom of contract in that particular would stand. But when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented." And the fundamental right of freedom to trade is analogous to the fundamental right of the individual to sell his labor or not, as he pleases, to whom he pleases. *Adair v. United States* (1908) 208 U. S. 161, 28 Sup. Ct. 277.

It is interesting to note that the remaining anti-trust act, the supplemental Clayton Act, provides in Section 2, prohibiting price discrimination between purchasers where its effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce, 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." Act of October 15, 1914 (38 Stat. at L. 730).

⁸ *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911) 220 U. S. 373, 31 Sup. Ct. 376; *Boston Store of Chicago v. American Graphophone Co. et al.* (1918) 246 U. S. 8, 38 Sup. Ct. 257; *United States v. A. Schrader's Son, Inc.* (1920) 252 U. S. 85, 40 Sup. Ct. 251. Likewise a trader may not, consistently with the Sherman Act, sell his products subject to contracts with his dealers designed and effective to prevent them from selling such products to those who do not resell at prices thus fixed by him.

The rule does not apply to a single and incidental transaction conceivably unrelated to the public interest. And it may be relaxed in an exceptional case involving "a very special kind of property." Suffice it here to say that ordinary articles of merchandise commonly sold in trade and commerce are not property of that kind.

⁹ *United States v. A. Schrader's Son, Inc.* *supra* note 8; *Frey & Son, Inc. v. Cudahy Packing Co.* (1921) 256 U. S. 208, 41 Sup. Ct. 451.

unenforceable. And the validity of such restrictive contracts is not saved by the fact that the prices they fix are reasonable, that they benefit the parties. Neither is their validity saved by the fact that they are made without any purpose to create or maintain a monopoly, that they are limited to fix wholesale, and not retail, prices.

3. Likewise a trader may not, consistently with the supplemental Federal Trade Commission Act, sell the articles he makes or in which he deals by the use of methods which involve co-operation with his dealers whereby together they undertake to prevent those who do not resell at his stated prices from obtaining his products and others from obtaining them at less than such prices, methods which, while they may not amount to agreements to fix and maintain resale prices, are equally and actually as effectual to restrain the natural flow of commerce and to suppress the freedom of competition in the channels of interstate commerce.¹⁰ And the validity of such methods is not saved by the circumstance that they are used incidentally to and in furtherance of the pursuit of the lawful plan of simply refusing to sell, hereinbefore described, since they transcend its limitations.

II

THE CONTROLLING PRINCIPLE

The controlling principle is *the common-law right of freedom to trade* which it is the public policy, declared by the anti-trust acts, to preserve and maintain, which is, therefore, the law of the land.¹¹ The right of freedom of alienation is an essential incident to a right of general property in movables, and restraints upon it are usually regarded as obnoxious to the public interest which is deemed to be best served by great freedom of traffic in such things as pass from hand to hand. Before sale he who owns movables has all the rights of ownership with respect thereto, including the right of simple refusal to sell. But he cannot, consistently with the general law, grant his whole title to such movables (ordinary articles of commerce) by sale for a full price satisfactory to him and yet reserve and retain the incidents of it, at least, to the extent of fixing and limiting the future price by contract. To do so would be at one and the same time to sell and retain, to part with and yet to hold, to project his will so as to cause it to control the movable parted with when it is not subject to his will because owned by another, and thus to keep property sold subject to a restriction hostile to the title and the right of freedom of alienation incident to it and to make the will of the seller unwarrantably take the place of the law of the land as to such movables. Having exercised and exhausted his right of ownership by sale and thus by his own voluntary act conveyed his entire interest in the movable, it passes beyond his dominion out

¹⁰ *Federal Trade Commission v. Beech-Nut Packing Co.* *supra* note 7. What are unlawful *coöperative methods* is illustrated by the modified Beech-Nut order, *infra* at p. 000..

¹¹ See the cases cited, *supra*.

into the channels of trade and becomes the property of another who has the right freely to sell what he owns, and the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.

III

THE CASES REVIEWED

"Every manufacturer," said the court in the *Miles* case,¹² "before sale, controls the articles he makes. With respect to these, he has the right of ownership. . . . But," the court adds, "because a manufacturer is not bound to make or sell, it does not follow that in case of sales actually made he may impose upon purchasers every sort of restriction. . . . Whatever right the manufacturer may have to project his control beyond his own sales must depend," continued the court, in the absence, of course, of statutory right, "not upon an inherent power incident to production and original ownership, but upon agreement."¹³ With this definitive and prophetic statement the law opens. And the question was whether, in the absence of statutory right and consistently with the general law, a manufacturer may sell the articles¹⁴ he makes and yet systematically¹⁵ by contract¹⁶ fix and maintain the price for

¹² *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, *supra* note 8.

¹³ *Ibid.* at pp. 403, 404, 405, 31 Sup. Ct. at p. 383 *et seq.*

¹⁴ The fact that the article is a proprietary medicine compounded by a secret formula does not take it without the rule. The court said: "No distinction can properly be made by reason of the particular character of the commodity in question. It is not entitled to special privilege or immunity. It is an article of commerce and the rules concerning the freedom of trade must be held to apply to it. Nor does the fact that the margin of freedom is reduced by the control of production make the protection of what remains, in such a case, a negligible matter. And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstances whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many." *Ibid.* at pp. 408-409, 31 Sup. Ct. at p. 385.

¹⁵ We are not dealing here, the court observed, "with a single transaction, conceivably unrelated to the public interest," but with "a system of interlocking restrictions by which the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers, and thus to fix the amount which the consumer shall pay, eliminating all competition." *Ibid.* at pp. 399, 407, 31 Sup. Ct. at pp. 381, 384. And it is apparently upon this ground that the court distinguishes *Elliman, Sons & Co. v. Carrington & Son, Limited* [1901] 2 Ch. 275. See also *Garst v. Harris* (1900) 177 Mass. 72, 58 N. E. 174; *Garst v. Charles* (1905) 187 Mass. 144, 72 N. E. 839; *Clark v. Frank* (1885) 17 Mo. App. 602; *Grogan v. Chaffee* (1909) 156 Calif. 611; 105 Pac. 745; *Ghirardelli v. Hunsicker* (1912) 164 Calif. 355, 128 Pac. 1041; *Fisher Flouring Mills Co. v. Swanson* (1913) 76 Wash. 649, 137 Pac. 144.

In the *Hartman* case (153 Feb. 24) Judge Lurton said (p. 43): "A general system of contracts, such as that which complainant seeks to enforce and which

future sales.¹⁷ It arose upon a demurrer to a bill to enjoin the defendant from inducing any party to said contract to violate it.

That such contracts restrain trade, in fact, "is obvious."¹⁸ And the test of their validity is whether, when construed in the light of the nature of their restraint, the attending circumstances and the paramount public interest, they are *reasonable*. If not, they are void as against public policy. Speaking through Mr. Justice Hughes, the court said:¹⁹

"With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy. As was said by this court in *Gibbs v. Baltimore Gas Co.*, 130 U. S. p. 409, 'The decision in *Mitchell v. Reynolds*. 1 P. Wms. 181; S. C., Smith's Leading Cases, 407, 7th Eng. ed.; 8th Am. ed. 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things, and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it is not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is, whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. *Rousillon v. Rousillon*, 14 Ch. D. 351; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345.'

"The true view at the present time,' said Lord Macnaghten in *Nordenfelt v. Maxim-Nordenfelt & Co.*, 1904, A. C. p. 565, 'I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty

the bill avers is a method generally adopted in his line of business, involves very different questions from those which arise when a single contract only is involved and when the action is between the contracting parties for a breach, as was the case in *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174, and *Elliman v. Carrington*, L. R. 1901, 2 Ch. Div. 275." Again (p. 41): "The reasons which might uphold covenants restricting the liberty of a single buyer might prove quite inadequate when there are a multitude of identical agreements. The single covenant might in no way affect the public interest, when a large number might. * * * A common purpose unites each covenantee to every other and the 'system' is to be construed as 'one piece,' in which the complainant and every assenting dealer, whether wholesaler or retailer, is a party, and the agreement of each such covenantee to sell only at the prices dictated by the manufacturer constitutes one general scheme."

¹⁶ Here an express written contract.

¹⁷ "Nor can the manufacturer by rule and notice," said the court, "in the absence of contract or statutory right, even though the restriction be known to purchasers, fix prices for future sales." *Ibid.* 405, 31 Sup. Ct. 383. See *Bobbs-Merrill & Co. v. Straus* (1908) 210 U. S. 339, 28 Sup. Ct. 722.

¹⁸ *Ibid.* 400, 31 Sup. Ct. 381.

¹⁹ *Ibid.* 406-407, 31 Sup. Ct. 384.

of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public.’”

