

## Supreme Court Decision Ends "Patent Monopoly"

The Washington Post of May 27 printed the following concerning the sweeping decision of the United States supreme court in the "patent trust" case:

"The so-called 'patent monopoly,' which threatened to prevent cut rates by retailers on all patented articles on the market, was destroyed yesterday by decision of the supreme court of the United States.

"The case in which this sweeping ruling was made was that of the Bauer Chemical company of New York against James O'Donnell, a local druggist. Mr. O'Donnell bought at wholesale a patented medicine manufactured by the Bauer company, and retailed it at 85 cents per bottle. Each bottle bore a label bearing the warning that the medicine was licensed to be sold at not less than \$1 per bottle, and the announcement that any dealer who violated this license would be sued for damages, and restrained by injunction.

"About one year ago the appellants sought to secure an injunction in the district supreme court, but Justice Wright, before whom the motion was heard, denied the petition. The chemical company immediately noted an appeal, and the district court of appeals, without rendering any decision, certified the case to the United States supreme court.

"The latter court held that owners of patents are not given the right by the patent law to control the price at which retailers must sell to consumers. The decision in words applied only to a nerve tonic for which a patent had been issued, but it will control all patented articles, hundreds of which are being sold under restrictions on the retailer not to sell at cut rates.

"The court reversed the policy adopted by it in the famous "mimeograph case," decided a little over a year ago when only seven justices were on the bench, but allowed that case to stand as far as it goes. Thus was accomplished what has been unsuccessfully sought in congress ever since the 'mimeograph case' was decided.

"In the 'mimeograph case' Justices McKenna, Lurton, Holmes, and Van Devanter upheld the right of patent owners to place restrictions on the nature of articles to be used on the patented articles sold. Chief Justice White and Justices Hughes and Lamar dissented. Yesterday Justice Day, who was absent a year ago from the court, and Justice Pitney, appointed since then, joined with the chief justice and Justices Hughes and Lamar in overruling the policy advocated by the four justices who handed down the court's decision in the 'mimeograph case.'

"Justice Day announced the decision of the majority members. The four minority justices contented themselves with a mere statement that they dissented. Justice Day stated that the manufacturers relied chiefly upon the 'mimeograph case.' An examination of the opinion of the court in that case, he said, showed that the restriction was sustained because the machine was sold at cost or less, and that the owner depended upon the profit realized from the sale of unpatented supplies to be used upon the machine for reward for his invention. No such conditions existed, he added, in the present case.

"In further attempt to distinguish the two cases, the justice said that the restriction in the 'mimeograph case' was in regard to the use of the

machine and only a 'qualified title' to the patented article passed. In the present case, he pointed out, the restriction was to 'keep up the price,' the sale to the retailer having been absolute.

"Many manufacturers had joined the manufacturer of the nerve tonic in his fight to sustain the contention that his patent gave him a right to sell or use his patented article under any conditions as to resale price he might see fit to impose. All decisions in the lower courts, with the exception of one, have been in favor of the manufacturers.

Almost simultaneously with the institution of the suit by the Bauer Chemical company, the Gillette Safety Razor company brought an action against Mr. O'Donnell on similar grounds. Justice Wright heard both cases, and rendered the same decision in the razor case as he had in the patent medicine case. As the legal points to be decided were the same in each case, counsel determined to go to trial in the supreme court on the Bauer case. The court, however, permitted the Gillette company, the Victor Talking Machine company, the Waltham Watch company, and the Ingersoll Dollar Watch company to file briefs, as they had cases pending in various courts throughout the country bearing on the rights of patentees to restrict the resale price of their articles. The arguments were made April 7 last, Frank J. Hogan and D. W. Baker, representing Mr. O'Donnell.

Officials of the department of justice regard the decision of tremendous importance, putting an end to existing widespread extensions of patent monopolies, and sharply drawing a line of demarkation between the Sherman anti-trust law and the patent laws.

"Under the cloak of the legal monopoly granted by the patent laws, many industries, it is contended, control the price of patented articles to the ultimate consumer. The department of justice has contended that once a patentee sells his patented article he loses all control of it, and is powerless, especially in view of the Sherman anti-trust law, to establish resale prices.

"Several anti-trust suits now in the courts are based upon this principle, and the department of justice has been eagerly awaiting a determination of the question before starting more prosecution on the same theory. It is said that the right to establish resale prices is being claimed by an almost unlimited number of companies, which are now expected to avoid attack by the government.

"When the 'mimeograph case' was decided by the divided court, with only seven judges sitting, the then Attorney General, Mr. Wickersham, endeavored to have the court grant another hearing. From point of importance the department of justice officials were inclined to place the patent cases on a parity with the state rate cases.

"Justices Wright and Barnard, of the district supreme court, were the first members of the bench of the country to render decisions with regard to the patentee's control of his product which accords with the decision of the supreme court of yesterday. With the exception of Judge Ray, of the federal court of New York, they were the only judges of the country who have taken such a view. In the many other decisions rendered touching on this point the courts have held with the patentee."

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