the injured person. The act does not authorize the Secretary to entertain claims for reparation against packers.

In 1926 the act was amended (proviso in section 304, title III) to authorize the Secretary to register as a market agency a duly authorized State department or agency that does the weighing of livestock at a stockyard. Such registration can be revoked if the State agency fails to comply with the Secretary's orders under the act.

After investigations had disclosed that live poultry marketing in some large cities was burdened with exorbitant charges and bad practices, the act was amended in 1935 by the addition of title V to authorize the Secretary to regulate the marketing of live poultry in certain large cities where practices detrimental to the interests of producers exist and the volume of poultry handled is large enough to warrant Federal supervision. Commission merchants, dealers, and other handlers of live poultry in designated cities have to be licensed. The rates and charges of licensees are subject to approval of the Secretary, and their trade practices must conform to the standards set out in sections 307 and 312 of title III of the act. Scales used there must be tested periodically and be operated in accordance with instructions. The Secretary may suspend or revoke poultry licenses for serious violations.

In 1942 the act was amended (section 317 of title III) to permit the Secretary to authorize an approved livestock association or State agency to conduct inspections at posted markets of brands, marks, and other identifying characteristics of livestock originating in or shipped to market from the State receiving the authorization and to assess reasonable fees for such services. The purpose of the amendment is to assure that livestock moving through stockyards posted under the act is not burdened with duplicate brand inspections and fees. Authorizations have been issued to livestock associations or State agencies in Idaho, Oregon, Nebraska, North Dakota, Montana, Oklahoma, South Dakota, Texas, Utah, Washington, and Wyoming.

Section 407 of title IV of the act authorizes the Secretary to make whatever rules, regulations, and orders are needed to carry out the provisions of the act. The regulations in effect in early 1954 were promulgated in 1943. Changes in the regulations to reflect new conditions and practices were proposed and discussed by groups from industry and producers over the years. In 1952 notice was given to the public, through the Federal Register, of recommended changes. Thereupon public hearings were conducted at nine places to give interested persons opportunity to state their views. Proposals for amending the regulations were prepared and published in the Federal Register with a view to promulgating new regulations in 1954. (*M. J. Cook.*)

So As Not To Spoil the Market

Forty-five States have fair-trade legislation on their books. Missouri, Texas, Vermont, and the District of Columbia have none.

In 24 States any seller can specify the minimum resale price of his products. In 21 States only the owner of a trade-mark or brand name or his authorized distributor may do so.

Usually a contract with a single dealer is enough to bind all resellers even if they have not signed, provided the seller affixes a notice of resale prices to the original price lists, sales contracts, or invoices.

Such fair-trade agreements applied at first only to commerce within a State. But the Miller-Tydings Act in

1937 exempted resale price agreements affecting interstate commerce from the Federal antitrust laws when agreements of that description are lawful as applied to intrastate transactions under the applicable State law or policy. To qualify for such exemption, the product has to carry the trade-mark, brand, or name of the producer or distributor. It must compete freely and openly with similar items made or distributed by others. It may only be fair-traded vertically, not horizontally—that is, a seller may set resale prices for his own outlets and for their customers, but not for fellow manufacturers or sellers. No reseller may undercut the established minimum, except when the product is below specifications, or is sold under court order, or is damaged, or is being closed out.

The history of fair-trade legislation goes back to the price and trade practice codes of medieval merchant guilds. Businessmen have traditionally exerted pressure upon each other "not to spoil the market." Nearly two centuries ago Adam Smith discussed at length in his *Wealth of Nations* the drive of merchants and manufacturers to restrain rigorous competition and to raise prices, "even on occasions of merriment."

When a farmer brings his crops to market and is paid, his main worry about prices is over. Not so the manufacturer selling a commodity bearing his brand, trade-mark, or other identification. He still has a property right in his product. He may have spent large sums persuading the public that his brand stands for dependable quality at a stable price. Resellers offering the item at varying, or special, or "loss-leader" prices cause consumers to doubt its genuine origin or quality and also deprive the manufacturer of sales outlets that are unable or unwilling to handle it at cut rates.

To safeguard his property rights, the manufacturer first stipulated terms and conditions of resale in his sales contracts. But in 1911 the Supreme Court in the case of *Miles Medical Co.* v. *Park & Sons Co.* declared resale price agreements in violation of the antitrust laws. Other measures were tried, such as refusing to sell to price-cutting distributors, setting up exclusive representatives, licensing, and financing retail inventories. The only way out seemed to be legislation.

THE SUPPORTERS of fair trade, especially retailers' associations, maintain that resale-price maintenance helps to keep the small, independent, local retailer in business. A uniform price prevents large department and chain operators, who can afford "loss-leader" sales, from driving their smaller rivals out of business, merely because of length of purse. The large distributors have their private labels on which they can police any price setup they please. Without "fair trade" they would cut prices only on products that are also handled by their smaller rivals whose volume may be too small to warrant a private brand.

Resale-price maintenance, say the manufacturers, makes it unnecessary for us to enter the retail field and supplant small business: Our responsibility for the product does not end at the factory door. We frequently keep up consumer demand, if, indeed, we do not create it, by our expenditures for research, development, and national advertising. Throughout the life of the product we often provide refills, spare parts, and technical servicing. We have a perpetual stake in the quality, reputation, and performance of our product. To get and keep distributive outlets that will push it requires stable prices and dependable profit margins.

Uniform, well-publicized resale prices put all competition on an even footing. The one-price-to-all practice economizes time of consumers and retailers, lowers distributing costs, and eliminates price cutting.