Applying this test the court holds that the restraint upon the future price imposed by the contracts is obnoxious to the public interest and contrary to the public policy, declared by the Sherman Act, and, therefore, the contracts are invalid both at common law and under that act. This for the reason that it offends against the general rule of the right of freedom to trade which is the law of the land.²⁰ That is to say, the contracts violate the rule against restraints upon the right of freedom of alienation of movables sold to and owned by another. They are designed and effective, if valid and enforced, to qualify the title of those who buy and trade in the articles made by the manufacturer, to restrict their right freely to sell the property they own, and to prevent competition between them in its sale.²¹

²⁰ See, also, the *Boston Store* and *Colgate* cases, *infra* at pp. 684 and 685 respectively.

²¹ *Dr. Miles Medical Co. v. John D. Park & Sons Co.* *supra* note 8. The court said in part: “The contracts relate to an article of commerce and the rules concerning the freedom of trade must be held to apply to it;” (*ibid.* 408, 31 Sup. Ct. 385); they restrict “the freedom of trade on the part of dealers who own what they sell” (*ibid.* 407, 408, 31 Sup. Ct. 384) and constitute a plan which, “in effect, creates a combination (between the manufacturer and his dealers) for the prohibited purposes” (*ibid.* 408, 31 Sup. Ct. 384); “it certainly cannot be said that there is no public interest in maintaining freedom of trade with respect to future sales after the article has been placed on the market and the producer has parted with his title” (*ibid.* 403, 31 Sup. Ct. 383). Again: “The agreements are designed to maintain prices, after the complainant (manufacturer) has parted with the title to the articles, and to prevent competition among those who trade in them (*ibid.* 407, 31 Sup. Ct. 384). “The complainant having sold its products at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic” (*ibid.* 409, 31 Sup. Ct. 385). “The present case is not analogous,” remarked the court, (*ibid.* 407, 31 Sup. Ct. 384) “to that of a sale of good will, or of an interest in a business, or of the grant of a right to use a process of manufacture. The complainant has not parted with any interest in its business or instrumentalities of production. It has conferred no right by virtue of which purchasers of its products may compete with it. It retains complete control over the business in which it is engaged, manufacturing what it pleases and fixing such prices for its own sales as it may desire.” “The questions involved,” the court concluded, (*ibid.* 409, 31 Sup. Ct. 385) “were carefully considered and the decisions reviewed by Judge Lurton in delivering the opinion of the Circuit Court of Appeals in *Park v. Hartman*

It was sought to justify the contracts upon the ground that they prevent damage to the manufacturer's business asserted to result from sales at less than the prices fixed by him, prices which are reasonable and benefit him. But, the court tersely replied, the advantage thus derived by the parties does not suffice to sustain contracts effective to restrain the right of freedom to trade and to destroy the freedom of competition which it is the declared public policy to preserve and secure.²²

Mr. Justice Holmes dissented,²³ saying in part:²⁴ ". . . I suppose that the reason why the contract is held bad is that it is part of a scheme embracing other similar contracts each of which applies to a number of similar things, with the object of fixing a general market price. This reason seems to me inadequate in the case before the court. 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. If it should make the retail dealers also agents in law as well as in name and retain the title until the goods left their hands I can-

[1907, C. C. A. 6th, 153 Fed. 24] *supra*, and, in following that case, it was concluded below [1908, C. C. A. 6th, 164 Fed. 803] that the restrictions sought to be enforced by the bill were invalid both at common law and under the act of Congress of July 2, 1890. We think that the court was right." Judge Lurton was a member of the Supreme Court when the *Miles* case was heard and decided, but took no part in its consideration and decision. His opinion for the Circuit Court of Appeals in the *Hartman* case is the foundation of the opinion of the Supreme Court in the *Miles* case. Hence we shall refer to it.

"A prime objection to the enforcability of such a system of restraint upon sales and prices," said Judge Lurton in the course of the learned opinion of the Circuit Court of Appeals in the *Hartman* case (153 Fed. at p. 39) which the Supreme Court quotes with approval (220 U. S. 404-405, 31 Sup. Ct. 383) "is that they offend against the ordinary and usual freedom of traffic in chattels or articles which pass by mere delivery. 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."

The Supreme Court also refers to Gray, *Restraints on the Alienation of Property*, secs. 27, 28, who says (2d ed. 1895) at sec. 27: "A condition or conditional limitation on alienation attached to a transfer of the entire interest in personalty is as void as if attached to a fee simple in land."

²²*Dr. Miles Medical Co. v. John D. Park & Sons Co.*, *supra* note 8 at pp. 407-408, 31 Sup. Ct. 384-385.

²³The question was not new to Mr. Justice Holmes, since, as Chief Justice of the Supreme Judicial Court of Massachusetts, he wrote the opinion in *Garst v. Harris* (1900) 177 Mass. 72, 58 N. E. 174. That case involved an action to recover damages for breach of an agreement not to sell a proprietary medicine below a stipulated price. Judgment was for the plaintiff. The court said (at p. 74, 58 N. E. 174): "It is said that the contract was unlawful as in restraint of trade. * * * When, as here, there is a secret composition, which the defendant presumably would have no chance to sell at a profit at all but for the plaintiff's permission, a limit to the license, in the form of a restriction of the price at which he may sell, is proper enough."

²⁴*Ibid.* 411, 412, 31 Sup. Ct. 386.

not conceive that even the present enthusiasm for regulating the prices to be charged by other people would deny that the owner was acting within his rights.²⁵ It seems to me that this consideration by itself ought to give us pause. . . .”

“I cannot believe 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 to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get.”

While the *Bauer* case²⁶ did not involve the application of the general law, we may incidentally note its decision. It presented the question whether the exclusive right to “vend” secured by the patent law includes the right, by notice attached to the patented article, to fix and limit the price of future sales. And the court held that it does not. Speaking through Mr. Justice Day the court said:²⁷

“The right to vend conferred by the patent law has been exercised, and the added restriction is beyond the protection and purpose of the act. This being so, the case is brought within that line of cases in which this court from the beginning has held that a patentee who has parted with a patented machine by passing title to a purchaser has placed the article beyond the limits of the monopoly secured by the patent act.”

Mr. Justice McKenna, Mr. Justice Holmes, Mr. Justice Lurton, and Mr. Justice VanDevanter dissented, without stated opinion.

The *Victor Talking Machine Company* case²⁸ likewise involved the construction of the patent law. Here a manufacturer sought to sell a patented phonograph subject to a “license notice” attached to it and a “license contract” with dealers fixing a minimum price at which it should be resold, under the guise of exercising the exclusive right to “use” secured by the patent law. In the course of its opinion condemning the plan, the court, speaking through Mr. Justice Clark, said:²⁹

“ . . . it is plainly apparent that this plan of marketing adopted by the plaintiff is, in substance, the one dealt with by the court in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, and in *Bauer v. O'Donnell*, 229 U. S. 1, adroitly modified on the one hand to take advantage, if possible, of distinctions suggested by these decisions, and on the other hand to evade certain supposed effects of them. . . .

“Courts would be perversely blind if they failed to look through such an attempt as this ‘License Notice’ plainly is to sell property for a full price, and yet to place restraints upon its further alienation, such as have been hateful to the law from Lord Coke’s day to ours, because

²⁵ In the case of *Federal Trade Commission v. The Curtis Publishing Co.* (January 8, 1923) 43 Sup. Ct. 210 it was held that a contract of agency stipulating, *inter alia*, the sales price and systematically used in the sale of periodicals does not offend against the Federal Trade Commission Act.

²⁶ *Bauer & Cie v. O'Donnell* (1913) 229 U. S. 1, 33 Sup. Ct. 616.

²⁷ *Ibid.* 17, 33 Sup. Ct. 620.

²⁸ *Straus et al. v. Victor Talking Machine Co.* (1917) 243 U. S. 490, 37 Sup. Ct. 412.

²⁹ *Ibid.* pp. 498, 500-501, 37 Sup. Ct. 414, 415.

obnoxious to the public interest. . . . Convinced as we are that the purpose and effect of this 'License Notice' of plaintiff, considered as a part of its scheme for marketing its product, is not to secure to the plaintiff any use of its machines, such as is contemplated by the patent law statutes, but that its real and poorly concealed purpose is to restrict the price of them, after the plaintiff had been paid for them and after they have passed into the possession of dealers and the public, we conclude that it falls within the principles of *Adams v. Burke*, 17 Wall 453, 456; and of *Bauer v. O'Donnell*, 229 U. S. 1; that it is therefore, invalid"

Mr. Justice McKenna, Mr. Justice Holmes, and Mr. Justice VanDevanter dissented, without stated opinion.

The *Boston Store* case³⁰ again presented the question whether a manufacturer may sell the articles he makes and yet, consistently with the general law, fix their future price by a system of uniform contracts with his dealers. And again the court answered *No.*³¹ The question arose out of a suit to enjoin the Boston Store from selling at less than the price fixed in its contract with the manufacturer.

Mr. Justice Holmes and Mr. Justice VanDevanter dissented, without stated opinion.

