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PRICES, PROFITS AND PRESTIGE

By G. E. HALE*

INTRODUCTION

Some members of the Congress are rumored to be planning a fresh assault upon big business. The new attack is not to be directed against monopolies or conduct thought to lead to monopolization. Instead, the target is all business conducted on a great scale regardless of its position in any one market or its conduct therein.

In the past orthodox antitrust enforcement has not reached the large, diversified firm which has no monopoly in any one market. Corporate wealth as such has not been explicitly challenged. Now, however, the thought is that various legal doctrines developed in antitrust decisions could be utilized to destroy business firms which are merely large and not monopolistic in character. In part, the rumored thinking merely reflects that "soft" competition reflected in many recent decisions: that small firms are to be sheltered from the pressure of their larger rivals regardless of the results in economic terms. Apparently, however, the concept goes farther. Various "evils" assumed to inhere in different "integrated" forms of business organizations are to be attacked under the antitrust laws in the hope that a greater dispersion of corporate wealth can be achieved.

HIGH PRICES

One possible avenue of assault lies in the accusation that prices and profits are unduly high. One might imagine that the mere charging of high prices to consumers might have been considered a violation of section 2 of the Sherman Act. High prices are considered typical of monopolistic power and the exploitation of consumers the vice of monopolization. The mere charging of high prices (with consequent high profits) has not, however, been considered unlawful, possibly because no one knows whether the prices are "high" or "low."

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This paper is a revision of a talk delivered at the Practicing Law Institute in New York City on 14 December 1963. The author is indebted to Mr. Jerrold G. van Cise, chairman of the Practicing Law Institute session, for suggesting the topic and giving helpful advice with respect to its formulation.

In a few decisions the courts have found firms thought to enjoy low costs guilty of antitrust violations. Such low costs, of course, suggest the existence of high profits. Thus in the litigation involving the Great Atlantic & Pacific Tea Company the court held that the grocery chain's ability to buy at lower prices than its rivals was an "abuse" indicating a violation of section 2 of the Sherman Act.[1] Another example is found in the recent Federal Trade Commission decision with respect to Proctor & Gamble's acquisition of Clorox. Clorox bleach was a complementary and noncompetitive product to the detergents manufactured and sold by Procter & Gamble. One of the reasons for holding the acquisition unlawful was that economies would be achieved in the joint advertising of the bleach and the detergents. Savings would also be effected in using a single sales organization.[2] Aside from such decisions, however, there is not much in the law to suggest that high prices in and of themselves are unlawful.

An exception should be made, however, for the cases involving the practice known as "squeeze." In the old *Corn Products* case, for example, it was found that the defendants had kept the prices of glucose so high and of syrup (of which glucose was a component) so low as to drive other syrup mixers out of business.[3] A similar decision was

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[1]United States v. New York Great Atlantic & Pacific Tea Co., 173 F.2d 79, 82-83, 88 (7th Cir. 1949). In this case the famous "recoupment" fallacy appears. The court said A&P had raised prices in some places in order to cut them in other areas. The fallacy is exposed in Hale & Hale, Market Power § 7.9 (1958).

Note the implications of United States v. Griffith, 334 U.S. 100 (1948). There the operator of a chain of movie houses was held to be in violation of § 2 of the Sherman Act because he bargained for films for the chain as a whole. In some towns Griffith had the sole theater. In others he was faced with competition. Combining the bargaining power of "monopoly" with the competitive towns was held to be unlawful. Presumably costs were lower in the monopoly towns. Less expensive films would probably suffice in such areas. To the extent that is true it suggests that the discrimination thus worked is illegal and hence that all geographic dispersion must be prohibited. Cf., Hale & Hale, Market Power, ch. 7 (1958).

