# MONOPOLY AND COMPETITION IN TRADE-MARKED ARTICLES.*

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In discussing trade-marks one should consider the economic concepts concerning monopoly and competition, standards of legality, property rights acquired in trade-marked articles, as well as remedies and procedure to protect these rights and the rights of the public. There has been an increasing recognition of studying the underlying economic and social aspects of the many phases of trade. As early as 1897, Mr. Justice Holmes said:

> "I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them."

In considering the economic concepts of monopoly and competition, it should be borne in mind that it was not until the nineteenth century that the English common law definitely fostered a system of competitive individualism. It required centuries and the accelerating force of an Industrial Revolution to make the transition from a regimented guild system, the oppression of monopolistic grants and the restrictions of the area of mercantilism to the establishment of the *Laissez Faire* policy under which competition was considered the regulator of industrial life. One need only to review the history of the enactment of the Interstate Commerce Act of 1887 and the Sherman Anti-Trust Act of 1890, together with the state anti-trust legislation of that era, to realize that all of these were intended to preserve the competitive system in industry and prevent the encroachments of monopoly. Remedy by civil action was granted to any person injured in his business or property through monopoly, and provision was made for the dissolution of the monopoly by injunctive process. No effort was made to safeguard the competitive economic processes against the abuses of business conduct which frequently lead to its subversion. These laws aimed to eliminate restraint of trade and monopoly through the enforcement of competition rather than through regulation.

And to-day we are seemingly suffering from too much competition, and are turning again to regimentation and restrictions, with the hope of control through the passage of laws and the administrative supervision of unfair methods of competition. We have come to a realization with regard to competitive practices that though, generally speaking, it is to the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have his freedom, yet under certain circumstances it may be to the interest of the individual to contract in restraint of this freedom, and the community if interested to maintain freedom of trade, is equally interested in maintaining freedom of contract within reasonable limits. The public policy toward these rights and restrictions was demonstrated by the establishment of the Federal Trade Commission in 1914, which was launched as an administrative agency for the enforcement in the public interest of a statutory prescription against unfair methods of competition. The

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economic work assigned to the Federal Trade Commission was to gather and compile information concerning, and to investigate from time to time, the organization, business, conduct, practices and management of any corporation engaged in commerce (excepting banks and common carriers), and its relations to other corporations and to individuals, associations and partnerships.

Predicating our discussion upon the foregoing economic concepts concerning monopoly and competition, we should now turn to the druggist and the sale of the trade-marked article. But before defining a trade-marked article, we will consider briefly, standards of legality. With reference to the nature of common-law standards, such as due care, reasonableness and constitutional standards, such as due process, Dean Pound has defined them as "legally defined measures of conduct to be applied by or under the direction of tribunals. It will be noted that a common idea of reasonableness or fairness runs through them all, and in consequence, they must have a variable application with time, place and circumstances. Moreover, most of them contain a large moral element and so application of them calls for common sense or the average moral judgment rather than deductive knowledge."

With respect to legislative standards, the progression from the policy of enforced competition under the Sherman Act to the principle of administrative supervision of business practices by the Federal Trade Commission has been previously shown. Justice Brandeis in delivering the opinion of the Court in the case of the Board of Trade of City of Chicago *vs.* United States (246 U. S. 231,238) said:

> "The legality of an agreement or regulation cannot be determined by so simple a test as to whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the peculiar remedy, the purpose or end sought to be attained, all are relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

Now as to the definition. A trade-mark may be defined "as a name, sign, symbol or device which is attached to goods offered for sale in the market so as to distinguish them from similar goods, and to identify them with a particular trader, or with his successors, as owners of a particular business, as being made, worked on, imported, selected, certified or sold by him. It has been aptly described as the commercial substitute for one's own autographic signature, certifying to the genuineness of the goods to which it is affixed." (63 Corpus Juris, page 308.) The extent to which this property right in the trade-mark has existed is evidenced by the following quoted from the case of Arbutnot, Latham & Co. *vs.* Cage Drew Co., (6 La. A. (Orleans) 374,375):

> "It is elementary that the right of property in trade-mark is not derived from any statute whatever, but is a so-called 'common law' right which has existed and been recognized and protected by the courts of all commercial nations from time almost immemorial."