It is needless to dwell upon the authoritative value of the opinion of the court in the *Boston Store* case, containing, as it does, a careful, definitive, and approving review of its prior decisions upon the subject and a clear statement of the fundamental ground upon which they rest. That is manifest. As a result of the opinion and decision in this case it is now made plain that the rule of the *Miles* case is settled law. That the court declares in language which admits of no doubt. That Mr. Justice Brandeis, who before he became a member of the court was

³⁰ *Boston Store of Chicago v. American Graphophone Co. et al.* (1918) 246 U. S. 8, 38 Sup. Ct. 8.

³¹ Mr. Justice Brandeis filed a concurring opinion in which he said: (*Ibid.* 27-28, 38 Sup. Ct. 261-262) "Whether a producer of goods should be permitted to fix by contract, express or implied, the price at which the purchaser may resell them, and if so, under what conditions, is an economic question. [This is the first formal recognition of the fact, later declared by the court in the *Schrader* case, that the contracts condemned may be *express or implied.*] To decide it wisely it is necessary to consider the relevant facts, industrial and commercial, rather than established legal principles. On that question I have expressed elsewhere views which differ materially from those entertained by a majority of my brethren. I concur, however, in the answers given herein to all the questions certified; because I consider that the series of cases referred to in the opinion settles the law for this court. If the rule so declared is believed to be harmful in its operation, the remedy may be found, as it has been sought, through application to the Congress or relief may possibly be given by the Federal Trade Commission which has also been applied to."

Congress has, as yet, declined to enact legislation designed to make lawful what is prohibited as a result of the decision in the *Miles* case. The value of such legislation has been strongly urged. The adverse opinion of the Federal Trade Commission is plainly declared in the order challenged in the *Beech-Nut* case, *infra* note 66. For the substance of the order see *infra* p. 696.

the foremost advocate of the economic value of standard resale prices, concedes in his concurring opinion.³²

The *Colgate* case³³ presented the quite different question whether a manufacturer, acting alone in the course of a private business wholly free from unlawful monopoly, may consistently with the Sherman Act, pursue the announced plan of *simply refusing to sell the articles he makes and owns* to dealers who do not resell them at his stated prices, with the purpose and effect of maintaining such prices—who, when he does sell, imposes no restraint, by agreement, express or implied, upon the price of future sales. And the court unanimously held that he may, since such refusals involve but and no more than the exercise of the long recognized right of a trader freely to select his own customers, but and no more than the exertion of the fundamental common-law right of freedom to trade which the Sherman Act was enacted to preserve and, therefore, does not impair. And, of course, a trader may announce his intention to do what he has a legal right to do.

An indictment³⁴ charged that Colgate & Company, a producer of laundry soaps, toilet soaps, and other toilet articles and selling and shipping such articles to wholesale and retail dealers throughout the United States, knowingly and unlawfully created and engaged in a combination with such dealers to procure their adherence to prices fixed by it in reselling its said products and to prevent them from reselling said products at lower prices and thus to suppress competition amongst them in restraint of interstate trade and commerce in said products in violation of the Sherman Act; that with the purpose and effect of inducing its dealers to adhere to the prices fixed by it in their resale of its said products and of preventing them from reselling said products at lower prices and of suppressing competition amongst them in reselling said products, the company did the things hereinafter alleged to have been done by it and with the same purpose and effect induced many of its dealers throughout the United States to do the things hereinafter alleged to have been done by them; the company³⁵ (1) distributed amongst the wholesale and retail dealers in its products, letters, telegrams, circulars, and lists showing uniform wholesale and retail prices to be charged for its said products; (2) urged such dealers, by letters and circulars and orally, to adhere to the prices thus indicated in reselling said products; (3) informed such dealers, by letters and circulars and orally, that it would refuse to sell its products to any dealer who did not resell them at the prices thus indicated; (4) requested such dealers, orally and by letters, to inform it of sales by dealers at prices other than those so indicated, and, induced by such requests, many

³² *Supra* note 31.

³³ *United States v. Colgate & Co.* (1919) 250 U. S. 300, 39 Sup. Ct. 465.

³⁴ The indictment is literally stated.

³⁵ Compare with the facts found in the *Beech-Nut* case, discussed *infra* p. 696 *et seq.*

dealers informed it of such sales; (5) thus secured from many such dealers information as to many such sales; (6) investigated and discovered, through its representatives, agents and employes, other sales by its dealers at prices other than those so indicated by it; (7) placed the names of dealers whom it ascertained to have made such sales at other prices on "Suspended Lists," so-called; (8) requested the dealers whom it ascertained to have made such sales at other prices to give it assurances and promises that they would in future resell its products at the prices which it indicated; (9) uniformly refused to sell its products to dealers who had made sales at prices other than those indicated by it until they gave assurances and promises that they would thereafter resell its products at the prices which it indicated, and, induced by such requests and refusals, many dealers who had sold its products at prices other than those indicated by it gave to it assurances and promises that they would thereafter resell its products at the prices indicated by it; (10) thus procured many such assurances and promises from dealers throughout the United States and, upon their receipt, sold its products to the dealers who gave such assurances and promises; (11) requested similar assurances and promises from dealers to whom it had not previously sold its products, upon opening accounts with them, and many such dealers, induced by such requests, gave such assurances and promises to it, and it thereupon sold its products to them; (12) freely sold its products to dealers with whom it had established accounts and who had not resold such products at prices other than those indicated by it; that by reason of the foregoing, wholesale dealers throughout the United States, with few exceptions, resold its said products at the uniform prices fixed by the company and refused to resell such products to retail dealers at lower prices; that for the same reason retail dealers throughout the United States resold its said products at the uniform prices fixed by the company and refused to sell such products to the consuming public at lower prices; that thus competition in the sale of such products, by wholesale dealers to retail dealers and by retail dealers to the consuming public, was suppressed and the prices of such products to the retail dealers and to the consuming public throughout the United States were maintained and enhanced.

The District Court sustained a demurrer to the indictment³⁶ upon the ground that "the averments of the indictment, when carefully considered, and read in the light of the defendant's inalienable right to deal lawfully with his own property, the handling, trading in, and disposing of which is made the subject of this indictment, fail to charge any offense, either in restraint of trade and commerce, under the Sherman Act, or any other law of the United States."³⁷ Judge Waddill said:³⁸

³⁶ (1918, E. D. Va.) 253 Fed. 522.

³⁷ *Ibid.* 528.

³⁸ *Ibid.* 524.

"No suggestion is made that the conduct complained of was a monopoly, or was an attempt to monopolize the trade in toilet and laundry soaps, and other articles referred to; that the defendant was in a position to effect such purpose; that its business bore any appreciable proportion to the general extent of the business in question; or that the defendant was under any special duty or obligation to the public, not applicable to all citizens alike in other private businesses, to manufacture its products"

And then the District Judge made this definitive statement,³⁹ later accepted by the Supreme Court as conclusive of the construction of the indictment:

"The pregnant fact should never be lost sight of that no averment is made of any contract or agreement having been entered into whereby the defendant, the manufacturer, and his customers, bound themselves to enhance and maintain prices, further than is involved in the circumstance that the manufacturer, the defendant here, refused to sell to persons who would not resell at indicated prices, and that certain retailers made purchases on this condition, whereas, inferentially, others declined so to do. No suggestion is made that the defendant, the manufacturer, attempted to reserve or retain any interest in the goods sold, or to restrain the vendee in his right to barter and sell the same without restriction. The retailer, after buying, could, if he chose, give away his purchase, or sell it at any price he saw fit or not sell it at all; his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer, who could refuse to make further sales to him, as he had the undoubted right to do. There is no charge that the retailers themselves entered into any combination or agreement with each other, or that the defendant acted other than with his customers individually."