[2]Proctor & Gamble, Trade Reg. Rep. ¶16673 at 21,577-81 (FTC Dec. 18, 1963). Cf., 1 Nevins, Study in Power: John D. Rockefeller, Industrialist and Philanthropist 89 (1953). It is sometimes said that the defendants' profit margin is a factor which may properly be considered in determining whether the defendant enjoys monopoly power. E.g., Banana Distributors, Inc. v. United Fruit Co., 162 F. Supp. 32, 39 (S.D.N.Y. 1958). It is easy to demonstrate that high profits, standing alone are not indictive of the existence of monopoly, let alone monopolization. They may reflect high risks or important innovations. Ignorance and indivisibility can also account for "excessive" profits. Attorney General's National Committee to Study the Antitrust Laws, Report 323-24 (1955); Hale & Hale, Market Power § 4.10 (1958).

[3]United States v. Corn Products Refining Co., 234 Fed. 964, 1003-08 (S.D.N.Y. 1916).

rendered in the *Aluminum* case some years later when it was found that Alcoa had kept the price of ingot so high that there was no adequate "spread" between it and the price of rolled sheet.[4] To say that one product is priced at "too high" a level is, of course, merely to assert that there is discrimination against the customers purchasing that product as opposed to some other. In the *Shoe Machinery* case much was made of the fact that the defendant leased its machines and provided service to keep them operating without a separate charge. Thus efficient shoemakers who required less service on the machines were penalized in favor of those whose apparatus was in need of greater attention.[5]

Critique of High Prices

With the foregoing exceptions the courts have not usually found that high prices were unlawful under the antitrust laws. It is, however, axiomatic that a monopolist can and will discriminate in price among his customers. Such discrimination is a means of exploiting his monopolistic position against customers whose demand curves differ.[6] We thus have an extensive body of law, primarily embodied in the Robinson-Patman Act, prohibiting price discrimination.[7] We have been warned, however, that there are so many different types of and motives for price discrimination that it is unreasonable to pronounce a wholesale condemnation of that practice. In some cases discriminatory pricing results in a less efficient allocation of resources; in others it serves to increase or maintain a monopoly position of an undesirable type. On the other hand, it may merely represent more

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[4]United States v. Alumnium Co. of America, 148 F.2d 416, 436-38 (2d Cir. 1945).

[5]United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 322-23 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954). In the same case, note the comments with respect to price discrimination in the sale of nails, tacks and eyelets (at p. 336). Cf., United States v. New York Great Atlantic & Pacific Tea Co., 173 F.2d 79, 88 (7th Cir. 1949); Beacon Fruit Co. v. H. Harris & Co., 152 F. Supp. 702 (D. Mass. 1957). In the latter case the plaintiff purchasers complained of a charge made on them of 5c per package paid by the defendant auctioneer at the auction. The court denied a motion for summary judgment, saying that it must hear evidence in order to determine whether defendant should collect equivalent revenues from sellers rather than buyers or from buyers on some other basis. The implication is that the defendant had a monopolistic position and was engaged in some form of price discrimination which the court might correct.

[6]Bailey, Price and Output Determination by a Firm Selling Related Products, 44 Am. Econ. Rev. 82 (1954).

[7]Rowe, Price Discrimination Under the Robinson-Patman Act (1962). Cf., Hale & Hale, Market Power § 2.10 (1958).

active competition or a means of increasing output and reducing prices to all.[8]

A rigid ban on price discrimination would vitally affect integrated firms. In the *United Shoe Machinery* litigation the court implied that diversification into a number of products was illegal because the defendant charged varying prices for the several machines which it manufactured.[9] Theoretically, that difficulty could only be overcome by requiring firms to charge prices geared to marginal costs for all their several products. Any such program, however, would drive sellers into bankruptcy because there would be no contribution toward total costs. In other words, discrimination is necessary unless a state subsidy is to be paid to the producers.[10] While some such doctrines have found acceptance in the public utility field, they seem unsuited to the free sector of the economy.[11]