That the object of the trade-mark is two-fold may be stated by citing quotations from two cases. From Shaw Stocking Co. *vs.* Mack (12 F. 707,710) "First to protect the party using it from competition with inferior articles; and second to protect the public from imposition;" and from Peter Schoenhofen Brewing Co. *vs.* Maltine Co. (30 App. D. C. 340,343) "It serves a two-fold purpose—to protect the owner from unfair competition, and the public from being deceived."

The relief afforded when trade-marks have been infringed is often expressly placed upon the ground of an exclusive property right in the use of the trade-mark itself, as when in Kann *vs.* Diamond Steel Co.(89 F. 706), the court held that "every suit to restrain the infringement of a trade-mark is founded on the fact that the action or the proposed action, of defendant has deceived, or is calculated to deceive, ordinary purchasers buying with usual care, so that they have purchased, or will probably purchase, the goods of defendant under the mistaken belief that they are those of the complainant, to the serious damage of the latter." In some instances the relief afforded is often expressly placed on the ground that the public is also deemed entitled to protection, as when in the case of Avenarius *vs.* Kornely (121 N. W. 336,342) the court said:

> "Actions to restrain the infringements of trade-marks are based upon the doctrine that the law will not allow one person to sell his goods as and for the goods of another, and this is to prevent not alone fraud upon private rights, but as well upon the public."

But the real basis of the remedy for infringement is the protection of one's property rights in his business and good-will. Thus where a product has been advertised and marketed under a trade name to such an extent that the public mind has been brought to the point of associating it with its manufacturer or producer, such manufacturer or producer has established a good-will in the featured word or trade-mark which the court will protect. In considering property rights in trade-marked items, stress is laid upon good-will as the substantial thing which the law protects against invasion, and this good-will provides the theoretical basis upon which to afford redress against the piracy of marks and names. We quote the following from Schechter, Historical Foundations of Trade-Marked Law, page 171: "It is not essential in protecting trade-marks that they be classified as property, since equity should prevent the destruction or impairment of the probable expectancy of trade or custom, of which the trade-mark is a symbol as well as a creative factor." The law of unfair competition is the natural evolution of the law of the trade-mark, out of which it has grown. The earlier cases were decided on the ground of trade-mark. The present tendency is to decide every case on the ground of unfair competition, by making the decision turn on whether or not the effect of what was done is to pass off the business or goods of one man as the goods or business of another regardless of the existence of any technical trade-mark. Protection against unfair competition is afforded on the same general principles on which technical trade-marks are protected, the cases are all unfair competition in trade.

Although generally speaking, the owner of the trade-mark has the right to its exclusive use, that a monopoly of goods is not conferred by a trade-mark is set forth in the principles of law stated in 63 Corpus Juris page 322, where it is stated:

> "The owner of a trade-mark has no right of property to prevent others from manufacturing, producing or selling the same article to which it is attached. The trade-mark confers no exclu-

sive right in the goods to which the mark has been applied. Such a right can be acquired only under the patent or copyright laws. Anyone, unless prevented by a copyright or patent, may make and sell goods, similar in all respects to the goods sold by another under a trade-mark, and he may also use the trade-marked article in his business, and advertise to that effect."

In the case of the Putnam Nail Co. *vs.* Dulaney (140 Pa. 205, 213) it was held that "A man may make any article he pleases that is not protected by a patent. He may imitate it so perfectly that the one may be mistaken for the other, but he may not sell his own article and as for that of another, by means of a trade-mark in imitation of the trade-mark of such other person."

Further, in connection with the rights and privileges which emanate from monopoly, competition and control of substitution, we quote the following from 41 Harvard Law Review, 728, 745, by Carpenter, Interference with Contract Relations:

"Whether a privilege of invasion exists depends upon whether it is of greater moment to society to protect the defendant in the invading activities than it is to protect and guard the plaintiff's interest from such invasions. An evaluation and balancing of the social import of the conflicting interests of the respective parties and of the social interests per se are involved. The defendant may be privileged to invade an interest of the plaintiff although it is not for the protection or furtherance of any interest of his own, if the invasion is in furtherance of a social interest of greater public import than is the social interest involved in the protection of the plaintiff's individual interest. Where the protection of the actor's interest is involved, there is simply a privilege to invade equal or inferior interests, but not superior ones."