Thereupon a second indictment was returned against Colgate & Company identical, in substance, with that condemned by the District Court with the exception of the addition of a new paragraph stating that "amongst other dealers, wholesale and retail, in the products of the defendant, in the eastern district of Virginia, who engaged in the aforesaid combination with the defendant, were John A. Gill Grocery Co. (Inc.), Dunnavent & Cook, and Gill Brothers Co., all doing business at Petersburg, Virginia, who, at that time, on or about February 6 or 7, 1917, agreed with the defendant to resell its products at the prices fixed by it as aforesaid," to correct the formal defect found in the first indictment. Regardless of the fact that the second indictment expressly charged, as the first indictment did not, that *dealers agreed with the company to resell its products at the prices fixed by it*, the District Court sustained a demurrer to it *upon the ground and for the reasons that it sustained the demurrer to the first indictment.* "For reasons stated in the opinion filed on the 29th day of October, 1918, in the case

³⁹ *Ibid.* 527. The District Judge later explicitly says that the indictment contains no averment of any agreement between the Company and its dealers to maintain prices fixed by it.

of *United States v. Colgate & Company*, a corporation, No. 1294," said District Judge Waddill,⁴⁰ "the demurrer to this indictment is sustained in so far as it avers that the indictment fails to charge any offense under the Sherman Act, or any other law of the United States. So far as the substance of this indictment is concerned, and the conduct or acts charged, I construe this indictment as I construed the former indictment in the above mentioned opinion. The demurrer is overruled in so far as it raises questions as to the form of the indictment." *In short, the District Court construes the second indictment to contain no charge of any agreement between the company and its dealers to maintain prices fixed by it and, upon that ground, condemns the indictment, in the face of a direct and explicit charge of such an agreement.*

Upon writ of error the Supreme Court unanimously affirmed the judgment of the District Court.⁴¹ Speaking through Mr. Justice McReynolds the court first pointed out that "upon such a writ 'we have no authority to revise the mere interpretation of an indictment and are confined to ascertaining whether the court in a case under review erroneously construed the statute.' 'We must accept that court's interpretation of the indictments and confine our review to the question of the construction of the statute involved in the decision.' *United States v. Carter*, 231 U. S. 492, 493; *United States v. Miller*, 223 U. S. 599, 602;"⁴² that "we are confronted by an uncertain interpretation of an indictment itself couched in rather vague and general language. Counsel differ radically concerning the meaning of the opinion below and there is much room for the controversy between them."⁴³ The indictment," continued the court,⁴⁴ "runs only against Colgate & Company, a corporation engaged in manufacturing soap and toilet articles and selling them throughout the Union. It makes no reference to monopoly, and proceeds solely upon the theory of an unlawful combination."⁴⁵

The court concluded:⁴⁶

"Considering all said in the opinion (notwithstanding some serious doubts) we are unable to accept the construction placed upon it [the

⁴⁰ Not reported.

⁴¹ *United States v. Colgate & Co. supra* note 33.

⁴² *Ibid.* 301-302, 39 Sup. Ct. 466.

⁴³ *Ibid.* 302, 39 Sup. Ct. 466.

⁴⁴ *Ibid.* 302, 39 Sup. Ct. 466.

⁴⁵ After reciting the charge and averments contained in the indictment and quoting from the opinion of the District Judge the court defined the problem presented: (*ibid.* 306, 39 Sup. Ct. 467) "Our problem is to ascertain, as accurately as may be, what interpretation the trial court placed upon this indictment—not to interpret it ourselves; and then to determine whether, so construed, it fairly charges violation of the Sherman Act. Counsel for the Government maintain, in effect, that, as so interpreted, the indictment adequately charges an unlawful combination (within the doctrine of *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373) resulting from restrictive agreements between defendant and

indictment] by the Government. We cannot, e. g., wholly disregard the statement that—"The retailer, after buying, could, if he chose, give away his purchase, or sell it at any price he saw fit, or not sell it at all; his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer, who could refuse to make further sales to him, as he had the undoubted right to do." And we must conclude that, as interpreted below, the indictment does not charge Colgate & Company with selling its products to dealers under agreements which obligated the latter not to resell except at prices fixed by the company. The position of the defendant is more nearly in accord with the whole opinion and must be accepted. And as counsel for the Government was careful to state on the argument that this conclusion would require affirmation of the judgment below, an extended discussion of the principles involved is unnecessary."

And then the court stated the fundamental principle underlying the doctrine here announced in the following pregnant language:⁴⁷

"The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."

"In *Dr. Miles Medical Co. v. Park & Sons Co.*, *supra*," the court added,⁴⁸ "the unlawful combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell." And it is upon the ground of the absence of such restrictive contracts that the court distinguishes this from the *Miles* case.

The rule of the *Colgate* case is clear and settled law. It is manifestly but declarative of the ancient rule of the common law of the right of freedom to trade, of the right of freedom of alienation incident to the ownership of movables. In the exercise of this fundamental right a trader may freely select his own customers, may freely refuse to sell the articles he owns to whom he pleases, for any reason he pleases, or for no reason if he pleases, if and where he acts alone in the course of a private business free from unlawful monopoly. Such a simple refusal to sell, so made, involves the exertion of an unquestioned legal

sundry dealers whereby the latter obligated themselves not to resell except at agreed prices; and to support this position they specifically rely upon the above-quoted sentence in the opinion which begins 'In the view taken by the court,' etc. On the other hand, defendant maintains that looking at the whole opinion it plainly construes the indictment as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same."

⁴⁶ *Ibid.* 306-307, 39 Sup. Ct. 467-468.

⁴⁷ *Ibid.* 307, 39 Sup. Ct. 468.

⁴⁸ *Ibid.* 307-308, 39 Sup. Ct. 468.

right, the assertion of the liberty secured by the Constitution of the United States. It is a real and essential trade right, than which none is more important, if the assured freedom of trade and competition is to exist, a right designed to be fully and freely enjoyed, within the broad limitations stated, in the practical conception and conduct of trade and commerce.

The *Colgate* case presents a curious and extraordinary situation in that the court is compelled to hold that an indictment does not charge an offense against the anti-trust act upon the ground that, *first*, it presents but a simple refusal to sell, whereas, under the rule of the later *Schrader*⁴⁹ and *Frey*⁵⁰ cases, it presents a course of dealing to be submitted to the jury to decide whether it involves, in fact and by necessary or reasonable implication, a combination or agreement between the manufacturer and his dealers to fix and maintain resale prices in restraint of interstate trade, a course of dealing which includes methods said in the still later *Beech-Nut*⁵¹ case to constitute an offense against the Federal Trade Commission Act; *second*, it fails to aver agreements between the manufacturer and his dealers to fix and maintain prices for the resale of his products, whereas, as a matter of fact, it expressly avers such agreements. This situation arose, of course, out of the construction placed upon the indictment by the lower court.

Following the decision of the *Colgate* case a third indictment was returned against Colgate & Company, based upon the same facts. This indictment was held to be sufficient, upon demurrer, and now awaits trial.⁵² It contains fifty-six counts, comprises one hundred and fifteen type-written pages, legal folio, and charges that the company "knowingly and unlawfully created and engaged in a combination with the said wholesale dealers and jobbers throughout the United States to whom it sold and shipped its soap, to suppress competition amongst the said wholesale dealers and jobbers in reselling such soap to the retail dealers, and to procure adherence on the part of such wholesale dealers and jobbers to uniform and enhanced resale prices in making such sales to the retail dealers, in restraint of the above described trade and commerce among the several States, in violation of the Act of Congress of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' by means of publishing and distributing amongst the wholesale dealers and jobbers lists of resale prices to be observed in reselling such soap to the retail dealers; by urging all wholesale dealers and jobbers to adhere to such resale prices; by threatening not to sell to wholesale dealers and jobbers who did not so adhere; by procuring agreements, written, oral, and tacit, from the wholesale dealers and jobbers that they would adhere to such resale prices in consideration of being furnished with defendant's soap; and by furnishing such soap to such wholesale dealers and jobbers in consideration of such agreements;—and more particularly by the following means,"

⁴⁹ *United States v. A. Schrader's Son, Inc.* (1920) *supra* note 8.

⁵⁰ *Frey & Son, Inc. v. Cudahy Packing Co.* (1921) *supra* note 9.

⁵¹ *Federal Trade Comm. v. Beech-Nut Packing Co.* (1922) *supra* note 7.

⁵² The District Court overruled the demurrer without written opinion.

etc.⁵³ Then follows a long recital of the overt acts alleged to constitute the offense charged. It remains for the jury to decide whether the course of dealing duly established by the evidence involves in fact, an agreement or combination between the company and its dealers to fix and maintain prices for the resale of its products in restraint of interstate trade.

The *Schrader* case⁵⁴ again presented the question whether a manufacturer may, consistently with the Sherman Act, systematically sell the articles he makes subject to contracts⁵⁵ fixing the price for their resale. And the court again held that he may not, simply citing the *Miles* case as authority for its conclusion.

The District Court sustained a demurrer⁵⁶ to an indictment charging that "the defendant (a manufacturer of automobile accessories) knowingly and unlawfully engaged, in the manner hereinafter described, in a combination with the said tire manufacturers and jobbers to whom it sold and shipped its products, in restraint of the above-described trade and commerce among the several States in such products, in violation of the act of Congress of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies;' that is to say: The defendant executed, and caused all the said tire manufacturers and jobbers to whom it sold its said products to execute with it, uniform contracts concerning resales of such products. . . . The contracts provided that the products should not be resold at prices other than those fixed by the defendant . . . etc." The ground upon which the District Court based its judgment was this: the Sherman Act, as construed and applied by the Supreme Court in the *Colgate* case, does not prohibit such resale price fixing contracts *unless they are made with the purpose to create or maintain an unlawful monopoly* and the indictment neither charges nor recites facts from which it can be inferred that the defendant made the contract in issue with that purpose. *In short, it was held that the opinion and judgment in the Colgate case are necessarily effective to modify and limit the rule of the Miles case to the extent stated, that the contracts challenged are not within that limited rule.*

Judge Westenhaver said in the course of his interesting opinion:⁵⁷

"The point . . . , which I wish to emphasize, is that the allegations of this indictment, not alleging any purpose, or facts from which such a purpose can be inferred, to monopolize interstate trade, within the prohibition and meaning of section 2 of the Sherman Anti-Trust Act and the last clause of Section 2 of the Clayton Act, does not charge a crime under section 1 of the Sherman Anti-Trust Act as that act should

⁵³ Italics are the author's.