Another reason why a rigid ban on discrimination is undesirable is found in the fact that almost all diversified firms have common or joint costs in producing their several products. Allocation of those costs among the products is an extremely difficult matter. Take, for example, an oil refinery. Gasoline, kerosene, fuel oil and other goods are produced out of crude oil. To the extent that the proportion of gasoline may be increased or decreased, it is theoretically possible to ascertain the cost of refining properly attributable to the gasoline. That cost, simply stated, is the value (in the market place) of the commodities necessarily lost when more gasoline is produced. Thus if production of one additional gallon of gasoline from each barrel of crude oil requires the abandonment of two gallons of fuel oil and fuel oil is selling in a competitive market at 7 cents per gallon, the cost of that gasoline is 14 cents per gallon. Possibly somewhat similar methods of allocation could be derived for use with respect to such "common" costs

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[8]Machlup, The Political Economy of Monoply 163 (1952); Bowman, Toward Less Monopoly, 101 U. Pa. L. Rev. 577, 619-20 (1953); Adelman, Effective Competition and Antitrust Laws, 61 Harv. L. Rev. 1289, 1330-32 (1948).

[9]United States v. United Shoe Machinery Company, 110 F. Supp. 295, 326-28, 341, 343 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954). The discrimination there was found in a wide variance in the ratio cost to rental among the several products manufactured.

[10]Clemens, Price Discrimination in Decreasing Cost Industries, 31 Am. Econ. Rev. 794, 797-98, 801 (1941); Tyndall, The Relative Merits of Average Cost Pricing, Marginal Cost Pricing and Price Discrimination, 65 Q. J. Econ. 342, 344, 355, 370 (1951); Wright, Mr. Harrod and Growth Economics, Readings in Business Cycles and National Income 220, 222 (Hansen ed. 1953); Mason, Schumpeter on Monopoly and Large Firm, Schumpeter: Social Scientists 89, 90-91 (Harris ed. 1951).

[11]Cf. Produce Terminal Co. v. Illinois Commerce Comm'n, 414 Ill. 582, 112 N.E.2d 141 (1953).

as interest on working capital, executive salaries and the like. As a practical matter, however, such allocations are almost impossible to compute and are not in actual use in the market place. All other methods of cost allocation are arbitrary and meaningless.[12] It follows that a rigid ban on price discrimination under the antitrust laws could not be achieved with the tools now at hand. Our experience with the Robinson-Patman Act indicates that any such effort might create more discrimination than it dissipated.

Low Prices

We turn now from the product thought to be priced "too high" to that allegedly sold at "too low" a level. Here there are decisions suggesting that the mere quotation of low prices, even when "predatory" practices cannot be found, is violative of the antitrust laws. One of the important decisions is the recent merger case involving the acquisition of Arrow Foil by Reynolds Metals. Arrow was a small fabricator of florist foil. Reynolds, of course, was a large, wealthy concern engaged in the production of aluminum ingot and various products fabricated therefrom. After the acquisition various price cuts in Arrow products caused competitors to lose some 14 to 47 per cent of sales, while Arrow sales rose 18.9 per cent. Price cutting was an important factor in finding that the merger was unlawful.[13] Another prominent example is the litigation involving the Great Atlantic & Pacific Tea chain. There the court stated that A & P's ability to obtain goods from its own manufacturing subsidiaries enabled it to reduce the cost of its products and hence the prices thereof in its retail stores. This again was held to be a factor leading to a finding of a violation of section 2 of the Sherman Act.[14] In the old *Corn Products* litigation also, Judge Learned Hand condemned the charging of low prices. He wrote:

> "...I think it quite safe to estimate that the profit per grind on the staples... was not 4 cents a bushel. This was much lower

[12]Hale & Hale, Market Power § 5.14 (1958); United States v. Aluminum Co. of American, 148 F.2d 416, 436-37 (2d Cir. 1945). The phenomenon of "squeeze" does not result from vertical integration or subsidization. It merely reflects monoply power in the high priced products. Hale & Hale, Market Power § 5.13 (1958).