With reference to the structural imitation or copying in trade-marks, trade names and unfair competition, we quote the following principle of law:

"In the absence of any representation that the product offered is that of another, an unpatented article or uncopyrighted book may be reproduced by any one in the precise original form and shape. The subsequent trader may be required clearly to distinguish his goods so that they may not be mistaken for the goods of the prior trader, although he will not be required, merely in order to change the appearance of the product, to sacrifice strength, durability, efficiency and cheapness. However, where goods are cast into a distinctive form, which has acquired a secondary meaning, unnecessary and deceptive imitation of the size, shape and structure of the article itself will be enjoined as unfair competition. Functional features may be used and copied in the absence of any other features calculated to deceive. The copying or imitation of non-functional features may be evidence of fraudulent intent constituting unfair competition, but necessary elements of mechanical construction, essential to the practical operation of a device, and which cannot be changed without either lessening efficiency or materially increasing expense, afford no presumption of an attempt to compete unfairly. Copying or imitation of the distinctive marks, ornamentation, lettering, etc., making up the dress of goods of another is unfair competition, although the article itself may be copied." (63 Corpus Juris page 459.)

With reference to advertisements, circulars and notices, we quote the following principle of law.

"Unfair competition may be affected by means of circulars or advertisements, and circulars, advertisements or other announcements calculated to deceive the public and pass off defendant's goods or business as the goods or business of plaintiff will be enjoined. However, where the advertising matter is necessarily similar and defendant does nothing to deceive the public, it has been held that he is not guilty of unfair competition. The imitation or copying of complainant's circulars and advertisements is strong evidence of fraud and unfair competition and is ground for an injunction." (63 C. J. page 461.)

Many and various cases may be cited that have been decided in connection with trade-marked preparations from the standpoint of property rights, dishonest business practices, unfair competition, effect on ultimate purchaser, etc.

In the Gray *vs.* Armand Co. (Court of Appeals of District of Columbia 1928) (58 App. D. C. 50), where the silhouette head of a lady of the time of Louis XVI was used for advertising purposes but not on the package sold, it was held that to establish a right to the registration of a trade-mark, two things are necessary: That the trade-mark must have been actually applied to vendible goods, and that the goods have been sold in interstate commerce. Further, that property in a trade-mark can only be acquired by the actual application of it to goods of a certain class, so that it serves to indicate the origin of the goods—that is to say, to identify them with the particular manufacturer or trader, and to distinguish them from similar goods.

In the case of Upjohn Co. *vs.* Wm. S. Merrell Chem. Co. (Circuit Court of Appeals of the United States, Sixth Circuit 1920) (26 F. 209) the plaintiff in the Spring of 1908 manufactured a thin, oblong, rectangular phenolphthalein wafer, colored pink, with a specially compounded flavor, each wafer indented so as to be easily broken into two equal parts, and adopted the arbitrary trade name "Phenolax" or "Phenolax Wafers," and spent some $30,000.00 in advertising it. In the Summer or early Fall of 1908 the Wm. S. Merrell Chemical Company put up a phenolphthalein wafer which was indistinguishable from that of the plaintiff, but did not use the word "Phenolax" and packed the phenolphthalein wafers in bottles or packages of standard form. The court decided this case of unfair competition against the Upjohn Company, in that it was decreed that they could have relief only against an attempt to palm off on the purchasing public the goods of the defendant as goods of the plaintiff (which the Wm. S. Merrell Company had not done); further, that the Wm. S. Merrell Company or any one else had the right to enter into competition in the manufacture of laxative phenolphthalein wafers, as the public by October 1908 had not come to look upon all phenolphthalein wafers as "Phenolax Wafers" as made by the Upjohn Company. It was also brought out in this case, which was not instituted until 1920 (twelve years after the wafers were first manufactured) that the defendants had continued the manufacture of phenolphthalein wafers without interruption since 1908 and that of late years other manufacturers were also making phenolphthalein tablets. It was also brought out in this case that there is injustice in the state of a law which denies protection to a plaintiff who has expended $30,000.00 in introducing his particular product, but it must be remembered that in this case the expense indivisibly inured to the advantage of the trade-mark "Phenolax" which is now fully respected; and in any such case it may be the lesser evil that plaintiff must fail of full protection rather than that free choice of common form should be denied to competitors.