⁵⁴ *United States v. A. Schrader's Son, Inc.* (1920) 252 U. S. 85, 40 Sup. Ct. 251.

⁵⁵ Here express written contracts.

⁵⁶ (1919, N. D. Ohio, E. D.) 264 Fed. 175.

⁵⁷ *Ibid.* 185.

be construed. . . . The Sherman Anti-Trust Law, as I construe it in the absence of other and additional allegations charging an intent and purpose to monopolize trade does not make the acts thus charged a crime."

Upon writ of error the Supreme Court reversed the judgment of the District Court. After restating its opinion in the *Colgate* case the court, speaking through Mr. Justice McReynolds, said:⁵⁸

"The court below misapprehended the meaning and effect of the opinion and judgment in that cause. We had no intention to overrule or modify the doctrine of *Dr. Miles Medical Co. v. Park & Sons Co.*, where the effort was to destroy the dealers' independent discretion through restrictive agreements. Under the interpretation adopted by the trial court and necessarily accepted by us, the indictment failed to charge that Colgate & Company made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices; and it was treated as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with any one who failed to maintain the same."

"It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different States which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercised his independent discretion concerning his customers and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the States.

"The principles approved in *Dr. Miles Medical Co. v. Park & Sons Co.* should have been applied."

Mr. Justice Clarke announced that he concurred "in the result."⁵⁹ Mr. Justice Holmes and Mr. Justice Brandeis dissented, without stated opinion.

The *Schrader* case establishes that, *first*, the rule of the *Miles* case is not modified and limited as a result of the opinion and judgment in the *Colgate* case; *second*, the validity of the contracts condemned in the *Miles* case is not saved by the fact that they are made without any purpose to create or maintain an unlawful monopoly; *third*, such unlawful contracts may be either express or implied from a course of dealing or other circumstances.

The ground upon which the court distinguishes the resale price maintenance plan approved in the *Colgate* case from that condemned in the *Miles* case is made plain. The *Colgate* plan presents the simple exercise of the right of freedom of alienation of movables owned, whereas

⁵⁸ *United States v. A. Schrader's Son, Inc.*, *supra* note 54, 99-100, 40 Sup. Ct. 253.

⁵⁹ *Ibid.* 100, 40 Sup. Ct. 253.

the Miles plan involves a restraint by contract upon that right. The Colgate plan amounts to but the assertion of the right of ownership before sale, whereas the Miles plan is an attempt to sell movables and yet by contract to keep them under a restriction hostile to the title conveyed and the right of freedom of alienation incident to it. This legal distinction is clear.

But it cannot be denied that, from a practical standpoint, the two plans are precisely the same in purpose, economic consequence and effect upon the buying public, are distinguished in method alone. It is a fact that they are both designed to maintain prices fixed by the manufacturer for the resale of his products. It is a fact that they both result in maintaining such prices. It is a fact that the consequence and effect is, in each instance, that there is no competition in price in the resale of such products, that the public pays the prices fixed by the manufacturer. Hence the reality of the situation is that the *Colgate* case essentially legalizes what the *Miles* case outlaws.

Whatever may be the merit of the rule of the *Miles* case, as to which the court is divided in its opinion, the soundness and finality of the rule unanimously affirmed in the *Colgate* case and later unanimously reaffirmed in the *Beech-Nut* case is beyond question. Certainly a statute enacted to preserve the right of freedom to trade cannot be construed and applied to destroy it. And no statute would stand for a moment that is effective to deprive a trader, acting alone in the course of a private business free from unlawful monopoly, of the right simply and freely to refuse to sell what he owns, for any or no reason, and thus to compel him against his will to sell his own private property to others, to whom he is under no contractual obligation to sell, for their private use and benefit. Consequently the law cannot be harmonized, from the standpoint of its practical application, by denying the rule of the *Colgate* case. And if we start with that case it is clear that the *Miles* case cannot be distinguished upon the ground that the purpose of the Miles contracts was to maintain prices fixed by the manufacturer for the resale of his products, since that was the admitted purpose of the Colgate plan. Neither can it be distinguished upon the ground that the result of the Miles contracts was that such prices were maintained, that there was no competition in price in the resale of the products subject to them and that the public paid the prices fixed by the manufacturer, since that was the admitted result of the Colgate plan. And we are not permitted to say that the distinguishing consideration is the presence and absence, respectfully, of a purpose to create or maintain an unlawful monopoly. Hence we are driven to conclude that the distinction must exist in the difference in *method* used to effect a common purpose and to achieve a common result, in the fact that the method presented in the *Miles* case was a system of restrictive contracts, whereas the method presented in the *Colgate* case was a simple refusal

to sell. That is the distinguishing ground as and for the reasons we have seen.

The dissent of Mr. Justice Brandeis is significant, when viewed in the light of his opinion in the *Boston Store* case. Apparently he concurs in the opinion of District Judge Westenhaver. Mr. Justice Holmes presumptively remains steadfast to his dissenting opinion in the *Miles* case.

The *Frey* case⁶⁰ involved but the application of established principles. Frey & Son, Inc., a wholesale grocer, brought suit against the Cudahy Packing Company in part to recover three-fold damages under section 7 of the Sherman Act⁶¹ because of injuries claimed to have been sustained in its business by reason of an alleged combination or agreement between the company and wholesale dealers in one of its products, known as "Old Dutch Cleanser," to maintain prices fixed by the company for its resale in violation of that act as construed and applied in the *Miles* case. A judgment rendered by the District Court upon the verdict of a jury in favor of the plaintiff was reversed⁶² by the Circuit Court of Appeals, upon the asserted authority of the *Colgate* case.

Circuit Judge Woods, speaking for the court, said:⁶³

" . . . there was so little real conflict in the testimony on the vital issue that except on the measure of damages, the case might well have been tried without prejudice on the following as an agreed statement of facts.

"The defendant manufactured and sold Old Dutch Cleanser, and developed a large trade in that article by extensive advertisements in newspapers and magazines and by circulars and solicitors. Considering the maintenance of a fixed price necessary to an adequate profit, defendant adopted the following means of promoting sales and maintaining the wholesale price: It sold only to jobbers and wholesalers who were expected to sell only to retailers. Soliciting agents were sent to retail merchants, and orders taken from them at the list price, to be transmitted to any jobber that the retailer named of the jobbers to whom the defendant was selling. These jobbers selected by defendant, though called distributing agents, were purchasers to whom defendant sold at a fixed deduction or discount from the list price. This discount was intended as the jobber's profit. By circulars and personal interviews jobbers were insistently exhorted to maintain the fixed prices in their own interest and that of the defendant. The jobbers knew they were expected to maintain the prices fixed by the defendant and that they were liable to be cut off if they refused. There was occasional underselling by dealers, and perhaps occasional disregard by defendant of isolated acts of underselling. But the plan of the defendant was generally acquiesced in by jobbers, and its requests or demands

⁶⁰ *Frey & Son, Inc. v. Cudahy Packing Co.* (1921) 256 U. S. 208, 41 Sup. Ct. 451.

⁶¹ Act of July 2, 1890 (26 Stat. at L. 209). Sec. 7 is at p. 210.

⁶² (1919, C. C. A. 4th) 261 Fed. 65. (See also *Welch Grape Juice Co. v. Frey & Son, Inc.* (1919, C. C. A. 4th) 261 Fed. 68).

⁶³ 261 Fed. at pp. 66-67.

that the prices be maintained were generally complied with. There was no formal written or oral agreement with jobbers for the maintenance of prices.

"The plaintiff was a jobber on defendant's list of 'distributing agents,' who had a considerable trade in Old Dutch Cleanser. Believing that by the elimination of certain expenses usually incident to the wholesale business, it could afford to sell Old Dutch Cleanser at less than the price enjoined by defendant, plaintiff reduced the price below that fixed by defendant. For that reason the defendant refused to sell plaintiff at its usual discount from the list price, thus cutting off its business by making it impossible for it to compete with other jobbers at a profit.