[13]Reynolds Metals Co. v. Federal Trade Comm'n, 309 F.2d 223, 229-30 (D.C. Cir. 1962).

[14]United States v. New York Great Atlantic & Pacific Tea Co., 173 F.2d 78, 86 (7th Cir. 1949). Cf., United States v. United States Machinery Company, 110 F. Supp. 295, 326, 329 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954).

than the usual profit in the trade.... I believe that the profits were lower... than a fair profit."[15]

The weight of authority, however, looks in the opposite direction. A leading and highly interesting case, although it was decided in a state court, is *Dodge v. Ford Motor Company*.[16] The Dodge Brothers were shareholders in Mr. Ford's enterprise. They became dissatisfied with the way in which the business was conducted. They complained basically of two things. First, reinvestment of earnings, instead of paying out as dividends; and second, cutting prices. The price of the Ford automobile had been reduced from $900 to $440 in 1916. Mr. Ford then ordered a further cut to $360.[17] The Dodge Brothers urged that Ford's policy of reducing prices would result in a monopoly in automobile manufacturing. The Michigan Supreme Court answered that argument briefly:

> "As we regard the testimony as failing to prove any violation of antitrust laws or that the alleged policy of the company, if successfully carried out, will involve a monopoly other than such as accrues to a concern which makes what the public demands and sells it at a price which the public regards as cheap or reasonable...."[18]

Many federal decisions can be cited in accord with the foregoing opinion. They recognize the right of the seller to reduce his price either to meet competition or to develop larger sales through reaching a further point on the consumers' demand curves.[19] In an interesting recent case several parties defendant included corporations respectively publishing a newspaper and operating a radio station.

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[15]United States v. Corn Products Refining Co., 234 Fed. 964, 991, 995 (S.D.N.Y. 1916). Interestingly enough, the court recognized that the defendants deliberately held down prices in order to discourage the entry of new capital into the industry. The court further recognized that output was not curtailed but accelerated. Id. at 1009. Cf., Proctor & Gamble, Trade Reg. Rep. ¶ 16673, at 21,577-78, 21,583-84 (FTC Dec. 18, 1963). The commission in the last cited case expressly stated that Procter & Gamble's position in the soap market permitted it to "subsidize" its acquired product, Clorox, in the bleach business.

[16]204 Mich. 459, 170 N.W. 668 (1919).

[17]Id. 170 N.W. at 670, 673.

[18]Id. 170 N.W. at 681.

[19]Balian Ice Cream Co. v. Arden Farms Co., 104 F. Supp. 796, 801, 807 (S.D. Cal. 1952), aff'd, 231 F.2d 356 (9th Cir. 1955), cert denied, 350 U.S. 991 (1956); United States v. E. I. duPont de Nemours & Co., 118 F. Supp. 41, 159 (D. Del. 1953), aff'd, 351 U.S. 377 (1956); Dollac v. Margon Corp., 164 F. Supp. 41, 64 (D.N.J. 1958), aff'd, 275 F.2d 202 (3d Cir. 1960); United States v. Aluminum Co. of America, 44 F. Supp. 97, 221 (S.D.N.Y. 1941), rev'd on other grounds, 148 F.2d 416, 438 (2d Cir. 1945). Cf., United States v. General Electric Co., 82 F. Supp. 753, 855-56 (D.N.J. 1949).