The case of the Bayer Company *vs.* United Drug Co. (District Court of United States S.D. New York, 1921) (272 F 505) dealt with a product which had enjoyed a monopoly for seventeen years through the fact that it had been patented. The suit was brought to enjoin infringement of the plaintiff's common-law trade-mark "Aspirin." Patent was secured by plaintiff's predecessors in February 1900 for "acetyl salicyclic acid." The predecessors also registered the trade-mark in the United States on May 5, 1899, and the Bayer Company held both common-law and the registered mark by proper assignments. The Bayer Company manufactured the drug in bulk and sold it under its name to all the leading manufacturing chemists. These manufacturers compressed the powder into tablets, and put them out for many years in their own packages, with the word "Aspirin" and their own names on the labels, with no reference to Bayer. Many well-known manufacturing concerns appeared to be independent manufacturing sources of it. The public became familiar with the name "Aspirin" in association with a variety of dealers during a period of over ten years, and no advertising by the Bayer Company reached the consumer. In the autumn of 1915, less than two years before the patent expired, the Bayer Company refused to sell the powder to manufacturing chemists and made the tablets for itself. The tablets were widely advertised by direct appeal to the consuming public, and sold in small tin boxes of as few as 12 tablets to the box. The boxes were labeled "Bayer—Tablets of Aspirin." Large quantities of tablets or capsules, 24, 50 and 100, were sold in bottles and they all bore the legend "Bayer—Tablets of Aspirin" or "Capsules." In deciding the case the court held the mark to be a true trade-mark so far as the trade (as distinguished from the general public) was concerned, but not so far as the public was concerned. The court granted an injunction against the direct sale of the drug acetyl salicylic acid under the name of "Aspirin" to manufacturing chemists, physicians and retail druggists; but gave the defendant the right to sell acetyl salicylic acid direct to consumers under the name "Aspirin" without suffix or qualification; in sales to retail druggists the tablets to be packed in bottles or boxes of 50 or less, labeled "Aspirin," provided these bottles or boxes be wrapped or boxed in containers marked "Acetyl Salicylic Acid" manufactured by defendant without the word "Aspirin," and that in making sales to retail druggists, the invoices, bills of lading, etc., refer to the drug as "Acetyl Salicylic Acid." Each party won and each party lost, "Aspirin" was declared to be a trade name when selling direct to manufacturers, chemists, physicians and retailers, but a descriptive word for the consuming public.

In the case of Winthrop Chemical Co. Inc. *vs.* Blackman, *et al.* (285 N. Y. Supreme Court 443) it was held that the arbitrary trade-marks denoted goods of definite manufacture and were not descriptive words. The decision enjoining defendants from using trade-marked terms was affirmed. The trade-marks "Theobrominal," "Aristol" and "Kre-o-Minal" were held infringed by defendants' use of such terms. Although there was one dissenting opinion, the four other judges concurred in the opinion that the trade-mark "Veronal" was infringed by defendants putting out "Barbital" with accompanying words "Introduced as Veronal" or "Equivalent of Veronal;" and that the trade-mark "Protargol" was infringed by the defendants putting out "Silver Proteinate" with accompanying words "Introduced as Protargol." The patent rights on Veronal and Protargol had expired. In delivering the opinion, Justice McAvoy said in part:

"The names 'Veronal' and 'Protargol' are not descriptive words or generic terms solely identifying the drugs in question. They represent in effect, in their secondary meaning in the trade, products of plaintiff which it is entitled to use exclusively even after a patent has expired, since the other terms have throughout the patent period been applied to the products in question. There may be instances where an arbitrary name may so identify an article that no other term is its equivalent, but all of these remedies have chemical names apart from their proprietary designations by which they may be purchased and purveyed to the medical profession, by whose members they are usually ordered and prescribed.—The cases in which a patent's expiry permits the use of the patented name on another's product apply only where no other term would give it meaning in the public domain."