"The vital question is whether defendant's method of business, coupled with the acquiescence of its customers therein by observing its requests or demands to maintain prices, was such co-operation between seller and purchasers as amounted to a combination in restraint of trade within the rule laid down in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373 . . . and other following cases. We are obliged to hold that the question has been clearly answered in the negative by the Supreme Court in *United States of America v. Colgate & Co.*, 250 U. S. 300 . . . decided June 2, 1919. The court expressly held that the announcement in advance that customers were expected to charge a price fixed by the seller and that the penalty for refusal to maintain prices would be refusal to sell to the offending customer, observance of the request to maintain prices by customers generally, and the actual enforcement of the penalty by refusal to sell to such customers as failed to maintain the price, did not constitute a violation of the trust statute. Nothing more was done by the defendant and its customers in this case."

Upon writ of error the Supreme Court affirmed the judgment of the Circuit Court of Appeals, holding that although the Circuit Court of Appeals had erred in saying that a verdict for the defendant should have been directed, and although the trial court had been correct in leaving the facts to the jury, yet that "as given the instruction was erroneous and material."⁶⁴

⁶⁴*Frey & Son, Inc. v. Cudahy Packing Co.*, *supra* note 60. This case was not retried in the District Court.

The Supreme Court, again speaking through Mr. Justice McReynolds, said (*Ibid.* 210-211, 41 Sup. Ct. 451-452):

"The court below concluded 'There was no formal written or oral agreement with jobbers for the maintenance of prices,' and that considering the doctrine approved in *United States v. Colgate & Co.* the District Court should have directed a verdict for the defendant. Other errors by the trial court were assigned and relied upon. If any of them was well taken we must affirm the final judgment entered after waiver of new trial and upon consent as above shown. It is unnecessary to repeat what we said in *United States v. Colgate & Co.* and *United States v. Schrader's Son, Inc.* Apparently the former case was misapprehended. The latter opinion distinctly stated that the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances. Having regard to the course of dealing and all the pertinent facts disclosed by the present record, we think whether there existed an unlawful combination or agreement between the manufacturer and jobbers was a question for the jury to decide, and that the Circuit Court of Appeals erred when it held otherwise.

"Among other things the trial court charged: 'I can only say to you that if you shall find that the defendant indicated a sales plan to the wholesalers and

Mr. Justice Pitney filed a dissenting opinion,⁶⁵ in which Mr. Justice Day and Mr. Justice Clarke concurred.

The value of the *Frey* case is this: *first*, it records a course of dealing to be submitted to the jury to decide whether it involves, in fact and by necessary or reasonable implication, a combination or agreement between a manufacturer and his dealers to maintain prices fixed by him for the resale of his products in restraint of interstate trade; *second*, it illustrates the narrow margin that may separate a lawful plan of simple refusal to sell from an unlawful combination or agreement inferred from a course of dealing built upon but transcending the limitations of that plan.

The dissenting opinion of Mr. Justice Pitney is interesting in that it is the opinion of three members of the court. Moreover it contains an interesting discussion of the subject under consideration.

We now come to the *Beech-Nut* case.⁶⁶ It is distinguished from the prior cases in that it arose under the Federal Trade Commission Act⁶⁷ which, in Section 5, empowers and directs the Commission to prevent the use of unfair methods of competition in interstate and foreign commerce "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." The question presented was whether the Commission is empowered by the act to order "that respondent, Beech-Nut Packing Company, its officers, directors, agents, servants, and employees cease and desist from directly or indirectly recommending, requiring, or by any means bringing about the resale of Beech-Nut products by distributors, whether at wholesale or retail, according to any system of prices fixed or established by respondent, and more particularly by any or all of the following means: 1. Refusing to sell to any such distributors because of their failure to adhere to any such system of resale prices; 2. Refusing to sell to any such distributors because of their having resold respondent's said products to other distributors who have failed to adhere to any such system of resale prices; 3. Securing or seeking to secure cooperation of its distributors in maintaining or enforcing any such system of resale prices; 4. Carrying out or causing others to carry out a resale price maintenance policy by any other means."

jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent from such plan, but actually cooperating in carrying it out by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Anti-Trust Act.'

"The recited facts, standing alone (there were other pregnant ones) did not suffice to establish an agreement or combination forbidden by the Sherman Act. This we pointed out in *United States v. Colgate & Co.* As given the instruction was erroneous and material."

⁶⁵ *Ibid.* 211 *et seq.*, 41 Sup. Ct. 452 *et seq.*

⁶⁶ *Federal Trade Comm. v. Beech-Nut Packing Co.* (1922) 257 U. S. 441, 42 Sup. Ct. 150.

⁶⁷ Act of Sept. 26, 1914 (38 Stat. at L. 717). Sec. 5 is at p. 719.

The facts found and upon which the order was based were essentially these:⁶⁸ The Beech-Nut Packing Company is engaged in the business of manufacturing divers food products and chewing gum and selling such products to wholesale dealers, principally, throughout the United States, who are selected by it as desirable customers for the reason that they are known or believed by it to be of good credit standing, willing to and do resell at prices suggested by it, willing to and do refuse to sell to other dealers who do not resell at such prices, and are good and satisfactory merchandisers in other respects. The total number of dealers handling Beech-Nut products includes the greater proportion of the wholesale and retail dealers in the grocery trade and a large proportion of the wholesale and retail dealers in the drug, candy, and tobacco trades, throughout the United States. In the sale of its products the company adopted and maintains the "Beech-Nut Policy," so-called, the announced policy of refusing sales to dealers who do not sell Beech-Nut products at prices suggested by it or sell to other dealers who do not charge such prices, and requests the coöperation therein of all dealers in its products, dealing with each customer separately. In order to carry out its said policy and to secure such co-operation, the company (a) issues circulars, price lists, and letters to the trade generally showing suggested uniform resale prices, wholesale and retail, to be charged for Beech-Nut products; (b) requests and insists that its selected dealers resell only at such prices; (c) requests and insists that its selected dealers sell only to such other dealers as have been and are willing to and do resell at such prices and that they discontinue selling to other dealers who fail to resell at such prices; (d) makes it known broadcast to its selected dealers that if they fail to resell at such prices it will refuse to sell further supplies of its products to them, that it will also refuse to sell to dealers who sell to other dealers failing to resell at such prices. In carrying out its said policy the company (a) has refused and does refuse to sell its products to practically all dealers who do not resell at its suggested prices; (b) has refused and does refuse to sell to practically all dealers who sell to other dealers who have failed to resell at such prices; (c) has refused and does refuse to sell to practically all so-called mail-order houses engaged in interstate commerce, because they frequently sell at cut prices, and has refused and does refuse to sell to practically all dealers who sell its products to such mail order houses; (d) has refused and does refuse to sell to practically all so-called "price-cutters;" (e) has maintained and does maintain a large force of so-called "specialty salesmen" or "representatives" who call upon the retail trade and solicit orders from them to be filled through jobbers and wholesalers, commonly known in the trade as "turnover orders," and who, under its instructions, have refused and do refuse to accept any such turnover orders to be filled through jobbers and

⁶⁸ The essential facts found are here literally stated.

wholesalers who sell or have sold at less than the suggested resale prices or sell or have sold to other dealers who sell or have sold at less than such prices, and in such cases have requested the retailers to name other jobbers; (f) has reinstated and does reinstate as distributors of its products dealers previously cut off or withdrawn from the list of selected dealers for failure to resell at its suggested prices and / or for selling to distributors who do not maintain such prices, upon the basis of declarations, assurances, statements, promises and similar expressions, as the case may be, by said distributors, respectively, which satisfy it that they will thereafter resell at its suggested prices and / or will refuse to sell to distributors who do not maintain such prices; (g) has added and does add to its list of new distributors, concerns reported by its representatives as declaring that they intend to and will resell at its suggested prices and / or will refuse to sell to distributors who do not maintain such prices; (h) has utilized a system of key numbers or symbols stamped or marked upon the cases containing its products, thus enabling it, for any purpose, to ascertain the identity of the distributors from whom such products were purchased, and when instances of price cutting have been reported to it by the selected dealers or ascertained in other ways its salesmen and representatives have been repeatedly instructed by it to investigate, and that in pursuance of these instructions its salesmen and representatives have by means of these key numbers or symbols traced the price cutters from whom the goods have been obtained and have thus ascertained the identity of such price cutters and have also thus traced and ascertained the identity of distributors from whom price cutters have purchased its products, and have thereafter refused to supply all such dealers with its products, whether they were cutting the suggested prices or selling to dealers who do so; (i) has maintained and does maintain card records containing the names of thousands of dealers, including its selected distributors, and in furtherance of its refusals to sell goods to distributors selling at less than the suggested prices or to other distributors selling at less than such prices has listed upon said cards the words "Undesirable-Price Cutters," "Do Not Sell," or "D. N. S.," the abbreviation for "Do Not Sell," or expressions of a like character, to indicate that the particular distributor was not, in the future, to be supplied with its goods, on account of failure either to maintain the suggested prices or to discontinue selling to dealers failing to maintain such prices. When the company has received declarations, assurances, statements, promises, and similar expressions, as the case may be, by said distributors, respectively, which satisfy it that they will resell at the suggested prices and / or discontinue selling to distributors failing to maintain such prices, it has issued instructions to "Clear the record," or directions of similar import, notation of which is made on the cards, and has thereafter permitted shipments of its products to be made to such distributors; and such distributors to whom shipments are thus allowed to go forward constitute the company's list of so-called

“selected” dealers, and no distributor is thus listed on such card records as one to whom goods are allowed to go forward who fails to maintain the suggested resale prices or sells to distributors failing to resell at such prices; and when a distributor is reported as failing to maintain the suggested resale prices and / or as selling to distributors who fail to maintain such prices and has been entered in said card records as one to whom shipments should not go forward, the company notifies those who supply said distributor of this fact and also its specialty salesmen and gives similar notices to its distributors and specialty salesmen when reinstatements are made in its said list of selected distributors.