Plaintiff contended that the common control of the corporations permitted the defendants to obtain "free" advertising for the radio station in the newspaper. That theory was rejected by the court. It found that there was a mere redistribution of corporate profits among the several entities. If the radio station operator had paid for the advertising there would be less in his pocket and more in that of the publisher of the newspaper. No conspiracy to restrain trade could be found.[20]

Similarly, it is not unlawful for one with a monopoly position in one market to use the profits thus derived to enter into another market even though it may charge low prices in the second area. Thus the Court of Appeals for the first circuit wrote:

> "Union Leader's real objection is to the superior financial resources of the group. But we have never heard of a principle that a corporation having affluent shareholders could not compete."[21]

And, as another Court of Appeals recently wrote:

> "Price reduction in a competitive situation is not a wrong in itself. It can become a violation of Section 2 of the Sherman Act only if shown to be motivated by a specific intent to drive a competitor or competitors from the field."[22]

Critique of Low Prices

A prohibition against low prices would strike at the heart of our competitive system. As the Attorney General's National Committee to Study the Antitrust Laws commented:

> "It is of the essence of effective competition that competitors should try to meet, or offer an equivalent for, any superior inducement which one of them offers... effective competition also involves freedom to undercut rivals' prices.
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> Effective competition is therefore compatible either with meeting (or matching) prices of rivals, or with undercutting them...."[23]

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[20]Syracuse Broadcasting Corp. v. Newhouse, 319 F.2d 683, 687 (2d Cir. 1963).

[21]Union Leader Corp. v. Newspapers of New England, Inc., 180 F. Supp. 125, 139, 144 (D. Mass. 1960), modified, 284 F.2d 582, 589 (1st Cir. 1960), cert. denied, 365 U.S. 833 (1961).

[22]Gold Fuel Service, Inc. v. Esso Co., 195 F. Supp. 85 (D.N.J. 1961), aff'd, 306 F.2d 61, 64 (3d Cir. 1962), cert. denied, 371 U.S. 951 (1963). Cf., Sano Petroleum Corp. v. American Oil Co., 187 F. Supp. 345, 353-54 (E.D.N.Y. 1960).

[23]Attorney General's National Committee to Study the Antitrust Laws, Report 331 (1955).

Price discrimination may be a force which can increase the number of effective sellers in any market or disrupt an otherwise effective system of monopoly pricing.[24] The low price policy of the Ford Motor Company achieved the well known results of putting the automobile within the reach of the mass of consumers and revolutionizing transportation in the United States. In economic terms, Ford cut the price of his automobile in order to reach a point on the demand curve where important economies of scale could be achieved.[25] Such price reductions bear an important relationship to innovation[26] and their prohibition might be fraught with unfortunate implications for economic growth.

Almost every firm which expands into a new geographic territory or the production of a new product may indulge in some degree of "underpricing." Resources already at hand within the firm are utilized to float the new venture.[27] Hence a prohibition against "low" prices would profoundly discourage such steps. Perhaps here lies the role of that "general" intent deemed necessary for a finding of monopolization.[28] It is a safety valve which shelters the progressive business organization from a violation of the law merely because it has reduced its prices below pre-existing levels.

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[24] Id. at 336.

[25] Nevins, Ford: The Times, The Man, The Company 511 (1953). Cf., United States v. United Shoe Machinery Company, 110 F. Supp. 295, 349 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954). In State ex inf. Major v. International Harvester Co., 237 Mo. 369, 649, 141 S.W. 672 (1911), aff'd, 234 U.S. 199 (1914), the court noted that the defendant might enjoy economies of scale which would permit it to reduce prices and hence did not forbid that practice generally.

[26] Wallace, Market Control in the Aluminum Industry 15, 390, 392 (1937); Brems, Product Equilibrium Under Monopolistic Competition 138 (1951); Monsanto Chemical Company, Annual Report 22, (1952). Note the interesting testimony in United States v. United States Steel Corp., 223 Fed. 55, 79 (D.N.J. 1915), aff'd, 251 U.S. 417 (1920), to the effect that after the organization of that concern, there was less price discrimination than prior thereto.

[27] Hale & Hale, Market Power §§ 6.24, 7.8 (1958). The "subsidization" complained is the converse of the "foreclosure" alleged to exist in the vertical integration cases. E.g., United States v. E. I. duPont de Nemours & Co. 353 U.S. 586 (1957). In the "foreclosure" cases prices are presumably "too high" rather than "too low."