The case of Bourjois, Inc. *vs.* Park Drug Co., Inc. (Circuit Court of Appeals of the 8th Circuit) (82 F. (2d) 468), which was a case appealed from the District Court of the U. S. for the Eastern District of Missouri, was tried on the issue of unfair competition, and the decision was that the "Court could not issue an injunction to prevent unfair competition unless fully persuaded by convincing evidence that the defendant has offended as charged." In this case the Bourjois Company sold "Evening in Paris" Face Powder at $1.10 per box. The Park Drug Co. advertised the "Evening in Paris" Face Powder, Lipstick and Perfume, as a loss-leader, at 69¢. The Bourjois Company hired a shopper to buy all of their Bourjois products offered for sale at cut prices. "Excella" was a face powder sold in St. Louis by the defendant, upon which the defendant made a large profit. Employees of the defendant were accused of misrepresenting the composition of the "Evening in Paris" powder, but this charge was not sustained in court. The following is part of the opinion given by the court in this case:

"In action to enjoin unfair competition by mercantile corporation, conduct of corporation's clerk in pushing sale of face powder competing with that of plaintiff and switching prospective customers to such competing face powder *held* not unfair competition so as to justify an injunction, where sales were pushed by way of honest representation and persuasion."

The case of Illinois Watch Case Co. *vs.* Hingeco Mfg. Co. (Circuit Court of Appeals 1st District from District Court of United States for District of Rhode Island) (81 F. 2d 41) concerned designs for two compacts, both more or less flattened, but one of a "Tulip" design and the other of "Acorn" design, the powder pad of the first marked "Elgin," powder of second not marked, but individual boxes in which they were enclosed was marked "Cara Mia." The two designs did not have substantially the same effect on the eye of the ordinary observer, and it was held that the Acorn design compact did not infringe the Tulip design. In considering the issue of unfair competition in this case, it was stated that "the essence of unfair competition is fraud, which is a question of fact, and it is sufficient to make out a case to show that the natural and probable result of defendant's conduct is to deceive ordinary purchasers buying under ordinary conditions into believing that they are purchasing the goods of one manufacturer for those of another."

The growing tendency of the courts to interfere to prevent fraud is evidenced in the case of Allen Mfg. Co. *vs.* Smith (229 N. Y. S. 692), which concerned two fly sprays for cattle, one known as "So-Bos-So" and the other "E-Z-Bos." Action was brought to enjoin defendant against infringement of trade-mark, unfair competition, disparagement of plaintiff's product and against dishonest business practice. From a judgment granting plaintiff an injunction and damages, defendant appeals. Judge Sears, in holding that the court was correct in enjoining its practice of false disparagement of plaintiff's product, said:

"The judgment which is here under review restrains the continuance, both of the practice of false and fraudulent disparagement and of the practice of dishonest business methods. The jurisdiction of the courts to restrain libels, including false disparagement of competitor's goods, has been vigorously denied and asserted. In England the equity courts formerly refused such jurisdiction. Now, however, the jurisdiction is fully recognized. In New York State the tendency has been against allowing such jurisdiction. Actions for unfair competition are not now confined to passing off cases."

In reaching his conclusions Judge Sears reviewed the opinion given in Burrow *vs.* Marceau (109 N. Y. S. 105) in which the following language is used:

"As I understand it, there is no hard and fast rule by which it can be determined when the court will interfere by injunction to prevent what is practically a fraud upon a person engaged in business by the unfair methods of competition. Each case must depend upon its own facts, but where it is clearly established that an attempt is being made by one person to get the business of another by any means that involves fraud or deceit, a court of equity will protect the honest trader and restrain a dishonest one from carrying out his scheme."

Continuing his decision, Judge Sears said:

"The courts have been increasingly inclined to protect business interests, even when such interests do not come within strict definitions of property. The judgment here in enjoining false and fraudulent disparagement, protects the intangible, but real, relationship existing between the merchant and his usual customers—his 'good-will.' The unfortunate result of denying equitable relief in such an instance as we have before us, illustrates the justice of Dean Pound's words (29 Harvard Law Rep. 640, 668) 'In substance the traditional doctrine puts any one's business at the mercy of an insolvent malicious defamer, who has sufficient imagination to lay out a skilful campaign of extortion.'"