The Commission neither charged nor found that the company’s business involved unlawful monopoly; that the company entered into any agreement or understanding with its dealers to fix and maintain resale prices. On the contrary, the Commission, upon its own motion, amended its formal complaint against the company to strike out the charge of such an agreement originally contained in it and formally found that “the merchandising conduct of respondent, heretofore defined and as herein involved, does not constitute a contract or contracts whereby resale prices are fixed, maintained, and enforced.” And it was neither charged nor found that the suggested prices were unreasonable.

Upon petition by the company to review and set aside the Commission’s said order because of want of power to make it, the Circuit Court of Appeals reversed it,⁶⁹ holding that the Commission’s conclusion that the methods found are unfair within the meaning and condemnation of the act cannot be sustained in the face of the decision in the *Colgate* case.⁷⁰

⁶⁹ (1920, C. C. A. 2d) 264 Fed. 885.

⁷⁰ Circuit Judge Ward delivered the opinion of the court in which it was said (*ibid.* 889): “The subject is one affecting the public generally, and plainly within the jurisdiction of the commission. The ground upon which the conclusion of law rests is that the method is unfair, because it stifles competition and so restrains trade. The obvious purpose of the respondent is to prevent any competition as to the resale price between purchasers of its products. Such a method, founded upon an agreement between a manufacturer and purchasers severally, was held to be a violation of the Sherman Act in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373 * * * It is difficult to say why a different conclusion should be reached, if the same result is attained by acquiescence and coöperation without express agreement between the manufacturer and his purchasers severally. *Eastern States Retail Lumber Association v. United States*, 234 U. S. 600 * * * But we understand the Supreme Court to hold in *United States v. Colgate & Co.*, 250 U. S. 300 * * * that a similar, but less drastic, method of sale constitutes merely the exercise of a man’s right to do what he will with his own, and is not obnoxious to the Sherman Act. The facts as found by the commission, being supported by testimony, are conclusive; but the effect of them is a question of law, to be expressed in a conclusion of law, and the commission so describes it. We do not see how this conclusion can be sustained, in the face of the decision in the *Colgate* case.” Circuit Judge Manton filed a concurring opinion. (*Ibid.* 889-892.)

Upon writ of *certiorari* the Supreme Court reversed⁷¹ the judgment of the Circuit Court of Appeals upon the ground that the company carried its "Beech-Nut Policy," so-called, into effect by the use of "unfair methods of competition" within the meaning and condemnation of the act. But the court further held that the order is too broad and must be modified as in the manner later stated.

After reviewing the complaint and facts found and stating the opinion and judgment of the Circuit Court of Appeals, the court, speaking through Mr. Justice Day, carefully restated its prior decisions upon the subject. In the course of the opinion it said:⁷²

"The *Colgate Case* was prosecuted under the Sherman Anti-Trust Act and came to this court under the Criminal Appeals Act. We therein held that this court must accept the construction of the indictment as made in the District Court; and, that, upon such construction, the only act charged amounted to the exercise of the right of the trader, or manufacturer, engaged in private business, to exercise his own discretion as to those with whom he would deal, and to announce the circumstances under which he would refuse to sell, and that, thus interpreted, no act was charged in the indictment which amounted to a violation of the Sherman Act, prohibiting monopolies, contracts, combinations and conspiracies in restraint of interstate commerce. . . .

"The Sherman Act," continued the court,⁷³ "is not involved here except in so far as it shows a declaration of public policy to be considered in determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress. The case now before us was begun under the Federal Trade Commission Act which was intended to supplement previous anti-trust legislation. . . .

"Of the Federal Trade Commission Act we said, in *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427: 'The words "unfair methods of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine as matter of law what they include. They 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. The act was certainly not intended to fetter free and fair competition as commonly understood and practised by honorable opponents in trade.'

"If the 'Beech-Nut System of Merchandising' is against public policy because of its 'dangerous tendency unduly to hinder competition or create monopoly,' it is within the power of the Commission to make an order forbidding its continuation."

Applying this test to the facts found, the court holds that the Beech-Nut system is against public policy upon the ground stated, wherefore the Commission is empowered to order its discontinuance. With reference to the particular circumstances of the case at bar, it said:⁷⁴

⁷¹ *Federal Trade Comm. v. Beech-Nut Packing Co.*, *supra* note 66.

⁷² *Ibid.* 451-452, 42 Sup. Ct. 153-154.

⁷³ *Ibid.* 453-454, 42 Sup. Ct. 154.

⁷⁴ *Ibid.* 455, 42 Sup. Ct. 155.

"The specific facts found show suppression of the freedom of competition by methods in which the company secures the co-operation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose. By these methods the company, although selling its products at prices satisfactory to it, is enabled to prevent competition in their subsequent disposition by preventing all who do not sell at resale prices fixed by it from obtaining its goods.

"Under the facts established, we have no doubt of the authority and power of the Commission to order a discontinuance of practices in trading, such as are embodied in the system of the Beech-Nut Company."

"We are, however, of opinion," the court added,⁷⁵ in conclusion, "that the order of the Commission is too broad. The order should have required the company to cease and desist from carrying into effect its so-called Beech-Nut Policy by co-operative methods in which the respondent and its distributors, customers and agents undertake to prevent others from obtaining the company's products at less than the prices designated by it—(1) by the practice of reporting the names of dealers who do not observe such resale prices; (2) by causing dealers to be enrolled upon lists of undesirable purchasers who are not to be supplied with the products of the company unless and until they have given satisfactory assurances of their purpose to maintain such designated prices in the future; (3) by employing salesmen or agents to assist in such plan by reporting dealers who do not observe such resale prices, and giving orders of purchase only to such jobbers and wholesalers as sell at the suggested prices and refusing to give such orders to dealers who sell at less than such prices, or who sell to others who sell at less than such prices; (4) by utilizing numbers and symbols marked upon cases containing their products with a view to ascertaining the names of dealers who sell the company's products at less than the suggested prices, or who sell to others who sell at less than such prices in order to prevent such dealers from obtaining the products of the company; or (5) by utilizing any other equivalent co-operative means of accomplishing the maintenance of prices fixed by the company."

The court divided five to four in the decision of this case. Mr. Justice Holmes filed a dissenting opinion, in which Mr. Justice McKenna and Mr. Justice Brandeis concurred.⁷⁶ Mr. Justice McReynolds, who,

⁷⁵ *Ibid.* 455-456, 42 Sup. Ct. 155.

⁷⁶ In his dissenting opinion Mr. Justice Holmes said (*Ibid.* 456-457, 42 Sup. Ct. 155-156):

"There are obvious limits of propriety to the persistent expression of opinions that do not command the agreement of the court. But as this case presents a somewhat new field—the determination of what is unfair competition within the meaning of the Federal Trade Commission Act—I venture a few words to explain my dissent. I will not recur to fundamental questions. The ground on which the respondent is held guilty is that its conduct has a dangerous tendency unduly to hinder competition or to create monopoly. It is enough to say that this I cannot understand. So far as the Sherman Act is concerned I had supposed that its policy was aimed against attempts to create a monopoly in the doers of the condemned act or to hinder competition with them. Of course there can be nothing of that sort here. The respondent already has the monopoly of its own goods with the full assent of the law and no one can compete with it with

as we have seen, wrote the opinion of the court in the *Colgate*, *Schrader*, and *Frey* cases, also filed a dissenting opinion.⁷⁷

In explanation of and comment upon the opinion and judgment of the court in the *Beech-Nut* case, we may say:

First. The Beech-Nut course of dealing is held to be without the rule of the *Colgate* case because it goes far beyond the simple refusal to sell there presented and sustained, and involves sales made by the use of methods by which the company secures the coöperation of its dealers to maintain prices fixed by it for the resale of its products.