[28] Johnston, Monopolize or Attempt to Monopolize, 4 A.B.A. Section of Antitrust Law 72, 75 (1953); Hale & Hale, Market Power § 3.18 (1958). "Tying" one product to another may well involve an element of subsidy. The decisions condemn that practice. They do so, however, on a different ground. E.g., Osborn v. Sinclair Refining Co., 286 F.2d 832 (4th Cir. 1961), cert. denied, 366 U.S. 936 (1961). Cf., the arbitrary decisions reached under the Robinson-Patman Act. E.g., Mueller Co. v. Federal Trade Comm'n, 323 F.2d 44 (7th Cir. 1963).

RATIONING

The fact that prices are "too low" may be established when a seller is compelled to ration his output among his customers. Oddly enough, the courts have not found such "allocations" unlawful.[29] Indeed, they are a common feature of our industrial organization. The chief executive of a leading steel company, for example, once testified before a Congressional Committee as follows:

> "I would like to establish that the steel corporation, its subsidiaries, never charged all that they could have charged for any product.
>
> In other words, during that period we had offers for prices far in excess of our announced prices which, of course, we never accepted."[30]

Economists have harsh words for such rationing. A leading student has stated:

> "The presence of voluntary non-price rationing presents one of the least ambiguous kinds of evidence of monopoly power and one which is rather easily spotted."[31]

Nevertheless, as indicated above, the courts have not deemed such low prices, evidenced by rationing, to be violative of the antitrust laws. No doubt the reason lies in the apparent lack of injury to either a competitor or customer.[32]

PREDATORY PRICE CUTTING

We have been speaking of low prices in general. Quite a different story must be told with respect to what is usually termed "predatory" price cutting. An attempt to drive rivals from the market place by means of such price reductions is well established as a violation of

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[29]Independent Iron Works v. United States Steel Corp., 322 F.2d 656 (9th Cir. 1963); Banana Distributors, Inc. v. United Fruit Co., 162 F. Supp. 32, 36, 39-40, 42 (S.D.N.Y. 1958).

[30]Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary, Serial No. 14, 81st Cong., 1st Sess., 2d Sess.: Serial No. 1, 82d Cong., 1st Sess.; Serial No. 12, 82d Cong., 2d Sess. (1949-52).

[31]Bowman, Toward Less Monopoly, 101 U. Pa. L. Rev. 577, 617 (1953). Cf., Hale & Hale, Market Power §§ 4.12, 8.2 (1958); Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. (1955-56).

[32]Note the fate of those who ignore political warnings not to raise prices to free market levels. Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954).

section 2 of the Sherman Act. Indeed, it is the typical "abuse" prohibited by that legislation.[33]

Illegality depends, however, on the finding of a specific intent to monopolize.[34] Such an intent, of course, may be demonstrated by the fact that the price cut was temporary in character, local in area, selective in operation and accompanied by other conduct indicative of a purpose to eliminate competitors.[35]

CRITIQUE OF PREDATORY PRICING

Everyone has agreed that "predatory" price cutting should be prohibited. The difficulty arises in distinguishing one type of price reduction from another. We must somehow find the difference between the promotional pricing of Henry Ford and the destructive pricing of the defendants in the *Corn Products* case.[36] We must be careful not to curb experimental pricing and innovation.[37] We must not forbid low pricing in which a hard-pressed firm seeks to raise cash quickly.[38] It would