In the case of A. Hollander & Son, Inc. *vs.* Philip A. Singer & Bro., Inc. (110 N. J. Equity 52) the court considered the effect of the trade-mark upon the ultimate purchaser. In this case the test in determining whether a trade-mark is infringed was whether alleged infringing trade-mark so far resembled another mark as to be likely to be mistaken for it by casual or unwary purchaser. The trade-mark was "Hudson Seal" on furs. Both manufacturers had stamped skins with "Hudson" with only a slight difference in connection with the direction of the lines composing the design around the word. In adjudicating the case, the judge quoted from the Rogers Silver Cases "That the defendant had sufficiently distinguished its goods from those of the complainant as far as jobbers and possibly as far as retail dealers are concerned. If there were no other class of persons that might be misled, I would say that notwithstanding the imitation of the name, the complainant was not entitled to an injunction. But the case is different when it comes to the ultimate purchaser. The law is well settled that if the manufacturer puts it in the power of the retailer to misrepresent, he is answerable for the probable consequences," and in the second of the Rogers Silver Cases, the Justice said: "It is elementary that the person to be considered is not the jobber or wholesaler, but the ordinary purchaser at retail."

Substituting, or dispensing a different article for, or in lieu of any article prescribed, ordered or demanded, or otherwise deviating from the terms of the prescription, order or demand, is a live question with the manufacturers, retailers and the public of to-day. Fundamentally, all of these groups are unalterably opposed to these practices. Eight or nine of the states have passed Anti-Substitution Laws in one form or another. Other states have proposed Anti-Substitution Laws for enactment, but have not agreed as to whom should be given the responsibility of enforcing such laws. Recently, in the Court of Special Sessions, County of Kings, New York, two brothers, operating a pharmacy at Coney Island, New York, were convicted on charges of having used a substitute in compounding a physician's prescription. Our popular magazines carry the statement "REFUSE SUBSTITUTES; BUY THE ADVERTISED BRAND EVERY TIME!" Manufacturers are adding reagents and indicators to their trade-marked preparations to assist in detecting substitution more readily. They are also requesting that prescriptions and orders be written so as to distinctly specify the trade-marked article; and are stressing their rights in the trade-marked preparation to the retail dealer. In fact, it is stated that the number of reports of the practice of substitution is declining. Prescription Protective Bureaus are being established to warn against, and to check and discipline substitutors.

When one considers whether the monopolistic property rights in trade-marks are to be defended or restrained; whether competition is to be encouraged and upheld, or regimented; whether stringent laws with reference to substitution are to be promulgated and actively enforced; it may be well to note one paragraph in the decision given by Chief Justice White, who delivered the opinion of the Supreme Court of the United States in the celebrated case of the Standard Oil Co. of New Jersey *vs.* United States (Supreme Court of the U. S. in 1911) (221 U. S. 1) when dissolving the Standard Oil Company under the provisions of the Sherman Anti-Trust Law:

> "In applying remedies for this purpose, however, the fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of, trade or commerce, is the foundation upon which the prohibitions of the statute rest, and moreover, that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property."

Who has the superior interest in the trade-marked medicine—the manufacturer, the retailer or the customer? Regardless of the decisions that have been made and may be made by courts, and the laws that have been enacted and may be enacted and enforced, if pharmacists are to hold the high professional place that rightly belongs to them, there can never be a compromise between right and wrong. The manufacturer has certain property rights in trade-marked articles, but he should have pride in that his article is chosen on merit rather than on account of the more or less elusive monopoly that may be established through the exclusive control of the manufacture of certain articles. The retailer should respect the rights of the manufacturer, remembering that he (the retailer) has at the same time fundamental rights of his own with respect to wholesome and lawful competition. Under any circumstances the retailer should eschew substitution. Although another preparation is the chemical equivalent of the trade-marked preparation, this does not give the right to substitute one for the other when a certain one is specified. The retailer should be ever mindful that, under the existing economic conditions, he is the person responsible to see that the public receives the medicine it orders or demands. He should not deviate from the kind, quantity or quality of the ingredients specified on prescriptions; but he has, at the same time, a fundamental right to sell in open competition another article other than that ordered or demanded, but of a similar nature, with the knowledge and consent of the customer.