Furthermore, as former Senator Tydings, co-author of the Miller-Tydings Act, pointed out, there must be "free and open competition" before the right of resale-price maintenance

is available. It is similar, he argued, to the collective and cooperative right that farmers exercise through their produce and milk associations. The producer-farmer makes contracts with processors and distributors, stating the prices of tomatoes, milk, and numerous other agricultural products. The large, integrated concerns, such as the manufacturers of automobiles, electrical appliances, or agricultural implements, are able by agency, consignment, or in their own stores to announce and maintain the resale prices of their products. Federal and State fair-trade enabling acts merely permit independent manufacturers, wholesalers, and retailers to do the same.

THE OPPONENTS of resale-price maintenance insist that it is a cartel device: What the retailers collectively cannot do by agreement among themselves, one of their number achieves by contract with a manufacturer. Though the latter may possess no knowledge of retail costs, he sets up a system of administered prices controlling all distributors of his product without the investment of a single dollar or the assumption of any distributive financial risk. The retailer, on the other hand, though he have clear title to the goods, is deprived of the elemental right to use his business judgment to price his property according to his particular market opportunities and operating economies.

Resale-price maintenance, the opponents say, removes the keystone of the American competitive enterprise system. How else than by sovereign choice of consumer buyers will those producers succeed most who give the best and most for the money? When prices are identical, the consumer cannot test, shop around, and choose. The price is the same for each store, irrespective of its location, size, equipment, or lines of merchandise; no matter what may be the wage differentials, the service, or customer. The consumer gets no benefit from new techniques or mass distribution at lower margins. Competition is transferred from attractive pricing to services that the consumer may not want, advertising, extravagant showrooms, and display facilities. Incentive markups sufficient to induce retail "pushing" result in prices that limit buying power and living standards. With high prices come the twin evils: Low volume and mass unemployment. Without the governor of consumer sovereignty, the competitive system fails to weed out the inefficient and to reward those who serve it best.

Maintenance of resale prices not only eliminates the price competition among retailers in price-maintained goods. It makes easy the private policing of horizontal agreements (open or tacit) among manufacturers, especially when three or four can command one-half of the market or more. Each need find but one distributor. The nonsigning distributors have no choice. They cannot appeal to courts, should an uneconomically high price drive customers away. They become the victims of a system of private law that gives them no recourse to public justice.

THE EVIDENCE is that fair-trade legislation raises and stabilizes resale prices. Ewald T. Grether documented this finding in 1939 in his volume, *Price Control under Fair Trade Legislation.*

It was corroborated by a number of other surveys, including one, *Fair Trade*, by Edgar H. Gault, of the School of Business Administration of the University of Michigan, who concluded: "There can be no doubt that consumers in Michigan who formerly purchased drug products at cut prices are paying from 15 percent to 30 percent more for price-controlled items under Fair Trade. Michigan's present minimum Fair Trade prices are higher than the competitive prices for the same items in the State of Missouri where there is no Fair Trade."

The Federal Trade Commission issued a report, *Report on Resale Price Maintenance*, in 1945 after a long in-

vestigation. Although some of the outlying independent credit-and-delivery stores may lower prices slightly, it said, large-volume, cash-and-carry mass distributors in densely populated areas had to raise their prices 15 to 30 percent. Such differences have persisted for over a decade between free-trade Missouri on one side of the Mississippi and fair-trade Illinois on the other, and between the District of Columbia and Maryland.

The opponents of resale-price maintenance—department stores, large farm, consumer, and labor organizations, and many economists—agree that the independent distributor needs protection against "loss-leader" selling and predatory price cutting. But the way to cope with that practice, they contend, is through enforcement of the Federal Trade Commission Act (which prohibits such "freezing out" tactics), through the Robinson-Patman Act prohibitions against discriminatory prices destructive of competition, through individual manufacturer-distributor contracts, and through civil suit for damages where trade-marks or brands have been injured—not by fair-trade legislation that coerces nonsigners.

THE SCOPE of fair trading is small. It is most important in the drug trade, but it has spread to liquor, books, cigars, jewelry, sporting goods, small garden tools, kitchenware, cooking utensils, and some electrical appliances. In 1948 the manufacturers belonging to the American Fair Trade Council estimated that fair-trade legislation affected about 4 percent of the retail trade in the United States.

Little use of resale-price maintenance is made in the grocery trade. Farmer's crops, including most fruits and vegetables, are usually not branded or trade-marked. Food processors and distributors market hundreds of brands, but each is reluctant to place his product under resale-price contract unless the rest do at equal or competitive prices. Because prices of processed food usually fluctuate with the prices of raw materials, no fixed-price line is firmly placed in consumer thinking.

Thus only such products as soap, canned milk, flour and cereal products, and vegetable shortenings are fair-traded to any appreciable extent.

Except for the processed foods just named, cigars, and alcoholic beverages, the produce of the farmer does not reach the consumer as a fair-traded item. With little to gain and much to lose as purchasers, farmers and their organizations have consistently opposed fair-trade legislation. Moreover, quick, effective distribution makes imperative a free competitive market with varying prices flexibly adjusting the amounts offered and sold. (*Theodore J. Kreps.*)

Barriers to Trade Between States

A trade barrier is any artificial restriction on the purchase, the sale, or movement of goods or services.

Interstate trade barriers are any State laws or administrative regulations that unreasonably discriminate, directly or indirectly, against the sale or importation for sale of goods produced in another State. They are designed to improve the competitive position of producers in one State over producers in another State. They attempt to do so generally by directly or indirectly limiting the volume of goods that may be imported, thereby maintaining or increasing the prices on the available supplies.

The Thirteen Original States granted to the Federal Government the power to regulate foreign and domestic commerce only when they were faced with