[33]Standard Oil Company of New Jersey v. United States, 221 U.S. 1, 76 (1911); Porto Rican Tobacco Co. v. American Tobacco Co., 30 F.2d 234, 236, 326-37 (2d Cir. 1929), cert. denied, 279 U.S. 858 (1929); United States v. New York Great Atlantic & Pacific Tea Co., 67 F. Supp. 626, 640-43, 664, 678 (E.D. Ill. 1946), aff'd, 173 F.2d 79 (7th Cir. 1949); United States v. American Can Co., 87 F. Supp. 18, 28 (N.D. Cal. 1949); Ware-Kramer Tobacco Co. v. American Tobacco Co., 180 Fed. 160 (C.C.E.D.N.C. 1910); United States v. Corn Products Refining Co., 234 Fed. 964, 980-81, 984, 985-89, 1014 (S.D.N.Y. 1916); Boggs v. Duncan-Schell Furniture Co., 163 Iowa 106, 143 N.W. 482 (1913); Birrell, The Integrated Company, 9 A.B.A. Antitrust Sec. Rep. 49, 57 (1956). Cf., Federal Trade Comm'n v. Sun Oil Co., 371 U.S. 502, 519 (1963); Proctor & Gamble, Trade Reg. Rep. ¶ 16673 at 21,578 (F.T.C. Dec. 18, 1963); Quaker Oats Co., Trade Reg. Rep. ¶ 16629 (F.T.C. Oct. 31, 1963).

[34]United States v. Aluminum Co. of America, 148 F.2d 416, 432 (2d Cir. 1945); Balian Ice Cream Co. v. Arden Farms Co., 104 F. Supp. 796, 807 (S.D. Cal. 1952), aff'd, 231 F.2d 356 (9th Cir. 1955), cert. denied, 350 U.S. 991 (1956); United States v. General Electric Co., 82 F. Supp. 753, 1016 (1949).

[35]An interesting recent decision is Scott Publishing Co. v. Columbia Publishers, Inc., 293 F.2d 15 (9th Cir. 1961), cert. denied, 368 U.S. 940 (1961). In that case the defendant pumped over a million dollars into a rival newspaper and admitted that it was "driving the plaintiff to the wall." The court, nevertheless, found that there was no violation of § 2 of the Sherman Act because the defendant did not intend to run the plaintiff out of business but merely to keep the rival publication in business. Cf., Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582, 586-87 (1st Cir. 1960), cert. denied, 365 U.S. 833 (1961).

[36]United States v. Corn Products Refining Co., 234 Fed. 964, 991, 1012 (S.D.N.Y. 1916); Nevins, Study in Power: John D. Rockefeller, Industrialist and Philanthropist 228, 370 (1953).

[37]Air Reduction, 8 Fortune 24, 117 (July 1933); Ladik & Kent & Nahl, Test Marketing of New Consumer Products, 24 J. Marketing 29 (April 1950).

[38]Hale & Hale, Market Power § 229 (1958).

be a mistake to place stress upon the fact that prices are below "cost" since, as stated above, it is extremely difficult to determine what the "cost" of any individual product may be.[39] Again we come back to the role of intent and the proper criterion cannot be better stated than in the opinion of Judge Learned Hand in 1916:

> "[T]he intent of the combination so often appears in the cases as the determinating factor in illegality. It is not because unfair competition is a crime, but only because a monopolistic intent is the clearest evidence that the competition attempted is shown to be temporary and local, and that there is on this account a reasonable expectation that it will be succeeded by competition which the newcomer might well be able to meet, had its development been all the while left unimpeded. If that temporary or local competition were not coupled with such an intent, if there were honest grounds for supposing that it could or would remain to the permanent advantage of the consumer, the public would have no ground to complain...."[40]

And a leading economist has added that the predatory "abuses" prevalent at the turn of the century probably gave the consumer more competition than the so-called "cooperation" which subsequently ensued.[41]

Conclusions

It will be seen that in part the doctrines which might be applied in the manner above indicated are little more than the old concept of "soft" competition. They would prevent the Atlantic & Pacific Tea Company, for example, from charging low prices in its grocery stores because that might drive inefficient grocers out of business. They are, in short, doctrines of protection.[42]

To the extent that prohibitions against price cutting and subsidization are directed to the short term, they are not wholly inconsistent with the maintenance of a competitive economy. Whether such protection is desirable in the long run boils down to whether entry into the industry is easy. Freedom of entry, of course, is a fundamental requisite for long run effective competition.[43] Without such freedom

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[39]United States v. Corn Products Refining Co., 234 Fed. 964, 989-90 (S.D.N.Y. 1916). The standard taken for costs in that case is highly ambiguous.