Second. The Beech-Nut course of dealing is held to involve the use of the "unfair methods of competition" outlawed by the Federal Trade Commission Act, enacted to supplement the Sherman Anti-Trust Act, upon the ground that it is against public policy because it has a dangerous tendency unduly to hinder competition, and more, it necessarily constitutes a scheme which restrains the natural flow of commerce and suppresses the freedom of competition in the channels of interstate trade which it has been the purpose of all the anti-trust acts to maintain.⁷⁸ This for the reason that in its practical operation it necessarily constrains the trader to maintain the prices suggested by the company if he would have and deal in its products. It matters not that this course of dealing is found by the Commission not to constitute a contract or contracts whereby resale prices are fixed, maintained and enforced, since the specific facts found show suppression of the freedom of competition in the resale of Beech-Nut products by methods in which the company secures the coöperation of its distributors and customers, which are quite as effectual as agreements, express or implied, intended to accomplish the same purpose. And the validity of these methods is not saved by the circumstance that they are used incidental to and in furtherance of the lawful plan of simple refusal to sell, since they transcend its limitations as and to the extent stated.

regard to those goods, which are the only ones concerned. It seems obvious that respondent is not creating a monopoly in them for anyone else, although I see nothing to hinder its doing so by conveying them all to a single vendee. The worst that can be said, so far as I see, is that it hinders competition among those who purchase from it. But it seems to me that the very foundation of the policy of the law to keep competition open is that the subject-matter of the competition would be open to all but for the hindrance complained of. I cannot see what that policy has to do with a subject-matter that comes from a single hand that is admitted to be free to shut as closely as it will. And, to come back to the words of the statute, I cannot see how it is unfair competition to say to those to whom the respondent sells, and to the world, you can have my goods only on the terms I propose, when the existence of any competition in dealing with them depends upon the respondent's will. I see no wrong in so doing, and if I did I should not think it a wrong within the possible scope of the word unfair. Many unfair devices have been exposed in suits under the Sherman Act, but to whom the respondent's conduct is unfair I do not understand."

⁷⁷ *Ibid.* 458-459, 42 Sup. Ct. 156.

⁷⁸ Thus the Beech-Nut course of dealing, in the opinion of the court, amounts to a combination to fix prices in restraint of interstate trade in violation of the Sherman Act.

Third. The vice of the Beech-Nut course of dealing is held to be this: *It embraces methods involving coöperation between the company and its dealers whereby together and in pursuance of a common plan they undertake to prevent those who do not resell at its stated prices from obtaining its products and others from obtaining them at less than such prices, by which methods the company, although selling its products at prices satisfactory to it, is enabled to prevent competition in their subsequent disposition.* It is because the company sought and secured the active participation and aid of its dealers in carrying into effect its plan of resale price maintenance,⁷⁹ whereby they act together and in coöperation to maintain the prices fixed by it for the resale of its products, that it is held to violate the act. That is the coöperation found by the Commission and forbidden in its order. That is the coöperation condemned by the court in its opinion. That is the coöperation, it is submitted, against which the modified order is directed.

Fourth. The order of the Commission is, upon its face, broadly designed and unquestionably effective, if valid and enforced, to prevent the entire practice of resale price maintenance, by whatever means pursued by the company. The company is ordered to cease and desist, *inter alia*, from simply recommending resale prices for its products, and from simply refusing sales to those who sell at other prices or to those who sell at other prices. The company is further ordered to cease and desist from securing or seeking to secure the coöperation of its distributors in maintaining or enforcing its system of resale prices. And the court holds that the order is too broad, manifestly for the reason and to the extent, at least, that it forbids the simple recommendation and refusal to sell stated, which in the *Colgate* case was held to be within the legal right of a manufacturer, that it must be modified and limited as stated.

Fifth. The modified order defined by the court is phrased in broad and ambiguous language which leaves its precise meaning and application in doubt, when it is read literally and by itself. It is necessary to construe it. And it must be construed, of course, in the light of the definitive facts found, of the definitive terms of the order of which it is a modification, of the definitive opinion of the court. So construed, it is effective, we think, to require the company to cease and desist from carrying into effect its "Beech-Nut Policy," so-called, hitherto defined, *by the use of coöperative methods whereby the company (whether acting directly or through its agents) and its dealers together undertake to prevent those who do not resell at its stated prices from obtaining its products and others from obtaining them at less than such prices.*

⁷⁹ As by requesting dealers to report to it and by reporting to dealers the names of price cutters in order to prevent them from obtaining its products; as also by refusing sales to dealers unless and until they give satisfactory assurances of their purpose to maintain the prices stated by it and to refrain from selling to those who do not maintain such prices.

Sixth. It has been thought and said that as a result of the opinion and judgment of the court in this case the plan of simple refusal to sell, unanimously sustained in the *Colgate* case and again here, is made ineffectual and hence the rule of that case is, for all practical purposes, nullified. This for the asserted reason, principally, that the modified order here directed to be entered is effective to define any and all reporting of price cutters to the manufacturer by his agents in pursuance and furtherance of that plan as unlawful coöperation and therefore to forbid it. And attention is directed, in support of this assertion, to the language used in defining the first and third practices enumerated and forbidden in the modified order. This construction we are constrained to reject because, as we think, unwarranted and unreasonable. In the first place, it is indisputable that the plan of simple refusal to sell sustained in the *Colgate* case does not, *per se*, involve unlawful coöperation, albeit it is designed and effective to maintain the prices stated by the manufacturer. In the second place, there can be no coöperation in a legal sense between a manufacturer and his agents with respect to action by and between them *alone* in the due course of their business relationship, since they are legally but one. The agents act only for and in the name of the manufacturer, as his *alter ego*. It in no way derogates from the otherwise inherently lawful conduct of the manufacturer that he acts, as he must usually act, through agents, since whatever he has the legal right himself to do he may legally do through them. In the third place, the practices specifically enumerated and forbidden in the modified order must be read in the light of the general scope and purpose of the order precisely defined by the court to be directed against methods involving the coöperation condemned. In the fourth place, the coöperation found by the Commission and forbidden in its order and the coöperation condemned by the court in its opinion is plainly and unequivocally defined to be *coöperation between the company and its dealers* to maintain prices fixed by it for the resale of its products. The modified order forbids the company from using any and all methods involving such coöperation with its dealers, whether it acts directly or through its agents. The order has no application whatever to the use by the company of methods which do not involve such coöperation, whether it acts directly or through its agents. Suppose the recipient of this order was an individual manufacturer instead of the company. Surely no one would contend for a moment that he was forbidden by its terms from personally reading in the press or on posters in their stores the prices charged for his products by his dealers, respectively, and then carrying the plan of simple refusal to sell into effect upon the basis of the information thus secured. And it will not be reasonably said that the manufacturer cannot do precisely the same thing through his agents, who are but his eyes, ears and hands. In short, the reporting of price-cutters to the manufacturer by his agents may or may not involve the condemned and forbidden coöperation between him and his dealers. If the manufacturer acts independently, as in the case

supposed, there is no such coöperation in fact or law. If, on the other hand, the agent acts in the rôle of a messenger between one dealer and the manufacturer to report and prevent sales to another dealer, then the situation is quite different and there is present the coöperation condemned. Moreover, in exercising its statutory power to modify an order of the Commission, as here, the court is not empowered to extend its explicitly defined application. In the fifth place, the plan of simple refusal to sell involves the exercise of a real, practical and great trade right, the exertion of a fundamental legal right, the assertion of the liberty secured by the constitution of the United States. This being so, it cannot reasonably be said that this right may not be enjoyed in the practical conception and conduct of trade, within the broad limitations defined in the *Colgate* case, that while it cannot be directly denied it may be indirectly destroyed by forbidding the use of the bare means essential to its practical exercise and realization, where such means are used strictly within the limitations indicated. It seems to us clear that this right is necessarily designed to be, and hence may be, fully and freely enjoyed in the practical conception and conduct of trade, so long as the manufacturer acts alone in the course of a private business free from unlawful monopoly. And it makes no difference whether he acts personally or through his authorized agents. Any other construction of the law would do violence to reason and common sense and reduced a supposed and assured constitutional right to a fiction.

Seventh. The opinion in this case is of the greatest value for the reason that it authoritatively reviews and conclusively sums up the law upon the subject. It is effective to define, on the one hand, the extent to which public policy, declared by the anti-trust acts, permits a trader to go in the direction of maintaining prices stated by him for the resale of his products, and, on the other hand, the extent to which that policy will not permit him to go in that direction.

Eighth. It will be observed that the order of the Commission is effective to forbid the company even from using methods strictly limited to prevent the resale of its products at prices higher than those stated by it, whereas the modified order requires the company to cease and desist from using coöperative methods to prevent the buying public from obtaining its products at less than its stated prices. Thus the application of the anti-trust acts is made clear.

Ninth. We may add that the question remains open whether the rule of this case is settled law, since, *first*, the court is almost evenly divided in its opinion; *second*, three of the five members of the court deciding the case have since retired.⁸⁰

⁸⁰ The case of *Mishawaka Woolen Mfg. Co. v. Federal Trade Comm.* (1922, C. C. A. 7th) 283 Fed. 1022, *certiorari* refused by the Supreme Court on January 8, 1923, involves but the application of principles established by the prior cases.