[40]Id. at 1013; Gold Fuel Service, Inc. v. Esso Co., 195 F. Supp. 84 (D.N.J. 1961), aff'd, 306 F.2d 61, 64 (3d Cir. 1962), cert. denied, 371 U.S. 951 (1963).

[41]Machlup, The Political Economy of Monopoly 100 (1952).

[42]A practical instance of the impact of such protectionism is recounted in Learned, Pricing of Gasoline, 26 Harv. Bus. Rev. 723, 741 (1948).

[43]Attorney General's National Committee to Study the Antitrust Laws, Report 326 (1955).

of entry, we may be forced into public utility type controls which will shelter the existing firms against their more efficient and aggressive rivals.

As has been seen, however, the new approach carries wider implications. It is not merely a matter of protectionism but of an assault upon corporate wealth. If a firm does not improve its products, if it does not adopt new and better methods of manufacturing and selling, it will die. If the concept of subsidization can be applied to block integration of existing business firms into new geographic areas, new products and new processes, it can toll the knell of existing firms.

It is easy to point to unfortunate consequences which might result from such enforcement of the antitrust laws. A well known producer of dynamite, for example, would not have been allowed to utilize its profits in that field to develop nylon. On the other hand, the worst that could happen in such a situation would be some additional delay and expense in achieving the new product. Inventors have access to investment bankers and investment bankers in turn can reach the saving public. Through established channels, therefore, it is possible to raise capital funds to promote new ventures. It is true that such funds are not obtained nearly so easily as from the profits of the existing concern. The board of directors of the duPont Company is a small group to which communication is relatively easy and which can rapidly make a decision to allocate capital resources to a new product. Many frictions beset the path of those who seek to raise capital funds from the public for new ventures. Among other things, they lack the prestige of the duPont management with its history of proven successes in the past. They also must pay the heavy costs of financing, in part imposed by statutes designed to protect investors.[44]

The antitrust laws, Judge Learned Hand to the contrary,[45] are basically economic legislation. They speak of "restraint of trade" and of the "lessening of competition." An assault upon wealth involves non-economic factors. Utilization of the antitrust laws for such an end is bound to involve the warping of sound concepts. As we have seen, such doctrines might compel the maintenance of high prices. Furthermore, once economic criteria are abandoned there is little stopping point. How much protection should be afforded smaller firms, how little diversification should be permitted larger firms and the like are issues which do not lend themselves to anything even approaching sys-

[44]Hale & Hale, Market Power § 8.4 (1958).

[45]United States v. Aluminum Co. of America, 148 F.2d 416, 427-29 (2d Cir. 1945).

tematic analysis. The virtue of an economic standard is that it forces waste and unnecessary costs out into the public view.

There is, of course, a good deal to be said for a reduction in disparity of corporate wealth. Whether the antitrust laws constitute the appropriate vehicle for achieving such uniformity may, however, be seriously questioned. If it is desired to place limits upon corporate wealth, the device of inserting additional "notches" in a graduated corporate income tax seems far more logical and orderly.[46] To suggest that every disparity in wealth affords grounds for a finding of illegality and hence of the voidability of contracts would almost bring our economy to a standstill.[47] In any event, the public is entitled to know the true objectives of government policy and not be deluded into an assault upon corporate wealth disguised as antitrust enforcement.

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[46]Hale & Hale, Market Power § 11.5 (1958).

[47]Proctor and Gamble, Trade Reg. Rep. ¶ 16673 at 21,582 (F.T.C. Dec. 18, 1963).